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

BULETIN OF CASE LAW

2020

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OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

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Foreword:

I have the special honor and pleasure to write for the last time, in the capacity of the President of the Constitutional Court, the foreword for the first jubilee Bulletin of the Case Law of the Constitutional Court, the 10th in a row. The Bulletin has become a useful reference and often cited by those who work in the field of constitutional law and fundamental human rights and freedoms. Once again we are committed to show some of the main results of our work during 2020.

This edition of the Bulletin contains all the judgments of the Court of 2020 and a careful selection of the most specific decisions. Like all other courts in the region and the world, the Constitutional Court has faced the unexpected challenges of the COVID-19 pandemic, which have required immediate and vigilant adaptation to the successful exercise of our constitutional duties. Despite the difficulties caused by the pandemic, the Constitutional Court has continued its work without interruption, with a combination of office and remote work, in accordance with the specific rules and recommendations of relevant health institutions at the level of the Republic of Kosovo.

During 2020, the Court dealt with a large number of cases, among them (i) two specific cases related to measures taken to prevent and combat the COVID-19 pandemic; (ii) two cases filed by the Ombudsperson regarding the Law on Salaries in Public Sector and the Law on Public Officials; (iii) the case submitted by the deputies of the Assembly, in connection with the Decree of the President on the nomination of the candidate for Prime Minister; and (iv) cases filed by regular courts in the context of incidental control.

During the year, the Court also dealt with a significant number of cases with respect to individual referrals. In the latter, addressing the Applicants' allegations and applying the principles established by its consolidated case law and that of the European Court of Human Rights, the Constitutional Court found violations of Articles of the Constitution regarding: (i) the lack of the reasoning of the court decision; (ii) the principle of equality of arms and the principle of adversarial proceedings; (iii) the right of access to the Court; (iv) failure to hold a hearing; (v) the principle of legal certainty; (vi) the principle of the impartiality of the Court; (vii) the principle of legal certainty as a result of conflicting decisions of the case law; (viii) non-enforcement of the decision; (ix) participation of witnesses; (x) the right to privacy in terms of registering the death of a person, etc.

It is important to note to future applicants and their representatives, who intend to file referrals with the Constitutional Court, to consult this jubilee Bulletin carefully, as well as previous bulletins, and consider whether their case may have any possibility of success, referring to the similar decisions of

the Court. Also, the Court bulletins and all the case law published on the official website of the Court are there to serve the institutions and natural and legal persons to better build their constitutional arguments and to exercise, in practice, their rights and freedoms guaranteed by the Constitution.

It is important to note that the Court and its judges make their decisions independently and transparently, applying the highest standards of human rights and constitutional justice, as provided for in the Constitution and other international instruments, applicable in the Republic of Kosovo.

Finally, I would like to thank and express my special gratitude to the entire staff of the Court, whose work and support made the publication of the present Bulletin of Case Law of the Constitutional Court possible.

Arta Rama-Hajrizi

President of the Constitutional Court

KO197/19, Applicants: Judges of the Serious Crimes Department, the Basic Court in Prishtina, Constitutional review of Article 42, paragraph 4 of Law No. 06/L-054 on Courts#

KO197/19, Resolution rendered on 22 January 2020, published on 19 February 2020

Keywords: institutional referral, incidental control, authorized party

The Referral was submitted by the Judges of the Basic Court in Prishtina, the Serious Crimes Department, in accordance with Article 113.8 of the Constitution. The Applicants request the Constitutional Court to assess the constitutionality of Article 42, paragraph 4 of Law No. 06/L-054 on Courts (hereinafter: Law on Courts), which allegedly is in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

The essence of the Applicants' Referral consists of the allegation that Article 42, paragraph 4 of the Law on Courts, stipulating that cases falling within the jurisdiction of the Special Department but for which an initial hearing has been held will continue to be processed in the respective courts, namely within the Serious Crimes Department, whereas cases of the same nature but for which the court hearing has not been initiated will be dealt with within the Special Department, violates the principle of a trial within a reasonable time, as an integral part of the right to a fair trial guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

The Court initially examined whether the Referral fulfills the admissibility requirements established in the Constitution, and further specified in the Law on the Constitutional Court and the Rules of Procedure of the Court. Therefore, the Court first assessed whether the Applicants are authorized parties to file such a Referral, namely, whether the Referral was submitted by a "court" as set out in paragraph 8 of Article 113 of the Constitution. The Court considered that the Referral submitted by the Applicants, in their capacity of Judges of the Serious Crimes Department of the Basic Court, cannot be regarded as a Referral filed by a "court" that has the case under consideration, as stipulated in Article 113, paragraph 8 of the Constitution.

In conclusion, the Court finds that the Applicants are not authorized parties to file the Referral with the Court and, therefore, the Referral is inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO197/19

Applicant

Judges of the Serious Crimes Department, the Basic Court in Prishtina

Constitutional review of Article 42, paragraph 4 of Law No. 06/L-054 on Courts

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gerxhaliu-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 the judges of the Basic Court in Prishtina, the Serious Crimes Department, signed by Suzana Qerkini, Shpresa Hasaj Hyseni, Isuf Makolli, Shasivar Hoti, Violeta Namani, Naser Foniqi, Nushe Kukaj Meka, Beqir Kalludra, Vesel Ismajli, Lutfi Shala, Naime Jashanica (hereinafter: the Applicants).

Challenged decision

2. The subject matter is the Applicants' request for constitutional review of Article 42, paragraph 4 of Law No. 06/L-054 on Courts (hereinafter: Law on Courts), which allegedly violates Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

3. The Referral is based on Article 113.8 of the Constitution, Articles 51, 52 and 53 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo, (hereinafter: the Law) and Rule 77 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

4. On 4 November 2019, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

5. On 7 November 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu -Krasniqi and Gresa Caka-Nimani (members).

6. On 15 November 2019, the Court notified: the Applicants, the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Prime Minister of the Republic of Kosovo, the Ombudsperson, the Secretary General of the Assembly of the Republic of Kosovo and the Judicial Council of the Republic of Kosovo about the registration of the Referral.

7. On 22 January 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

8. On 23 November 2018, the Assembly of Kosovo adopted the Law on Courts, which was published in the Official Gazette on 18 December 2018.

9. In accordance with Article 18 of the Law on Courts, the Special Department within the Basic Court in Prishtina is established to review the cases falling under the competence of the Special Prosecution of the Republic of Kosovo..

10. In accordance with Article 42, paragraph 4 of the Law on Courts: *"With the entry into force of this Law, cases of the Special Prosecution Office of the Republic of Kosovo for which the initial hearing has not been*

held yet shall be transferred for review to the Special Department for cases under jurisdiction of the Special Prosecution Office of the Republic of Kosovo. Cases for which the initial hearing has been held will continue to be examined in the relevant courts until their completion".

11. On 23 April 2019, in accordance with the Law on Courts, the Judicial Council of the Republic of Kosovo (hereinafter: KJC) adopted the Regulation (No. 03/2019) on the Organization and Functioning of the Special Department within the Basic Court in Prishtina and the Court of Appeals.

Applicant s' allegations

12. The Applicants allege that Article 42, paragraph 4 of the Law on Courts is incompatible with Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 of the ECHR.

13. The essence of the Applicants' Referral consists of the allegation that Article 42, paragraph 4 of the Law on Courts, stipulating that cases falling within the jurisdiction of the Special Department but for which an initial hearing has been held will continue to be processed in the respective courts, namely within the Serious Crimes Department, violates Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

14. The Applicants build their arguments regarding the constitutionality of the Law on Courts based on the principle of adjudication within a reasonable time limit in criminal matters stating that the adjudication of cases referred by the Special Prosecution Office of the Republic of Kosovo (hereinafter: SPRK) from the Serious Crimes Department and not from the Special Department would make it difficult to adjudicate these criminal cases within a reasonable time. In this regard, the Applicants mention several cases, emphasizing that*" [...] it is case 'Medikus', which is being adjudicated for more than 10 years, and the trial is still ongoing, then the cases "Toka 1 and 2", "Syri i Popullit", "Veteranët", "Vizat" as well as many other cases of this nature."*

15. In the context of this allegation, the Applicants refer to the case of the European Court of Human Rights (hereinafter: the ECtHR).) *H v. France*, application no. 10073/82, Judgment of 24 October 1989. The Applicants further clarify that they receive complaints from the parties to the proceedings due to the delay of the proceedings on the grounds that in the Serious Crimes Department part of which are the Applicants, at the same time cases falling within their subject matter

jurisdiction are adjudicated, including cases falling within the jurisdiction of the Special Department under the provisions of the Law on Courts.

16. The Applicants also emphasize that *"The Special Department has been established to deal with cases that fall within the competence of the SPRK, which are cases involving criminal offenses of a particularly serious nature, and in view of the nature of these cases a special procedure of selection of judges has been developed, which process is structured on certain conditions, which everyone who claimed to be selected as a judge within this department had to meet, so judges who were selected were considered to be the only ones who could adjudicate cases of this nature".* In this regard, the Applicants allege that in this case the principle of fair trial is violated, because *"[...] the accused are tried by an incompetent judicial level, not prepared in sufficient professional level with respect to the cases of this nature, then violation of the principle of fair trial also relates to a violation of the principle of equality of arms, as persons who have committed offenses of the same nature are adjudicated by different Departments, and in this function by judges who are assumed to have different levels of professional background, namely stand above the criteria that were applied when selecting them".*

17. The Applicants further specify that the continuation of the adjudication of cases falling within the competence of the Special Department by the Serious Crimes Department constitutes a violation "of equal treatment of the parties". In this context, the Applicants refer to the ECHR case *Mullai and others v. Albania* [application no. 9074/07, Judgment of 23 June 2010, paragraph 86], in which case the ECtHR held, *inter alia*, that *"[...] the existence of multiple parallel and interrelated proceedings raising substantially the same legal issue cannot be considered to be in compliance with the rule of law".*

18. The Applicants also allege that Article 42, paragraph 4 of the Law on Courts is in violation of Article 18 [Special Department for cases under the jurisdiction of the Special Prosecution of the Republic of Kosovo] and Article 19 [The Serious Crimes Department of the Basic Court], as well as Article 42, paragraphs 3 and 5 of the Law on Courts itself, which provisions refer to the subject matter jurisdiction of the Special Department within the Basic Court in Prishtina to review cases falling within the competence of the SPRK.

19. The Applicants further allege that Article 42, paragraph 4 of the challenged Law "constitutes a substantial violation of the provisions of the criminal procedure" pursuant to Article 384 [Substantial Violation

of the Provisions of Criminal Procedure], paragraph 1, item 6 of the Criminal Procedure Code of the Republic of Kosovo for the reason that *"the judgment was rendered by a court which lacked subject matter jurisdiction to hear the case"*. In this context, the Applicants state that *"[...] the subject matter jurisdiction has never before been distributed into two instances, and adjudicated by two different court instances"*.

20. Finally, the Applicants referring to *"Article 31 of the Constitution of the Republic of Kosovo, Article 6 of the European Convention on Human Rights, Articles 18 and 22 of the CPCRK, Articles 18 and 19 of the Law on Courts* [request] *the Constitutional Court:*

> *1. To approve the Referral of the Basic Court in Prishtina-Serious Crimes Department;*
> *2. To repeal Article 41 [42] paragraph 4 of the Law on Court[s] in the first paragraph as incompatible with Article[s] 31 of the Constitution of the Republic of Kosovo"*.

Relevant provisions of the Law on Courts

Law No. 06/L – 054 on Courts

Article 3
Exercise of Judicial Power

1. Judicial power in the Republic of Kosovo shall be exercised by the courts established by this Law..
[...]

Article 18
Special Department for cases under the jurisdiction of the Special Prosecution of the Republic of Kosovo

1. The Special Department within the Basic Court of Prishtina has the competence to review cases falling under the competence of SPRK in accordance with the Law on Special Prosecution of the Republic of Kosovo, amended and supplemented by subsequent laws.
2. All matters in the Special Department for cases under the jurisdiction of SPRK shall be adjudicated by the panel of three (3) professional judges, one of whom shall be the presiding judge.

Article 19
The Serious Crimes Department of the Basic Court

1. The Serious Crimes Department of the Basic Court shall adjudicate criminal offenses punishable by more than ten (10) years, and criminal offences qualified as serious criminal offenses under the Criminal Code or Criminal Procedure Code of Kosovo.
2. All cases before the Serious Crimes Department of the Basic Court shall be adjudicated by a trial panel of three (3) professional judges, with one (1) of them being the presiding judge.

[...]

Article 42

Appointment of Judges in Special Department for cases under the Jurisdiction of Special Prosecution Office of the Republic of Kosovo and Completion of Pending Cases

1. Kosovo Judicial Council shall, at the latest six (6) months from entry into force of this Law, elect judges who shall serve in the Special Department for cases under the jurisdiction of the Special Prosecution Office of the Republic of Kosovo, respectively in the Department for cases under jurisdiction of SPRK, within the Basic Court of Prishtina and Court of Appeals, in accordance with provisions of the applicable law.
2. Kosovo Judicial Council shall, also undertake all measures to functionalize Special Department within the Basic Court of Prishtina and the Court of Appeals, including recruitment of supporting staff and professional collaborators
3. Judges assigned to work in the Special Department of the Basic Court of Prishtina and in the Department for cases under the jurisdiction of the Special Prosecution of the Republic of Kosovo, at the Court of Appeals, may be engaged in trial panels for the adjudication of cases within the Department for Serious Crimes at the basic Court of Prishtina respectively at the Court of Appeals.
4. With the entry into force of this Law, cases of the Special Prosecution Office of the Republic of Kosovo for which the initial hearing has not been held yet shall be transferred for review to the Special Department for cases under jurisdiction of the Special Prosecution Office of the Republic of Kosovo. Cases for which the

initial hearing has been held will continue to be examined in the relevant courts until their completion.
5. With the entry into force of this Law, cases of the Special Prosecution Office of the Republic of Kosovo that are at the Court of Appeal shall continue to be reviewed by the respective panel which has the case under review at the moment of entry into force of this Law. Cases of the Special Prosecution Office of the Republic of Kosovo, which are admitted to the Court of Appeal after the entry into force of this Law, shall be reviewed by the Department for cases under the jurisdiction of the Special Prosecution Office of the Republic of Kosovo.

Admissibility of the Referral

21. With regard to the admissibility of the Referral, the Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.

22. In this respect, the Court refers to paragraphs 1 and 8 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.

(...)

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue."

23. The Court refers to Articles 51, 52 and 53 of the Law, which stipulate:

Article 51
Accuracy of referral

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

Article 52
Procedure before a court

After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.

Article 53
Decision

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

24. The Court also takes into account Rule 77 of the Rules of Procedure, which specifies:

Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.

(2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:

(a) the contested law is to be directly applied by the court with regard to the pending case; and

(b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

(3) The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Constitution. The case file under consideration by the court shall be attached to the referral.

(4) The referring court may file the referral ex officio or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.

(5) After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.

25. The Court first notes that the Applicants in the "Subject" of the Referral to the Court specify Article 41, paragraph 4 of the Law on Courts, as a provision that they challenge before the Court. However, the Court notes that throughout the content of their Referral, the Applicants refer to Article 42, paragraph 4 of the challenged Law as a provision, the constitutionality of which they challenge before the Court. Accordingly, the Court considers that the Applicants challenge Article 42, paragraph 4 of the Law on Courts.

26. In the light of the abovementioned normative framework, it results that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria, which are closely interlinked with each other, and which must be cumulatively met:

a) the referral must be filed by a "court";
b) the challenged law must be directly applied by the referring court in the case before it;
c) the constitutionality of the challenged law is a prerequisite for deciding in the case under consideration;
d) the (referring) court must not be certain of the compliance of the challenged law with the Constitution;
e) The referring court must specify what provisions of the challenged law are considered incompatible with the Constitution.

27. Therefore, the Court will, initially, examine whether the Applicants are an authorized party to file such a Referral, namely, whether the Referral was submitted by a "court" as established in paragraph 8 of Article 113 of the Constitution, the Law and the Rules of Procedure.

28. In this regard, the Court refers to its case law where the abovementioned criteria have been applied as regards the admissibility of the Referral in accordance with paragraph 8 of Article 113 of the Constitution (see cases of the Constitutional Court, KO59/14, Applicant *Hilmi Hoxha*, Resolution on Inadmissibility of 26 June 2014; KO126/16, Applicants: *Specialized Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo*

Related Matters, Resolution on Inadmissibility of 27 March 2017, paragraph 62; KO142/16, Applicants: *Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters* Judgment of 9 May 2017, paragraph 58, and case KO157/18, Applicant *The Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2019, paragraph 45).

29. The Court recalls that in case KO157/18, mentioned above, in which case the referral was submitted by the Supreme Court and was signed by its President within the scope of authorizations relating to his function. The Referral clearly stated that it is submitted by the Supreme Court which had to decide on the revision of an insurance company against a Judgment of the Court of Appeals and the decision on the revision was directly linked with the constitutionality of the legal norm that should have been applied in the case before it. Consequently, the Constitutional Court considered that the Referral was submitted by the "court" which has the case under its consideration within the meaning of paragraph 8 of Article 113 of the Constitution (see case KO157/18 above, paragraph 48).

30. The Court recalls that in case KO126/16, mentioned above, had found that a "court" is also each judge or panel of judges having full competence to adjudicate the merits of a case pending before it. In the abovementioned case, the judge who referred the case to the Constitutional Court tried the case through a single judge as the judge competent to decide the case on which he had referred the case to the Constitutional Court. Consequently, the Court held that pursuant to Article 113, paragraph 8, of the Constitution, the Referral in question was submitted by the "court" having the case under review within the meaning of Article 113, paragraph 8 of the Constitution (see case KO126/16 above, paragraphs 59 and 60).

31. The Court notes that the Applicants' case differs from the abovementioned cases. The Court recalls that in the present case, the Referral was neither filed by a judicial panel having the case under consideration nor by the President of the Basic Court within the scope of his authorizations related to his/her function, but was filed and signed by eleven (11) judges of the Basic Court in Prishtina, namely, the judges of the Serious Crimes Department, who challenge in abstract the compliance of paragraph 4 of Article 42 of the Law on Courts with Article 31 [Right to Fair and Impartial Trial] of Constitution, in conjunction with Article 6 of the ECHR.

32. Furthermore, the Court notes that the Applicants have not specified whether any trial panel of the Serious Crimes Department, within the

Basic Court in Prishtina, has a "case under consideration" before it and that under the general provisions of the Law on Courts, will have to be dealt with by the Special Department, and if so, what is the case. The Applicants mention several cases such as, "*case 'Medikus', which is being adjudicated for more than 10 years, and the trial is still ongoing, then the cases "Toka 1 and 2", "Syri i Populllit", "Veteranët", "Vizat" as well as many other cases of this nature"* but without specifying the specific circumstances of these cases, if these cases by their nature should have to be dealt with by the Special Department and currently are handled by the Serious Crimes Department, which would prove before the Court that the referral was filed by a "court" that has the case under its consideration, as well as proving that other criteria for the admissibility of the referral have been met in the present case.

33. Therefore, the Court considers that the Referral submitted by the Applicants, in their capacity of Judges of the Serious Crimes Department of the Basic Court, cannot be regarded as a Referral filed by a "court", as defined in the legislation mentioned above, precisely, in Article 113, paragraph 8 of the Constitution, the Law and the Rules of Procedure and as further specified in the case law of this Court.

34. In addition, the Court, referring to the other inadmissibility criteria established in Article 113, paragraph 8 of the Constitution, considers that the Applicants have also failed to prove whether the challenged law should be directly applied by the referring court in the cases under consideration before it, and whether the constitutionality of the challenged law is a prerequisite for rendering a decision in the case under consideration.

35. In addition, the Court, despite the abovementioned conclusions, also notes that the Applicants' main allegation is that Article 42, paragraph 4 of the Law on Courts infringes Article 31 of the Constitution, specifically the principle of a trial within a reasonable time, as an integral part of the right to a fair trial. In this regard, without prejudice to the constitutionality of these legal provisions, the Court refers to the main principles established in its case-law and that of the ECtHR pertaining to the trial within a reasonable time, according to which the claims related to a trial within a reasonable time is assessed in the light of the circumstances of the specific cases, and not abstractly, in particular taking into account: (a) the complexity of the case, (b) the conduct of the parties to the proceedings, (c) the conduct of the competent court or other relevant authorities, and (d) the importance of what is at stake for the Applicant in the litigation (see cases of Constitutional Court KI23/16, Applicant: *Qazim Bytyqi and others*,

Resolution on Inadmissibility of 5 May 2017, paragraph 58 and KI18/18, Applicant: *Isuf Musliu*, Resolution on Inadmissibility of 30 May 2018, paragraph 43; see also ECtHR Judgment of 7 February 2002, *Mikulić v. Croatia*, no. 53176/99, paragraph 38).

36. In conclusion, the Court finds that the Applicants are not authorized parties to file the Referral with the Court and, therefore, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 of the Constitution, Articles 20 and 51 of the Law and Rules 59 (b) and 77 (2) of the Rules of Procedure, on 22 January 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Safet Hoxha Arta Rama-Hajrizi

KO54/20, Applicant: The President of the Republic of Kosovo, Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020

KO54/20, Judgment of 31 March 2020, published on 6 April 2020

Key words*: Institutional Referral, Article 113.2 (1) of the Constitution, freedom of movement, freedom of gathering, right to privacy, limitation without being "prescribed by law", Government, Assembly, President, difference between Article 55 and Article 56, limitation vs. derogation*

On 24 March 2020, the President submitted Referral KO54/20 to the Court. Through this Referral, the President requested a constitutional review of the Decision [no. 01/15 of 23 March 2020] of the Government and the imposition of the interim measure against the challenged Decision of the Government.

The subject matter of the Referral was the constitutional review of the challenged Decision of the Government, which according to the Applicant's allegation is not in compliance with Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution of the Republic of Kosovo, and Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights, Article 13 of the Universal Declaration of Human Rights, as well as Article 12 of the International Covenant on Civil and Political Rights.

Under the heading **VII – CONCLUSIONS** – of this Judgment (see paragraphs 310-325), the Court summarized the essence of the case and stated the following:

As a preliminary issue, the Court in this Judgment clarified that it is not its role to assess whether the measures taken by the Government to prevent and combat the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level.

The constitutional question that this Judgment entails is the compatibility with the Constitution of the challenged Decision of the Government, namely whether by its issuance the Government has limited the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers provided by law. In this context, regarding the assessment of whether the restrictions made at the level of the entire Republic of Kosovo by the challenged Decision of the Government are prescribed by law, the Court has focused on the assessment of the powers established in Articles 41 and 44 of Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of Law No. 04/L-125 on Health.

In this regard, the Court considered: (i) the Applicant's Referral and the allegations presented in this Referral; (ii) the comments submitted by the Government and other interested parties; (iii) the case law of the ECtHR and, in particular, general principles on the applicability of the criterion "prescribed by law" as regards the restriction of fundamental rights and freedoms; and (v) the case law of the Constitutional Court itself.

Based on the foregoing considerations and assessments, the Court, unanimously, decided to declare Referral KO54/20 admissible for review on merits since, in the circumstances of the present case, all the admissibility requirements established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure were fulfilled.

The Court also unanimously decided that Decision [No. 01/15] of the Government of 23 March 2020 is incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] and Article 2 (Freedom of movement) of Protocol no. 4, Article 8 (Right to respect for private and family life) and Article 11 (Freedom of assembly and association) of the ECHR.

The Court held that the limitations contained in the challenged Decision of the Government regarding the constitutional rights and fundamental freedoms referred to above, are not "prescribed by law", and therefore are contrary to the guarantees contained in Articles 35, 36 and 43 of the Constitution in conjunction with the respective Articles of the ECHR, and Article 55 of the Constitution, which in its first paragraph clearly states that the fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

The Court reiterates the fact that the challenged Decision of the Government refers to the implementation of the two abovementioned laws, which authorize the Ministry of Health to take certain measures in those laws in order to prevent and combat the infectious diseases. However, the Court held

that the abovementioned laws do not authorize the Government to limit the constitutional rights and freedoms provided in Articles 35, 36 and 43 of the Constitution at the level of the entire Republic of Kosovo and for all citizens of the Republic of Kosovo without exception.

In this respect, the Court found that the restrictions imposed through the challenged Decision: (i) regarding the freedom of movement and gathering established in Articles 35 and 43 of the Constitution, exceed the limitations permitted by the abovementioned law adopted by the Assembly ; and (ii) related to "gatherings in all settings - private and public, open or closed" which incorporate aspects of the rights guaranteed by Article 36 of the Constitution, are not based on any of the authorizations set forth in the aforementioned law or any other law of the Assembly.

The Court clarified that the Government cannot restrict any fundamental right and freedom through decisions unless a restriction of the relevant right is provided by the law of the Assembly. The Government can only enforce a law of the Assembly that restricts a fundamental right and freedom only to the specific extent authorized by the Assembly through the relevant law.

With regard to the Applicant's allegations of a violation of Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution, the Court held that this Article is not applicable in the circumstances of the present case, since it is applicable only following the declaration of a State of Emergency.

However, with regard to the disagreement between the parties to the dispute, the President and the Government, over the meaning of the constitutional terms "limitation" and "derogation" that appear in Articles 55 and 56 of the Constitution, the Court clarified that the "limitation" of human rights and freedoms can be made "only by law" of the Assembly, but this does not mean that the "limitation" of rights can only be made through and after the declaration of a State of Emergency. The Court also clarified that the term "limitation" used in Article 55 of the Constitution implies the fact that the Assembly has the right to limit the fundamental rights and freedoms, through law, but only insofar and to the extent necessary in order that in an open and democratic society, fulfills the purpose for which the limitation is allowed. In other words, "limitation" implies a lighter degree of interference and this can be done even without declaration of a State of Emergency; whereas "derogation" implies a more severe degree of interference since it can never be done without a declaration of a State of Emergency.

As to the request for interim measures, the Court finds that following the unanimous decision of the judges to decide in their entirety the merits of the case and to render this Judgment, the latter remains without subject.

In accordance with Articles 116.3 of the Constitution, Article 20.5 of the Law on the Constitutional Court and Rule 60 (5) of the Rules of Procedure, the Court set the date 13 April 2020 as the date of entry into force of this Judgment, namely the repeal of the challenged Decision of the Government.

The Court has set another date of entry into force of its Judgment, namely 13 April, 2020 exceptionally and having regard to: (i) the circumstances created by the declaration of the COVID-19 pandemic at the world level; (ii) relevant recommendations of the health institutions at the state and world level; (iii) the potentially harmful effects on public health as a result of the immediate repeal of the restrictions provided by the Decision of the Government; and (iv) the protection of public health and interest until the enforcement of this Judgment by the relevant institutions of the Republic of Kosovo.

During this period of time and within the meaning of Article 55 of the Constitution regarding the "limitation" of fundamental rights and freedoms, the relevant institutions of the Republic of Kosovo, and, in the first place, the Assembly, should take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to safeguard public health have been made in accordance with the Constitution and this Judgment.

Finally, the Court also notes that the Ministry of Health, namely the Government, continues to be authorized to render decisions with an aim of preventing and combating the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health.

JUDGMENT

in

Case No. KO54/20

Applicant

President of the Republic of Kosovo

Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020

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 the President of the Republic of Kosovo (hereinafter: the Applicant or the President).

Challenged decision

2. The Applicant challenges the constitutionality of Decision No. 01/15 of the Government of the Republic of Kosovo (hereinafter: the Government), of 23 March 2020 (hereinafter: the Challenged Decision).

Subject matter

3. The subject matter of the Referral was the constitutional review of the Challenged Decision of the Government, which according to the Applicant's allegation is not in compliance with Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and

Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution of the Republic of Kosovo; Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights (hereinafter: the ECHR); Article 13 of the Universal Declaration of Human Rights (hereinafter: the UDHR); and Article 12 of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).

4. The Applicant also requested the Constitutional Court (hereinafter: the Court) to impose interim measure for the immediate suspension of the challenged Decision, until a final decision by the Court, reasoning that the imposition of the latter, "*is in the public interest and avoids irreparable risks and damages*".

Legal basis

5. The Referral was based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court (hereinafter: the Law); and on Rules 32, 56 and 57 of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 24 January 2020, at 12:03 hrs., the Applicant filed the Referral with the Court.

7. On the same day, 24 March 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Nexhmi Rexhepi.

8. On the same day, 24 March 2020, through electronic communication, the Court notified the Applicant for the registration of the Referral and requested to notify the Court urgently for any change related to the Referral.

9. On the same day, 24 March 2020, around 16:00 hrs, through electronic communication, the Court notified for the registration of the Referral: (i) the Prime Minister of the Republic of Kosovo, Mr. Albin Kurti; (ii) the President of the Assembly of the Republic of Kosovo, Mrs. Vjosa Osmani-Sadriu, with the request that a copy of the

Referral be distributed to all deputies of the Assembly; and, (iii) the Ombudsperson, Mr. Hilmi Jashari.

10. By these letters, the Court notified the interested parties that the Referral will be treated with urgency and high priority, taking into account the circumstances in which the state of the Republic of Kosovo finds itself. As a result, the Court set short deadlines for submission of comments. Regarding the possibility of submitting comments concerning the imposition of the interim measure, the Court set to all the above mentioned parties a deadline until 22:00 hrs. of the same day when the notification letters were sent, namely of 24 March 2020. Whereas for the submission of comments concerning the Referral in general and its merits, the Court set a deadline of three (3) days from the time of receipt of the letter of the Court, namely until 27 March 2020.

11. Within the deadline set for submission of comments concerning the request for the imposition of interim measure, namely until 22:00 hrs. of24 March2020, the Court received comments from the Prime Minister, Mr. Albin Kurti, on behalf of the Government; the deputy of the Assembly, Mr. Rexhep Selimi, on behalf of the Parliamentary Group of the VETËVENDOSJE! Movement, and the deputy of the Assembly, Mr. Abelard Tahiri, in his personal name (see paragraphs 45-72 of this Judgment which reflect their comments regarding the interim measure).

12. Also, within the deadline set for submission of comments concerning the Referral in general, namely three (3) days from the time of receipt of the letter of the Court – which meant 27 March 2020, the Court received comments from: the Prime Minister, Mr. Albin Kurti, on behalf of the Government [already caretaker Government]; Mr. Hilmi Jashari, on behalf of the Ombudsperson; the deputy of the Assembly, Mr. Rexhep Selimi, on behalf of the Parliamentary Group of the VETËVENDOSJE! Movement; and the deputy of the Assembly, Mr. Abelard Tahiri, in his personal name (see paragraphs 73-149 of this Judgment which reflect their comments regarding the Referral in general, namely the merits).

13. On 28 March 2020, taking into account the urgency of the case and the need for the request to be treated with high priority, the Court only notified the interested parties of the comments received and sent them a copy, for their information, without giving any additional time limit to counter-respond to the comments received as such a process would delay the Court's decision-making for a certain period of time. Moreover, the Court also held that in order to decide on the

admissibility and merits of the Referral in question, the comments received were sufficient and there was no vagueness which would need to be addressed through additional questions or comments.

14. On 29 March 2020, the Government submitted to the Court another two additional decisions, namely: (i) Decision No. 01/17 of 27 March 2020 – whereby the Challenged Decision of the Government was amended and supplemented, and (ii) Decision No. 01/18 of 28 March 2020 – whereby few additional actions were undertaking in the context of the Government's public health protection measures.

15. On 31 March 2020, in the session held electronically, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended the Court the admissibility of the Referral.

16. On the same day, the Court voted unanimously that the Referral is admissible, and that the Challenged Decision of the Government, namely Decision No. 01/15, of 23 March 2020, is not in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy] and 43 [Freedom of Gathering] of the Constitution and equivalent articles of the ECHR, namely Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), as well as Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

17. On the same date, the Court voted unanimously that Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution is not applicable in the circumstances of the present case.

18. On the same date, the Court decisions that the request for interim measure is moot after deciding the case based on merits.

Summary of facts

19. From 11 March 2020 and onwards, the Government issued several decisions related to COVID-19 pandemic. (See the Government's mentioned decisions: no. 01/07 of 11 March 2020; no. 01/08 of 12 March 2020; No. 01/09 of 13 March 2020; No. 02/09 of 13 March 2020; No. 01/10 of 14 March 2020; No. 01/11 of 15 March 2020; No. 01/12 of 17 March 2020; No. 01/13 of 18 March 2020).

20. On 15 March 2020, the Government issued Decision No. 01/11 for declaration of the "public health emergency". [*Clarification of the*

Court: neither the above mentioned decisions nor this Decision have been challenged before this Court and the latter is not reviewing the constitutionality of the above mentioned decisions nor of Decision No. 01/11; however, the latter has been referred as one of the legal grounds based on which the Challenged Decision[No. 01/15] was issued– the constitutionality of which is being assessed by this Judgment – and consequently it is important to disclose its content and the content of Decision No. 01/11, of 15 March 2020].

21. The above mentioned decision of the Government had a total of four points. In point I, the request of the Ministry of Health for the Government to declare "public health emergency" was approved. In point II, the Institutions of the Government were obliged to act in accordance with the National Response Plan and to activate the emergency support function 8 (ESF8 public health and medical services). In point III, the Ministry of Health was obliged to manage the declared situation. In point IV, it was emphasized that the decision in question of the Government, signed by the Prime Minister, enters into force immediately, namely on 15 March 2020.

22. On 23 March 2020, the Government issued another Decision, namely Decision No. 01/15, challenged before this Court. The introduction of the Challenged Decision emphasized that it was taken pursuant to the following constitutional and legal basis (see section "Legal basis on which the Challenged Decision of the Government Decision was issued", after paragraph 150 of this Judgment where the content of all articles below is mentioned):

    a) Article 55 [Limitations on Fundamental Rights and Freedoms];
    b) Paragraph 4 of Article 92 [General Principles] of the Constitution;
    c) Paragraph 4 of Article 93 [Competencies of the Government] of the Constitution;
    d) Article 41 [No title] and Article 44 [No title] of Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases (hereinafter: Law for Prevention and Fighting Against Infectious Diseases);
    e) Paragraph 1.11 of Article 12 [Measures and activities] and Article 89 [Responsibilities of the Ministry] of Law No. 04/L-125 on Health (hereinafter: Laws on Health);
    f) Article 4 [the Government] of Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries;

g) Article 17 [Correspondence Meetings] and 19 [Decision Making] of the Rules of Procedure of the Government No. 09/2011; and,
h) In implementation of Decision No. 01/11 of the Government, of 15 March 2020 [mentioned above] for declaration of public health emergency.

23. In accordance with the Challenged Decision, following the approval of the request of the Ministry of Health, the Government approved the undertaking of the following measures on prevention and control of COVID-19 pandemic transmission:

> *"1. The movement of citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration).*
> *2. Free movement is allowed for economic operators classified as the most important under the NACE codes and that the Ministry of Economy, Employment, Trade, Industry, Entrepreneurship and Strategic Investments allows to operate during period of emergency related to the COVID-19 pandemic, as well as for transport of goods/services to ensure the functioning of the supply chain.*
> *3. Movements on the road shall be carried out by no more than two persons together and always keeping a distance of two meters from the others.*
> *4. Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral.*
> *5. Institutions of the Government of the Republic of Kosovo shall be obliged to take the necessary actions for the implementation of this Decision. […]"*

24. According to item 6 of the Challenged Decision, which explicitly states that, "The Decision shall enter into force on the day of signature", it entered into force on 23 March 2020.

25. On 24 March 2020, the above mentioned Decision of the Government was challenged by the Applicant before this Court.

Applicant's allegations

26. The Court recalls that the Applicant challenges the constitutionality of the Challenged Decision, namely Decision No. 01/15 of the Government, of 23 March 2020. According to the Applicant, the Challenged Decision was taken in violation of Articles 21, 22, 35, 43, 55, 56 of the Constitution; Article 2 of Protocol No. 4 of the ECHR; Article 13 of the UDHR; as well as Article 12 of the ICCPR.

27. With regard to the above mentioned allegations, the Applicant submitted arguments regarding: (i) the admissibility of the Referral; (ii) the content/substance of the Challenged Decision; and (iii) the imposing of interim measure. Below, the Court will present the allegations of the Applicant for all these categories.

Regarding the admissibility of the Referral and its accuracy

28. The Applicant states that paragraph (9) of Article 84 [Competencies of the President] of the Constitution explicitly gives the President the competence to refer cases to the Constitutional Court. This competence, according to the Applicant, "*is a broad competence and is not subject to any restrictions, including but not limited to the specific cases listed in Article 113 of the Constitution*."

29. In the circumstances of the present case, the Applicant states, in accordance with sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution [Jurisdiction and Authorized Parties], the President is the authorized party to request an assessment of the compatibility of the challenged Decision with the Constitution, *"regarding the limitation of fundamental rights and freedoms protected by the Constitution"*. In implementation of the constitutional responsibility for guaranteeing the democratic and constitutional functioning of the institutions of the Republic of Kosovo, *"The President may refer the matters with the Constitutional Court, in cases where clarification is needed regarding a situation, when it is required to know whether a law, decree/decision, regulation is in compliance with the Constitution"*.

30. Consequently, according to the Applicant, the admissibility of this referral is *"understood"* and the Constitutional Court has the jurisdiction to decide on matters relating to the compliance of laws, decrees of the President and the Prime Minister, and regulations of

the Government, with the Constitution. Undoubtedly, in this case, according to the Applicant, these two requirements are met and consequently the Constitutional Court must assess the issue of compatibility of the challenged Decision.

31. Regarding the need to specify the referral, as required by Article 29 of the Law, the Applicant states that the referral in question was filed *"to avoid any dilemma about the limitation, by the Government with an administrative act, of human freedoms and rights guaranteed and protected by the Constitution"*.

32. According to the Applicant, the decisions and actions of the Government, including the challenged Decision, which include measures to prevent and fight the virus COVID-19, *"how welcome they are, they must be based on the Constitution and laws."* Further, according to the allegation, none of the articles mentioned in the challenged Decision *"entitles the Government to issue such a decision (paragraph 1.11 of Article 12 and Article 89 of Law No. 04/L-125 on Health [...] as well as Article 41 and Article 44 of Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases [...]."*

33. On the contrary, according to the Applicant's allegations, *"in the Republic of Kosovo this issue is very clear, where in Article 56 of the Constitution, is established that derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances, while the derogation of the fundamental rights and freedoms guaranteed by articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38, of the Constitution is not allowed under any circumstances.*

34. The Applicant concludes by stating that the Government, upon issuance of the challenged Decision *"has derogated the fundamental rights and freedoms protected by the Constitution, without declaring a State of Emergency, and in this regard has violated the human rights and freedoms guaranteed by the Constitution"* and therefore *"requests the Constitutional Court to decide on the merits of this referral, by annulling this Decision, for non-compliance with the Constitution."*

Allegations regarding the content/substance of the challenged Decision

35. Regarding the content of the challenged Decision, namely the merits of the referral KO54/20, the Applicant considers that the Government *"has disregarded its constitutional and legal mandate and*

responsibilities, exceeding its powers and essentially limiting the freedom of movement and freedom of gathering guaranteed under Article 35 and Article 43 of the Constitution". The limitation of these rights for all citizens without distinction, according to the Applicant's allegation, *"can be done by law and only under the circumstances of the State of Emergency, as well as under conditions and circumstances that justify such a limitation, as well as to the extent that it proportionally justifies the essence of the limited right"*.

36. Such limitations, according to the Applicant, can only be made *"after the declaration of the State of Emergency by the President of the Republic of Kosovo, and with the consent of the deputies of the Assembly of the Republic of Kosovo"*, as expressly provided in Article 131 [State of Emergency] of the Constitution.

37. The Applicant states that the Constitution by Article 131 stipulates that the freedoms and rights of individuals may be limited only in the event of a declaration of a state of emergency and, according to him, *"under no circumstances, in any other condition."* In addition to this fact, the Applicant's allegation continues, *"The Constitution stipulates that limitations on the rights and freedoms guaranteed by this act may be imposed to the extent and as much as it is necessary, and in accordance with the form and manner prescribed by the Constitution"*. Therefore, he emphasizes that such a thing implies that "*the limitations on freedoms and human rights guaranteed by the Constitution cannot be imposed in cases where such a situation does not justify the imposed limitation"*.

38. Further, the Applicant, citing Article 56 [Fundamental Rights and Freedoms During the State of Emergency] of the Constitution, states that the latter guarantees that any limitation of rights and freedoms, except those referred to in paragraph 2 of this Article, may be done only after the declaration of the State of Emergency and only in the manner prescribed in the Constitution, as follows:*"1. Derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances. 2. Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.*

39. According to the Applicant, *"The Constitution explicitly regulates the derogation of these rights and freedoms after the declaration of the State of Emergency and strict application of the proportionality*

between the limitation of the right and the aim sought to be achieved with the limitation of the right, allowing the derogation only to the extent necessary, in certain circumstances, thus, only in circumstances after the declaration of a State of Emergency". According to him, this means that *"the validity of measures of derogation of fundamental human rights and freedoms is limited in time, and these measures cease with the abolition of the State of Emergency, and cannot be imposed by the Government, in so far as the Constitution does not provide for any Government responsibility, in imposing on such measures of a restrictive character*".

40. In this respect, the Applicant concludes his allegations regarding the content of the challenged Decision stating that the latter *"has limited some of human freedoms and rights guaranteed and protected by the Constitution such as Freedom of Movement, Freedom of Gathering, etc., although fundamental rights and freedoms guaranteed by this Constitution may only be limited by law and that the derogation of fundamental rights and freedoms protected by the Constitution can only be exercised after the declaration of a State of Emergency under the Constitution".*

Allegations regarding the need to impose interim measure

41. Emphasizing Article 116.2 of the Constitution and Article 27 of the Law, the Applicant states that *"it is in the interest of the citizens that their rights and freedoms guaranteed and protected by the Constitution are not violated*" and this is the reason why the Court has been requested *"to impose an interim measure on the issue raised, until the final decision".*

42. According to the Applicant, the imposition of an interim measure in this case *"it is in the public interest and avoids irreparable risks and damages".* According to him, *"the implementation of the challenged decision of the Government, will cause irreparable damage and will have a direct impact on causing legal consequences (legal, financial, economic, etc.), being unable to exercise fundamental human rights, as guaranteed legal values in the the constitutional and legal order of Kosovo, as well as multiple consequences in the exercise of constitutional and legal authorizations by the institutions and bodies, which by the challenged decision are obliged to implement it".*

43. Further, the Applicant states that the suspension of the challenged Decision is in the public interest *"for substantial reasons"* because precisely from the implementation or not of the challenged Decision of the Government *"depends the creation, change or termination of*

the full implementation of the exercise and effective realization of fundamental human rights and freedoms in the Republic of Kosovo".

44. Therefore, finally, with regard to the request for interim measure, the Applicant requested the Court that *"without prejudice to the admissibility or merits of the referral, to immediately approve the request for interim measure, regarding the challenged decision of the Government, in order to prevent irreparable damage to any person and citizen of the Republic of Kosovo, as well as irreparable damage in the aspect of exercising executive power to avoid and prevent possible abuses as a result of the limitations of limited rights and freedoms, during the state of emergency of public health, in the name of measures of the Government for "protecting and safeguarding human health" and outside the constitutional and legal framework of the state of emergency".*

Comments submitted regarding the request for imposition of interim measure, until 22:00^{hrs} on 24 March 2020

45. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments regarding the request for the imposition of an interim measure in case KO54/20 until 22:00hrs on 24 March 2020. In the following, the Court will present all the comments received [a total of three of them] regarding the interim measure within the set time limit.

Comments submitted by the Government

46. Regarding the request for an interim measure, the Government emphasized that paragraph (4) of Rule 57 of the Rules of Procedure of the Court *"sets out three necessary conditions that the Applicant must meet in order for the request for an interim measure to be approved".* Before the Review Panel may recommend that the request for interim measures be granted, the Government states, it must find that: *"(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral; (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and (c) the interim measures are in the public interest."*

47. The Government, through its comments, alleges that the request of the Applicant, namely the President, *"does not meet any of these three criteria necessary for the approval of the interim measure, let alone all of them."*

48. Regarding the first criterion, namely the argumentation of the request at the level *prima facie*, the Government states that the Applicant *"has completely failed to show the prima facie case on the merits of the referral , because his referral is built on an elementary error in the field of human rights*". According to the Government, the Applicant's Referral *"claims that the Government's Decision is unconstitutional because, according to him, it is inadmissible that the state institutions limit human rights, including freedom of movement and freedom of gathering, without first declaring a State of Emergency*" and that such an allegation is *"erroneous, not only because it is manifestly ill-founded in relation to the Constitution"* but it is also *"manifestly ill-founded in relation to all international instruments in the field of human rights, as well as manifestly ill-founded in relation to the case law"* of the Constitutional Court and the ECtHR.

49. The Government emphasizes that it is precisely the provisions cited by the Applicant himself that expressly state that *"even without declaring a state of emergency, human rights can be limited, such as freedom of movement and freedom of gathering"*. For example, the Government emphasizes, according to the Judgment of this Constitutional Court in case KO131/12, paragraph 128, it is emphasized that Article 55 of the Constitution *"is two-fold: it provides a justification for the limitation of constitutional rights, and, at the same time, it determines the boundaries of such a limitation"*. According to the Government, when the Constitutional Court wrote these words, the Republic of Kosovo was not in a state of emergency, but even without declaring a state of emergency, *"Article 55, according to the Court, nevertheless had the role of providing "justification" for the limitation of constitutional rights"*.

50. Citing Article 2 of Protocol no. 4 of the ECHR and Article 11 of the ECHR, the Government alleges that these provisions prove that the Applicant's allegation is manifestly ill-founded *"that the Decision of the Government is allegedly unconstitutional because it limits human rights without declaring a State of Emergency*." Although it is true that the Decision of the Government limits freedom of movement and freedom of gathering, the Government states; however, the submission submitted by the President as the Applicant *"does not provide even a single argument why these limitations are unconstitutional, except the lack of declaration of a State of Emergency, which is totally irrelevant in assessing the constitutionality of limitations of human rights*". Therefore, the Government concludes, the Applicant's Referral does not *"show a prima facie case on the merits of the referral"*.

51. The Government further emphasizes that the referral submitted by the President *"suffers from a total confusion between the two elementary concepts in the field of human rights: (1) the concept of the limitation of human rights and (2) the concept of the derogation of human rights.*" According to the Government, it is true that *"the derogation of human rights cannot be done without declaring a State of Emergency, but, as noted above, the same does not apply to the limitation of human rights"*. In this regard, the Government emphasizes that the fact that the President as an Applicant has failed *"to respect the essential difference between these concepts, is proved by some of his inaccurate allegations.*" As an example in this regard, the reference of the President to Article 56 of the Constitution and in the exceptions provided in paragraph 2 of that article where it is stated that the limitation *"may only occur following the declaration of a State of Emergency as provided by this Constitution."* According to the Government, this allegation is incorrect because Article 56 of the Constitution *"does not mention the concept of limitation at all, but only the concept of "derogation", which means the suspension of human rights*". As an illustration, the Government continues, *"the derogation of Article 30 of the Constitution [Rights of the Accused] would mean that none of the requirements set out in Article 30 (e.g. that the accused "has the assistance of a defense counsel of his choice" (item 5)) , would not need to be met, if such a measure is necessary in a State of Emergency) "*.

52. Finally, regarding this point, the Government emphasizes that *"the fact that the President's referral fundamentally misunderstands the difference between the limitation and derogation of human rights would not necessarily be a problem for the President's referral, if he had offered a single argument as to why the Decision of the Government should be considered to present the derogation, and not just limitation of freedom of movement and freedom of gathering"*. With such a valid argument, the Government emphasizes, the Applicant *"perhaps could have reached a conclusion that the Decision in question is unconstitutional, because the State of Emergency has not been declared*". However, according to the Government, in the entire submission of the President, no argument has been provided in that respect and for this reason the Government considers that *"the President's Referral again fails to fully meet the first requirement for the approval of the interim measure, to show "the prima facie case on the merits of the referral"*.

53. Regarding the second criterion, namely the argumentation of suffering irreparable damage, the Government states that the Applicant failed

to justify how through the implementation of the challenged Decision of the Government the party in the present case would suffer irreparable damage. Based on the linguistic interpretation of item (b) of paragraph (4) of Rule 57 of the Rules of Procedure, which stipulates that the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted, it appears to surface the clear fact, according to the Government, that the Applicant *"has not raised any allegation regarding irreparable damage that he - as a party to this proceedings - would suffer"*. According to the practice of the Court, citing the case KI56/09, the Government emphasizes, it is the obligation of the party to the proceedings not only to raise as an allegation the suffering of irreparable damage, but to sufficiently justify the suffering of such damage.

54. Further according to the Government, for the Applicant *"is not clear what the concept of "irreparable damage" in the spirit of the Constitution is"* pursuant to its Article 53 and the case law of the ECTHR. Regarding the latter, the Government mentioned some decisions according to which, the Government emphasizes, *"economic and financial damage cannot be considered as "irreparable damage"* and that, in this respect, the Applicant *"has not provided any argument for allegations of financial and economic damage* [...], *but also the legal damages which he emphasizes."*

55. The concept of irreparable damage has been interpreted, the Government points out, in the decision of the ECtHR, *Abdollahi v. Turkey* (see application no. 23980/08), in which case the Applicant was granted a request for an interim measure (deportation was prohibited) as his right to life was violated, because the death penalty could be applied against him. Further, in the case of the ECtHR, *EH. V, Sweden* (see application no. 32621/06), the ECtHR had approved the request for an interim measure on the grounds of causing irreparable damage, because the Applicant was in danger of being tortured or even killed. In case of *Abraham Lunguli v. Sweden* (see application no. 33692/02), the ECtHR had approved the request for the imposition of interim measures because the Applicant could otherwise have been subjected to ill-treatment and mutilation. In the cases of *Soering v. the United Kingdom* (see application no. 14038/88), *Ismoilov and others v. Russia* (see application no. 2947/06) and *Otham (Abu Qatada) v. United Kingdom* (see application no. 8139/09), the ECtHR has stated that the "irreparable damage" is considered a risk by which an Applicant is threatened in the realization of his judicial rights, namely if the Applicant is in a situation where he can be flagrantly deprived of justice. In this regard,

the Government refers to several other cases of the ECtHR where the irreparable damage has been justified: *Kotsaftis v. Greece* application no. 39780/06; *Evans v. the United Kingdom*, application no. 6339/05; *Öcalan v. Turkey* 46221/99; and *X. v. c. Croatia* application no. 11223/04.

56. The above-mentioned case law of the ECtHR, the Government emphasizes, leads to conclusion that the damage which can be considered as irreparable damage are: *"deprivation of fair and impartial court proceedings; deprivation of the Applicant of access to justice; the danger that threatens the Applicant that he will be arbitrarily imprisoned; the danger that threatens the Applicant that he could be subjected to inhuman treatment or torture; the danger that threatens the Applicant for his life"*.

57. In this regard, the Government considers that the Applicant, namely the party within the meaning of item (b) of paragraph (4) of Rule 57 of the Rules of Procedure *"not only has he not presented arguments that he may suffer any of the aforementioned damages, but it is a known fact that the challenged decision does not produce any legal effect with such consequences*".

58. Regarding the third criterion, namely the argumentation of the referral at the level of public interest, the Government considers that *"the Applicant not only did not justify the public interest, as a request for the imposition of interim measures with the effect of suspending the implementation of the challenged decision, but also stated untrue facts regarding the real effect of the acts of the Government",*

59. According to the Government, issues of public interest, but not limited to them, are considered: public safety (internal and external); public health; protection of environment; and ensuring the financial stability of the state. It is a known fact, according to the Government, that the Applicant *"has provided no argument as to whether, as a result of the enforcement of the challenged decision, public safety is endangered by internal turmoil or external attacks; public health is endangered; the environment is damaged or the financial stability of the Republic of Kosovo is endangered"*.

60. The Government considers that the Applicant has not justified the public interest as a reason for suspending the implementation of the challenged decision; and moreover in this respect, according to the Government, *"the suspension of Decision of the Government, not only is it not in the public interest, but it also poses a threat to the public interest*." And this is due to the fact that, according to the Government,

"suspension of the Decision, even only temporarily, would seriously endanger the health of the citizens and residents of the Republic of Kosovo." In this regard, the Government emphasized that: *"we note that the director of the National Institute of Public Health [hereinafter: NIPH], Prof. Dr. Naser Ramadani has publicly stated that we are entering, now and in the next two weeks, the most critical phase in the battle against COVID-19. Precisely for this reason, Dr. Ramadani, on 22 March sent official recommendations in writing to the Minister of Health (see attached letter), proposing the same measures that have already been adopted by the Decision of the Government, including the limitation on freedom of movement and freedom of gathering, in order to fight the spread of the virus at this critical stage"*. The scientific evaluation of Prof. Dr. Ramadani, the Government emphasizes, *"was that these measures are necessary, at this moment, "to prevent and significantly reduce the intensity of COVID-19 pandemic in the Republic of Kosovo" (p. 2 of the Recommendations). This is due to (1) "deterioration of the epidemiological situation with COVID-19 in the world and Europe" (ibid.) and (2) the significant increase in cases of infection within the Republic of Kosovo*."

61. Consequently, according to the Government, *"the suspension of the Decision of the Government would prevent, at the most sensitive moment for the citizens of the Republic, this prevention and reduction of the intensity of pandemic."* The fact that Kosovo is already entering the critical period of the epidemic only received further confirmation from the fact that, on 23 March, cases of infection in Kosovo have almost doubled. In these circumstances, according to the Government, *"Kosovo cannot afford to suspend the measures recommended by the director of the NIPH, based on his professional assessment. The risks that would be caused by the delay or suspension of these measures, even for a few days, can have serious consequences for the citizens and residents of Kosovo"*. Furthermore, it is emphasized that such a fact has been proven by the case of Italy, where even a brief hesitation and delay in imposing strict limitations, has caused thousands of deaths to date.

62. According to the Government, in order that the state of Kosovo *"avoids such a fate, we must ensure, especially at this time, that the measures recommended by our most distinguished public health professionals and experts, can be implemented without interruption, even if only briefly"*. Therefore, according to the Government, *"the adoption of the interim measure, namely the suspension of the Decision of the Government, not only that it is not in the public interest, but also poses a great risk to health of the citizens and residents of Kosovo"*.

63. The Court recalls that the Government, in addition to the abovementioned comments, has also submitted to the Court a Recommendation issued by the Director of the NIPHK [National Institute of Public Health of Kosovo], Prof. Dr. Naser Ramadani in which it is said as follows:

> *"Kosovo National Institute of Public Health and the Committee for Monitoring Infectious Diseases of the Ministry of Health, based on the Decisions of the Government taken so far:*
>
> *We recommend that the Ministry of Health take concrete measures:*
>
> *Urban traffic in the whole territory is prohibited;*
> *Circulation of vehicles is prohibited at certain times (except for official vehicles which help in the management of pandemics);*
> *The movement of citizens is prohibited (except in urgent cases and with special needs). Any gatherings are prohibited: feasts, ceremonies, weddings, parties (in all environments), funerals (only close family members), which do not guarantee a distance of 2 meters. […]"*

64. In conclusion, the Government requested the Court *"to reject the Applicant's request for the imposition of interim measure",* because, according to it, the Rules of Procedure of the Court stipulate that the foreseen criteria must be met cumulatively and that in the circumstances of the present case they have not been met.

Comments submitted by the Parliamentary Group of VETËVENDOSJE! Movement

65. The Parliamentary Group of VETËVENDOSJE! Movement regarding the request for an interim measure, stated that: *"The President in his request for the imposition of the interim measure, which he bases on the statements that: "Implementation of the Decision of the Government will cause irreparable damage and direct impact on causing legal, financial, economic, etc. consequences, being unable to exercise fundamental human rights, does not indicate exempli cause where such a thing would find a place and what would be those irreparable damages that would be caused by the implementation of the Decision of the Government".*

66. As a result, the Parliamentary Group of VETËVENDOSJE! Movement requested the Court to reject the request for an interim measure.

Comments submitted by Mr. Abelard Tahiri, deputy of the Assembly

67. The deputy Abelard Tahiri, regarding the request for imposition of the interim measure, states that: *"there are a series of facts that justify the approval of the request for an interim measure, with the effect of suspending the implementation of the challenged decision, until the decision on merits of the request for constitutional review, according to the respective procedure before this Court"*.

68. According to the deputy in question, the request of the Applicant for the imposition of interim measure is based on the constitutional authorizations of the Constitutional Court, in accordance with Article 116.2 of the Constitution and Article 27 of the Law. According to him, all three legal requirements for the approval of this interim measure by the Court have been cumulatively met.

69. First, the Applicant, according to the allegation, has *"justified the prima facie case on the merits mentioned in the subject of the referral, therefore the measure [...] is justified as a decisive tool in the current situation of exercising the constitutional and legal competencies and responsibilities by the Government"*.

70. Second, he stresses that the measure is in the public interest *"for the reason that the incomplete exercise, namely the limited exercise of these rights creates repercussions for the state of Kosovo, which are also defined by mandatory international legal acts such as: Universal Declaration of Human Rights, European Convention for the Protection of Fundamental Human Rights and Freedoms and its Protocols and the International Covenant on Civil and Political Rights and its Protocols, international legal acts, which in accordance with Article 22 of the Constitution, apply directly to the Republic of Kosovo and have priority, in case conflict, over the provisions of laws and other acts of public institutions"*.

71. Third, the lack of an imposition of an interim measure *"may cause irreversible and irreparable damage to the violation of the constitutional guarantees of fundamental rights and the principles of democratic governance*". In this regard, he stated that the facts and allegations presented in the Referral KO54/20, *"imply constitutional issues and identify concrete consequences in the effective exercise of guaranteed constitutional rights and freedoms and the implementation of the challenged decision of the Government will have extraordinary and multiple consequences, as well as serious*

violation of the constitutional order and the principle of separation and mutual control of powers, according to the Constitution".

72. Therefore, according to the deputy Abelard Tahiri, the interim measure should be imposed because *"the implementation of the decision of the Government will cause irreparable damage and will have a direct impact on causing legal consequences for nationals and citizens due to the impossibility of exercising their fundamental rights*".

Comments with respect to the merits of the Referral submitted within three (3) days, respectively by 27 March 2020

73. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments on the content or merits of the Referral, within a period of three (3) days from the moment of receipt of the letter of the Court, respectively until 27 March 2020. In the following, the Court will present all the comments received [four of them in total] regarding the content/substance of the challenged decision, respectively the merits of this case.

Comments submitted by the Government

Government comments regarding the admissibility of the Referral

74. The Government requests from the Court to assess whether all admissibility conditions have been met before assessing the merits of the Referral, claiming that in the circumstances of the present case they have not been met. In this regard, the Government states that the Applicant has based his request on paragraph (9) of Article 84 of the Constitution and sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution but did not refer to Article 29 of the Law. In this regard, the Government emphasizes that the Court must assess whether the applicant, respectively the President, is an authorized party; if he has "*specified his referral"* pursuant to Article 29 of the Law and if he has *"justified his referral"* sufficiently so that it is not considered "manifestly ill-founded on constitutional grounds*"*.

75. In this regard, the Government emphasizes that *"it is extremely important to specify the nature of the acts which may be challenged by the President."* This is due to the fact that, according to the Government, *"the procedural aspect of a constitutional dispute - unlike the interpretation of fundamental freedoms and rights in claims raised by individuals - is interpreted in a narrow sense in order to prevent abuse of the right to constitutional referral."*

76. The Constitution, the Government's commentary follows, explicitly states that the President may request an assessment of the compliance of "*Prime Minister's decrees"* and *"Government regulations."* In this respect, the Government states that "*it is clear that the challenged decision is neither a decree of the Prime Minister nor a regulation of the Government, but is a decision of this constitutional body approved in accordance with its constitutional procedures and authorizations."* Consequently, the Government claims and asserts that "*it is more than clear and there is no doubt that the Constitution does not authorize the President [...] to seek the constitutional review of Government decisions."*

77. In this regard, the Government emphasizes that the interpretation of the Constitutional Court in the case KO73 / 16 *"with all due respect to the Court, it is erroneous and outside the constitutional framework set by the Constitution-maker."* This is because, according to the Government, *"The Constitution leaves no room for any doubt regarding the legal nature of the acts of the Prime Minister or the Government which may be challenged by the authorized parties."*

78. In the above-mentioned Judgment, KO73/16, the Government states that "*The Court has dealt with the reasoning as to whether the challenged act is an administrative act or not. But at the same time, the Court has not addressed - in the spirit and to the letter of the Constitution - whether the challenged act is a decree of the Prime Minister or a decision of the Government."* Consequently, the Government in this respect concludes that, in the present case *"The Court has not oriented its reasoning in relation to the Constitution, but in relation to the claims of the parties in the proceedings."* In this regard, the Government has requested from the Court to review its case law and restore the constitutionality of the proceedings followed as it has done "in cases known as *"referral of constitutional questions [KO79/18]" "*. On the contrary, the Government's claim continues, *"legal certainty will be endangered and, as in the case of the mentioned procedures, the possibility of abusing the Constitutional Court will be created."*

79. Further, the Government has also considered that the Applicant has failed to specify his Referral in accordance with paragraphs 2 and 3 of Article 29 of the Law *"because he has not specified whether he claims that the whole act or a part of it is in contradiction with the Constitution and also did not specify any substantive objection to his claim that the chellenged decision is contrary to the Constitution."* The Government claims that page 10 of the Applicant's Referral only

incidentally mentions the title: *"Accuracy of the Referral"* and incidentally states some legal provisions but does not specify "*how does he concereteley consider that this decision violates constitutional provisions (regarding limitations of human Rights and freedoms).* Furthermore, the Government considers, in this part of the Referral which should serve to clarify his claims *"for constitutional violations - does not mention any provision of the Constitution or international acts applicable in the Republic of Kosovo - which could have been violated."* The President, according to the Government, only states that "*Decisions and actions of the Government, including the Decision of the Government of the Republic of Kosovo no. 01/15, dated 23.03.2020, which includes measures to prevent and combat the Covid 19 Virus, are welcomed , they must be based on the Constitution and laws".*

80. According to the Government, the Applicant not only did not substantiate his claim substantially but even failed to "specify a single constitutional or conventional provision which he considers to be contradicted by the challenged decision." In this regard, the Government recalls two resolutions of the Court, namely cases KO118/16 and KO47/16, has defined the admissibility standard of sufficient argumentation of the allegations of constitutional violations in the parts where it is stated that *"only the incidental mention of some constitutional provisions, without substantially arguing the claims, is not a sufficient reason for the referral not to be considered manifestly ill-founded on constitutional grounds."*

81. As a final comment on the admissibility of the Referral, the Government states that the Applicant is not an authorized party to request a constitutional review of the Government Decisions; he has failed to specify his referral; and has not presented any substantial objection regarding his claims. For such reasons, the Government considers that the Applicant has not met any of the eligibility criteria provided by the Constitution, Law and Rules of Procedure.

Government comments on the merits of the request

82. As regards the merits of the Referral, the Government initially alleges that the Applicant *"has not only confused the constitutional concepts regarding the limitation of fundamental freedoms and rights, but has also distorted the facts concerning the challenged decision."* This is because the Government's challended decision is only *"one of the many decisions issued by the Government"* aimed at preventing the spread of COVID-19 pandemic. The Government also refers to the decisions of the Government: "*no. 01/07 of 11 March 2020; no. 01/08*

of 12 March 2020; no. 01/09 of 13 March 2020; no. 02/09 of 13 March 2020; no. 01/10 of 14 March 2020; no. 01/11 of 15 March 2020; no. 01/12 of 17 March 2020; no. 01/13 of 18 March 2020" [Clarification of the Court: The Government has referred to these decisions but did not submit them to the Court].

83. Thus, the Government emphasizes, *"it is understood that the challenged decision is a decision which complements the earlier decisions"* and that by the challenged decision *"the measures recommended by the NIPHK in order to protect public health are increased"*, and they are *"consistent with the measures allowed to be taken according to Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, Chapter IV."* This logical course of the process, the Government claims, *"provides an answer to the raised, but unjustified allegation of the Applicant regarding the Government's competencies"*. Referring to paragraph (4) of Article 93 of the Constitution, the Government states that it is authorized *"to issue decisions whereby it implements laws in force "* and only *" if there would not exist a law which foresees the type of measures that the Government may take it, then the Applicant's allegation – even though unjustified - would at least make sense."* However, according to the Government, that article of the Constitution allows the Government to "take decisions and issue legal acts or regulations necessary for the implementation of laws;" and to "*instruct and oversee the work of the administration bodies."*

84. The Government, as a "supreme body within the bodies of public administration" is allowed under Article 24 of the Law No. 05/L-031 on the General Administrative Procedure to exercise the functions of its subordinate bodies in urgent cases. Furthermore, the Law for Prevention and Fighting against Infectious Diseases, in Article 4 stipulates that "The protection from the infections diseases endangering the whole country will be carried out by NIPHK, Sanitary Inspectorate of Kosovo, Kosovo Health Inspectorate, all public and private health institutions, non health institutions, municipalities and citizens supervised by Ministry of Health." On this basis, the Government clarified that *"its competence to issue these decisions is based on the Constitution and applicable laws."*

85. The Government further states that the President in his Referral alleges that *"the Decision of the Government is unconstitutional because, in his view, it is inadmissible for state institutions to limit human rights, including Freedom of Movement and Freedom of Gathering, without first declaring the State of Emergency."* This allegation, according to the Government, is erroneous and manifestly

ill-founded in relation to the Constitution, international instruments in the field of human rights, and the case law of the Constitutional Court and the ECtHR.

86. Despite the Applicant's allegations, the Government, the Constitution and international human rights instruments emphasize, “precisely the provisions cited by the President himself explicitly and clearly state that, even without declaring a state of emergency, human Rights and freedoms may be limited, including the Freedom of Movement and the Freedom of Gathering. ” In this regard, the *Government refers to paragraph 128 of case KO131/12 which specifically states that: “article 55 of the Constitution is to fold: it provides a justification for the limitation of constitutional Rights, and, at the same time, it determines the boundaries of such a limitation.”* When the Constitutional Court issued this finding, the Republic of Kosovo was not in a state of emergency; however, even without being in a state of emergency, Article 55, according to the Court, “ had nevertheless played the role of providing z “justification” for limiting constitutional rights. *“The same role, the Government claims, the said article “continues to play the same role in the current situation we are facing.”*

87. By citing Article 2 of Protocol no. 4 and Article 11 of the ECHR, the Government states that: *“these provisions prove that the President's allegation that the Government's decision is allegedly unconstitutional because it limits human rights without declaring the State of Emergency is clearly unfounded. It is true that Government Decision limits the Freedom of Movement and Freedom of Gathering. However, the president's submission does not provide a single argument as to why these limitations are unconstitutional, apart from the lack of declaration of the state of emergency, which is totally irrelevant in assessing the constitutionality of human rights limitations.”*

88. Subsequently, the Government emphasized the constitutional criteria for the constitutional review of limitations of Freedom of Movement and Freedom of Gathering. The question to be asked, according to the Government, is *"whether the limitations presented by the Government Decision, on Freedom of Gathering and Freedom of Movement, meet the conditions set out in Article 55 of the Constitution." If so, then it would provide a “justification for limitin the rights in question.”*

89. The criteria of Article 55 must also be read in accordance with the ECHR, based on Article 22 of the Constitution, the Government emphasizes.

90. With regard to the Freedom of Gathering, according to paragraph 2 of Article 11 of the ECHR, the Government emphasizes that there are presented three criteria for assessing the admissibility of limiting the Freedom of Gathering, emphasizing that the exercise of this right may not be subject to any limitations other than those that: are provided by law; are necessary in a democratic society; are in the interest of national security or public safety, for the protection of order and the prevention of crime, for the preservation of health or moral, or for the protection of the rights and freedoms of others. Also paragraph 3 of Article 2 of Protocol no. 4 of the ECHR also states *"in an identical language"* these three criteria for assessing the admissibility of limiting the Freedom of Movement.

91. Having emphasized these criteria, in the subtitle of the comments reading: *"Implementation of constitutional criteria for constitutional review of limitations on Freedom of Gathering and Freedom of Movement"*, the Government pointed out that the first criterion for the constitutional review of the limitations in question is that of legality" and that, according to the Government, all the limitations "presented in the Decision, on Freedom of Gathering and Freedom of Movement, are all foreseen by law."

92. As regards the Freedom of Gathering, according to the Government, Article 44 of the Law for Prevention and Fighting against Infectious Diseases "*gives the health authorities broad discretion to prohibit gathering for the purpose of controlling, preventing and fighting infectious diseases."* In this regard, the Government emphasizes that "*the broad discretion defined by these provisions, represents a discretion not only to prohibit all gatherings in public places but also to order "the taking of other foreseen general or special technical - sanitary and hygienic measures", is more than sufficient to cover the limitation of Freedom of Gathering in the Government Decision, especially because this Decision does not prohibit all rallies categorically. Exempt from this prohibition are those gatherings that are "necessary to perform work duties for the prevention and control of pandemics", as well as those where a distance of two meters is allowed with others."*

93. As regards the Freedom of Movement, the Government also states that Article 41 of the Law for Prevention and Fighting against Infectious Diseases *"gives health authorities broad discretion to stop circulation*

in the infected regions or endangered regions" in the part where it is stated that: "*In order to prohibit the entrance and spreading of [...] other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following: b) Prohibition of circulation in the infected regions or directly endangered."*

94. The above provision, the Government states, "*gives broad discretion to categorically prohibit the circulation in infected or directly endangered regions"* and that with *"79 detected cases of infection spread in different regions of the country, it is undeniable that the risk of infection by COVID-19 already includes the entire territory of the Republic of Kosovo, especially considering the latest studies in the field of medicine, which prove that a significant number of people infected with the COVID-19 virus to date, have been infected by people who have not yet shown symptoms."*

95. However, the Government emphasizes, *"despite the discretion given by law to categorically prohibit the circulation of citizens, the Government Decision has once again prohibited it only in some respects, by imposing limitations on circulation in terms of time (10 : 00—16: 00 hrs and 20: 00—08: 00 hrs) and the manner of circulation (only by two people, with a distance of two meters). "* It is worth mentioning, according to the Government, "*that the law also authorizes the Kosovo Police to cooperate with health institutions to implement these limitations"* where Article 18 of Law no. 04 / L-076 for the Police, itself provides that: "*A Police Officer has the power to restrict temporarily a person's Freedom of Movement within a specific area or to redirect a person's movements away from a specific area, in order to secure the specific area for a legitimate police objective [...]", where one of these" legitimate objectives" is also the protection of persons from epidemics."*.

96. For the above-mentioned reasons, the Government emphasizes, that the limitations provided in the challenged Decision are in accordance with the law, and consequently "defined by law."

97. In addition to the legality aspect, the Government claims that paragraph 3 of Article 55 of the Constitution also states that the limitations on fundamental rights and freedoms guaranteed by the Constitution may not be exercised for purposes other than those for which they are prescribed. Meanwhile, according to paragraph 3 of article 2 of Protocol no. 4 of the ECHR, the defined purposes for which restrictions on Freedom of Gathering and Freedom of Movement are allowed, include *"preservation of health"*. The purpose of the

limitations imposed by the Government, as stated by the latter: *" is to preserve health, respectively, to" prevent and significantly reduce the intensity of COVID-19 pandemic in the Republic of Kosovo pursuant to the recommendations of the NIPH. ""* Consequently, the limitations on Freedom of Movement and Freedom of Gathering, by the challenged decision of the Government, the latter emphasizes, have been made for a legitimate purpose according to the relevant provisions of the ECHR.

98. Further, regarding the criterion of necessity in a democratic society, the Government emphasizes that this criterion is also presented in paragraph 2 of Article 55 of the Constitution. In this case, the Government asserts that "*the existence of a 'highly important social need' is undeniable"* According to the NIPH, "COVID-19 virus has infected 445,982 people worldwide so far, causing 19,795 deaths, including 79 infected and 1 death in the Republic of Kosovo." The need to prevent and combat the spread of COVID-19 pandemic in the Republic of Kosovo is clearly of great importance. If we take into account the recommendations of the NIPH, they lead us to the conclusion that the goal of *"preventing and significantly reducing the intensity of COVID-19 pandemic in the Republic of Kosovo"* , could not be achieved without imposing the limitations in question, states the Government.

99. Prior to the issuance of the challenged Decision under discussion, the Government claims to have taken *"a series of milder measures with previous decisions"* and instead of taking all measures stimultaneously, the Government has taken steps in the process of preventing and combating COVID-19 in an escalating manner, by always taking into account the recommendations of public health experts, and on the basis of the epidemiological situation in the world, in Europe and at the local level.*"*

100. The most recent measures, those foreseen in the challenged Decision, "were taken on the basis of the reasoning of the NIPH, according to which these measures were necessary to be imposed in addition to the previous measures" and consequently, the Government states, *" the goal of preventing and reducing the intensity of COVID-19 pandemic could not be achieved with a lesser limitation"* therefore the measures taken are *"necessary in a democratic society".*

101. *As to the principle of proportionality, the Government states that "we must take into account the relationship between "the importance of the purpose of the limitation"and" the nature and extent of the restriction"(Article 55, paragraph 4), by assessing whether the*

Government measures achieve a proportional balance between the volume of the limitation and the importance of the purpose of the limitation. " According to the ECtHR case law, the Government emphasizes that states have a broad margin of appreciation *"in terms of health policies, in particular those relating to general preventive measures"*. According to this principle, the Government, acting on the recommendations of the NIPH, *"is in the best position to assess the importance of achieving the goal of preventing and fighting the COVID-19 virus."* In this field, the Government emphasizes, *"the discretion of the Government to act is at the highest possible level."*

102. Further, referring to the doctrine of subsidiarity and consensus at European level, the Government states that: "*State authorities enjoy more discretion in imposing a certain limitation on human rights, when there is no consensus among the member states of the Council of Europe against the imposition of that limitation. Whereas, when such a consensus exists, the discretion of the state authorities to act is narrower, respectively."* In respect of this principle, the Government refers to the cases of the ECtHR, *Goodwin v. The United Kingdom* (see Application no. 95, paragraphs 85-86); *Tekeli v. Turkey* (see Application no. 29865/96, paragraph 61) and *Handyside v. United Kingdom* (see Application no. 5493/72, paragraph 48).

103. In the present case, the Government states "*not only is there no European consensus against the use of limitations imposed by the Government Decision, but there are many status of the Council of Europe that have imposed limitations of the same nature and volume as those in the Government Decision, and sometimes even stricter, on the Freedom of Movement and Freedom of Gathering."*

104. In Italy, for example, the Government states, "*Decree of the President and the Council of Ministers, no. 20A01558, of 8 March 2020, Article 1 (2), categorically prohibits gatherings in public places and in private spaces open to the public. And by the Decree of the Ministry of Health, no. 20A01797 dated 22 March 2020, item (l) (b), the Italian Government has categorically prohibited recreational and sports activities in public places, including those carried out on an individual basis."*

105. In Germany, the Government also states, *"state authorities have decided, at the local level, to ban the stay in public places of more than two persons who are not from the same family union, as well as to prohibit non-festive gatherings not only in public places, but also in private apartments (see Besprechung der Bundeskanzlerin mit den*

Regierungschefinnen und Regierungschefs der Länder am 22. März 2020, points III and V).”

106. In the Republic of Albania, the Government also states that: “*prior to the declaration of the State of Natural Disaster on 24 March 2020, there was imposed a number of limitations on Freedom of Movement and Gathering, some of which are more severe than the limitations imposed by the Decision of the Government of the Republic of Kosovo. For example, by Order no. 168/2 of 18 March 2020, of the Ministry of Health and Social Protection, on Resttricing the Movement with Private or Public Administration State Vehicles, point 1, the Government of Albania has prohibited the movement of private or state vehicles, except in field work related cases. Also, by Order no. 193 of the same Ministry, date 20 March 2020, on Closure or Restriction of Movements in the Republic of Albania, point 1, the Government of Albania has limited the circulation of citizens, allowing circulation only during a certain period of time per day, from 5:00 to 13:00hrs.”*

107. The above three examples, namely that of Italy, Germany and Albania, states the Government, serve to draw two conclusions. The first conclusion, the Government emphasizes, is that “*faced with a new infectious and potentially deadly disease, the dangers and contagiousness of which are not yet fully understood by medical experts, various Council of Europe statess have imposed a number of different restrictions on Freedom of Movement and Gathering to prevent further spread of COVID-19.” Some of these restrictions, the Government states, “are just as severe, and in some cases even more severe than those presented by the Government Decision”*.

108. Also the above-mentioned decisions, such as the one of Albania, for example, the same as the challenged decision of the Government, states the Government, “*do not have a time limit, thus remaining in force until the issuance of another decision.”* Germany's aforementioned decision also *“imposes the same restrictions on all citizens throughout the country, not just on a limited part of the territory”* and the ECtHR in the case *Centrum för Rättvisa v. Sweden* (claim no. 35252/08 - in conjunction with article 8 of the ECHR) *has accepted as justified the human rights restrictions that apply to all citizens and residents of a certain country.”*

109. The example of the above-mentioned countries, according to the Government, *“constitutes a strong reason to conclude that the nature and volume of these restrictions, although strict, are proportional to the extremely high level of importance of the intended purpose.”*

110. Secondly, it is worth mentioning, that according to the Government, "*all three aforementioned States have imposed restrictions on Freedom of Movement and Gathering without having to derogate from these fundamental freedoms by notifying the Secretary-General of the Council of Europe, in accordance with Article 15, para. 3 of the ECHR.*" According to the oficial website of the Council of Europe, states the Government "only 6 member states of the Council of Europe (Armenia, Estonia, Georgia, Latvia, Moldova and Romania) have derogated from human rights due to the spread of COVID-19"; while *"all 41 other countries of the Council of Europe, including those affected by the spread of COVID-19 more than these six countries, have considered that authorized restriction of human rights, according to common criteria of the ECHR, constitute a sufficient justification for the strict restrictionn of these rights."*

111. By this position, the Government emphasizes*: "these 41 states have decided to follow the recommendation of the United Nations General Committee on Civil and Political Rights, which has found that, when dealing with natural disasters, "the possibility of restricting Freedom of Movement or Freedom of Gathering, is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."* (See, as quoted by the Government: General Comment no. 20 of the CCPR in conjunction with Article 4: "Derogation during a State of Emergency, adopted at the 72nd session of the Human Rights Committee, 31 August 2001, no. CCPR C / 21 / Rev.1 / Add.11, paragraph 5).

112. Finally, the Government states that: "*The concurrence of a large majority of Council of Europe member states, together with the recommendation of the General Committee on Civil and Political Rights, on this point, further confirms that the limitations imposed by the Government Decision, although strict, are justified according to European and international human rights criteria."*

113. As regards the essence of guaranteed rights as a criterion presented in paragraph 5 of Article 55 of the Constitution, the Government states that *"the restrictions presented by the Government Decision do not deny the essence of Freedom of Gathering and Freedom of Movement."*

114. As to the Freedom of Gathering, *"the Government's decision does not categorically prohibit gatherings, but only establishes a rule of distance (of two meters) during any gathering in physical space."* All "*forms of gathering in cyberspace (as beng used and more in global*

level during the COVID-19 pandemics) continue to be unlimited in any way."

115. As regards the Freedom of Movement, according to the Government the same conclusion applies because *the "citizens continue to have the right to move throughout the territory of the Republic of Kosovo, but are obliged by Government Decision to make these movements every day within the assigned 8 hours when the circulation of citizens and vehicles is allowed."*

116. In conclusion, the Government considered that: (i) the Applicant's Referral had failed to build a constitutional referral, as provided by the Constitution, the Law and the Rules of Procedure, and that it had not met any of the admissibility requirements; (ii) the Applicant has failed to build at least one substantial argument in respect of his allegations; (iii) The Government has submitted sufficient arguments to prove that all its decisions in the procedure of prevention and control of COVID-19 pandemic have been taken on the basis of the NIPHK recommendations and only upon the request of the Ministry of Health; (iv) The Government has not exceeded its powers set forth in the Constitution and applicable legislation (v) The Government has not limited fundamental freedoms and rights through a sub-legal act, but it has only issued decisions based on the Constitution and laws through which it has implemented the same constitutional and legal obligations; (vi) The Government has not exceeded the permitted limitation of fundamental freedoms and rights, but has strictly adhered to the constitutional and legal provisions regarding the type and extent of the limitation.

117. Consequently, the Government requested from the Court to issue a Judgment whereby the Applicant's Referral would be declared inadmissible as manifestly ill-founded.

Comments submitted by the Institution of the Ombudsperson

118. Institution of the People's Advocate, represented by the Ombudsperson, Mr. Hilmi Jashari, stressed that his comments, presented in the form of the Opinion, aim to express the views of the Ombudsperson "*viewed from the perspective of human rights in relation to the matter raised before the Constitutional Court by the President of the Republic of Kosovo , in the capacity of the Applicant who has requested from the Court to carry out: " Constitutional review of compliance of the Decision of the Government of the Republic of Kosovo no. 01/15, of 23.03.2020 with the Constitution of*

the Republic of Kosovo in relating to fundamental rights and freedoms protected by the Constitution."

119. With respect to the disputable matter, the Ombudsperson states that the challenged decision *"would be necessary to be considered in conjunction with the Government's decision no. 01/11, of 15.03.2020 on declaring a public health emergency."* The Ombudsman states that *"it is important to first verify whether both of these Government decisions have legal support, and whether they respond to the requirements of the conventions when it comes to limiting rights or derogation from rights."*

120. In his Opinion sent to the Court, the Ombudsperson has emphasized the international human rights standards which he considered relevant in the case of the limitation of human rights. In this regard, he has mentioned the International Covenant on Civil and Political Rights and its Protocols (hereinafter: the ICCPR) and the ECHR.

121. In such situation of restrictions, the Ombudsman states that *"there must be a previously adopted law and that actions or decisions limiting the rights must be supported by legal instruments, moreover they must be permitted."* Also, the Ombudsperson emphasizes, *"this does not exclude but rather recommends the supervision by the parliament regarding the implementation of the measures provided by law."*

122. The Ombudsman cites paragraph 2 of Article 11 of the ECHR, which, according to him, must be taken into account. He further states that "*the ICCPR is regarded as a fundamental document in international human rights law, which sets out the conditions and criteria for the restriction and derogation from human rights and freedoms."* Also "*the ECHR has fully accepted the definitions of the ICCPR. These international instruments allow member states to act in substantial manner to respond to emergency sitations by restricting specific rights instead of derogation from these Rights."*

123. The Ombudsperson further states that *"Derogation from the right or, from any aspect of any right, is the full or repeated elimination of any international obligation."* However, according to him, "*derogation from the obligations of the ICCPR in exigency circumstances legally differs from the prohibitions or restrictions which, according to the provisions of the ICCPR, are permissible even in normal circumstances."* The logic of the ICCPR, the Ombudsman points out, *"is that, if possible, states should restrict their rights as much as necessary, rather than completely derogate from them."* However,

"the basic condition for the restriction of rights remains the requirement for applicable law that serves as a legal basis for allowing such restrictions."

124. According to Article 4 of the ICCPR, the Ombudsperson states, *"the first criterion for assessment is whether there is a basis set out in the above-mentioned article for declaring a state of emergency which threatens the life of the nation."* In this regard, *"The Ombudsperson considers that the pandemic of COVID 19 virus falls into the domain of definitions of the threat to the health and life of the nation."*

125. The second condition, the Ombudsperson continues, "is that the state of emergency be officially declared. *"Such a request "to publicly and officially declare a state of emergency is essential for adhering to the principle of legality and the rule of law at a time when it is most needed."*

126. The principles of the Syracuse on the restriction and derogation from the provisions of the ICCPR, the Ombudsman states, "*make a clear distinction between the provisions of the ICCPR in those relating to restrictions and those relating to derogations."* When it comes to public health, the principles of Syracuse define, as follows:

> *"Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.*
> *Due regard shall be had to the international health regulations of the World Health Organization."*

127. The Ombudsperson further states: *"If the states claim the right to derogate from the Convention during, for example, a natural disaster, a mass demonstration involving cases of violence, or a major industrial accident, they must be able to justify not only that such a situation poses a threat to the life of the nation, but also that all their measures to derogate from the Convention must be strictly imposed by the exigency of the circumstances created. In the Committee's view, the possibility of limiting certain rights of the Convention, for example, Freedom of Movement (Article 12) or Freedom of Gathering (Article 21) is generally sufficient during such situations and no derogation from the provisions in question would not be justified by the exigency of the circumstances created."*

128. As regards the Government's decision more specifically, the Ombudsperson emphasizes that it is important to assess whether the chellenged decision approving the request of the Ministry of Health to take measures to prevent and control the spread of COVID-19 pandemic and another Government Decision declaring a public health emergency [Decision no. 01/11 of 15 March 2020] are interrelated since, according to the Ombudsman, those decisions must be *"addressed in interrelation"*.

129. The Ombudsperson considers that both of the aforementioned Government decisions, including the challenged Decision, *"have legal support."* While there is a legal basis for such a decision by the Government concerning the limitation of Freedom of Movement and Freedom of Gathering, point 4 of the challenged Government Decision "*concerning the prohibition of gathering in private premises remains unclear."* In this case, the issue of supervision remains essential.

130. Further, the Ombudsperson states that "*for assessing the legal measures in the light of international human rights instruments it is extremely important to assess the manner of implementation of special measures to limit human rights."*

131. The challenged decision "in itself does not provide definitions or legal basis for its implementation"; whereas, *"prohibitions have been enforced in the decision without determining the consequences for deviant behavior (lex in perfecta)."*

132. As to the constitutional issues, the Ombudsperson states that having analyzed the request in question, he notes that there is a need to interpret the two constitutional concepts, respectively: *"Limitations on Fundamental Rights and Freedoms, defined by Article 55 of the Constitution; and Derogation of the Fundamental Rights and Freedoms, as defined by Article 56 of the Constitution [Fundamental Rights and Freedoms during a State of Emergency]."*

133. In the circumstances of the present case, according to the Ombudsperson, *" we are dealing with two separate issues, although they may seem similar, there are substantial legal differences between them, which must not be confused, therefore there are two separate provisions in the Constitution of the Republic of Kosovo."*

134. In conclusion, the Ombudsperson emphasized that the human rights limitations are provided for in the Constitution, international instruments and laws adopted by the Assembly, which specify certain

limitations. However, according to the Ombudsperson, *"for the implementation of the legal provisions on which it is based (Article 41, paragraph 2 of the for Prevention and Fighting against Infectious Diseases) the challenged decision lacks the sub-legal acts and it remains to the Constitutional Court to assess whether such a thing is a constitutional issue or not."* The challenged Government decision *"does not foresee the manner in which Article 41.3 of the Law will be implemented, according to which: "For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority."*

135. Finally, the Ombudsperson "*considers that the Challenged Decision must have a time limit and the possibility of its revision, in periodical manner with the possibility of its change based on the circumstances which could be created during the emergency period."*

Comments submitted by the Parliamentary Group of the VETËVENDOSJE Movement!

136. As regards the merits of the Referral, the Parliamentary Group of the VETËVENDOSJE Movement initially stated that the President had completely omitted Article 53 of the Constitution despite its importance *"in the broader interpretation or clarification of articles of the Convention through the Court's case law."* For this reason, this Parliamentary Group emphasizes, *"the answer regarding the limitation of fundamental rights and freedoms must be sought first within the ECHR and other international instruments listed in Article 22, and then also within the case law of the Court."*

137. According to them, in order to assess whether the challenged decision is unconstitutional due to the President's claim for violation of fundamental rights and freedoms guaranteed by the Constitution, *"the ECHR and the case law of the ECtHR must be consulted in order to clarify if and to what extent the limitation of fundamental freedoms and rights can take place."*

138. In this respect, the Parliamentary Group of the VETËVENDOSJE Movement! states that *"the ECHR expressly provides in Article 15 for the limitation or derogation of fundamental rights and freedoms guaranteed in the Convention" and "the existence or declaration of a" state of emergency "in the form in which it is interpreted by the President is never provided in this Article."* The deputies of the Parliamentary Group in question emphasize that the possibility for the Contracting Parties (States) to make a *"limitation or derogation"* of

fundamental freedoms and Rights is prima facie understood. A limitation of the latter, the commentary follows, *"cannot be done for any reason, but only for those provided for in Article 15 further elaborated by the ECtHR."* Limitations on freedoms may be imposed by States in accordance with Article 15 of the ECHR in time *"war or other public emergency threatening the life of the nation."*

139. According to the Parliamentary Group of the VETËVENDOSJE Movement! it cannot be overlooked that what was stated in Article 15 of the ECHR *"corresponds to the text of Article 55 of the Constitution on which the Government is based"* when it issued the challenged decision. While paragraph (2) of Article 55 of the Constitution states that: *"Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society "*, also Article 15 of the ECHR dictates that *"in relation to the measures to limit fundamental rights and freedoms, measures may be taken to derogate from the obligations provided for in this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not be inconsistent with other obligations under international law."*

140. Based on what was said above, the Parliamentary Group of the VETËVENDOSJE Movement emphasizes that there can be noted two things. The first is the fact that Article 55 of the Constitution adheres precisely to Article 15 of the ECHR; and that the Government, by issuing the Decision, has acted in full compliance with Article 15 of the ECHR. *"Limitation on fundamental freedoms and rights has been imposed in order to prevent a seriuous threat or emergency endangering public health, and thereby has meet the requirement arising from Article 15 [ECHR]."* In this regard, it is emphasized that it can be concluded beyond any doubt that the Constitution has incorporated the ECHR and that respect for the latter *"is a constitutional obligation and at the same time, the violation of the ECHR is a violation of the Constitution."*

141. Consequently, it is asserted that in the territory of the Republic of Kosovo, the limitation of freedoms and human rights can be done in accordance with the text of Article 15 of the ECHR. Taking into account that this article enables *"derogation"* from fundamental freedoms and rights in case of "*public danger that threatens the life of the nation"*, it can be concluded beyond any doubt, that in case of public danger that threatens the people of Kosovo by COVID-19 pandemic, limitation of fundamental freedoms and rights, or *"derogation"* from these rights is enabled by the Constitution.

142. Further, in the received comments is stated that the ECtHR, in the case of *Lawless v. Ireland* [no reference is cited], defines *"public emergency"* as a situation of crisis or exigency which affects the entire population and poses a threat to the organized life of community. Such an "emergency" is further emphasized in the case of *Ireland v. The United Kingdom* [no reference is cited], *"the ECtHR also allows it as current or imminent, as a crisis which also can threaten only a region of the state."* Finally, the ECtHR, in case *Brannigan v. the United Kingdom* [no reference is cited], states that this does not imply that the crisis is temporary, but allows the measures taken to remain in force for longer periods and a such is left to the state authorities. In this regard, it is stated that, according to the ECtHR case law, derogation from fundamental freedoms and rights in case of emergencies is justified - such as that of COVID-19, through a Government Decision such as this challenged one and that the Government in this respect benefits from a margin of appreciation").

143. Article 55 of the Constitution states that *"it allows the limitation of fundamental rights and freedoms by law, which is precisely the position of the ECtHR and which is in full compliance with the Government action [...], which has based its decision on also on the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases [Article 42.2] "*. Finally, Article 45 of the mentioned Law states that: *"measures from article 41 to 44 of this Law referred to individuals and institutions will be ordered by a decision and administrative procedure."*

144. On the basis of the above-mentioned articles of this Law it is emphasized that there is a possibility of limiting fundamental rights and freedoms in cases of prevention of the spread of infectious diseases such as COVID-19, through sub-legal acts of the Ministry of Health. In this respect, there follows the claim that, *"attention should also be paid to Article 45, which defines how orders are applied to individuals."* The latter are summarized in the ruling issued in an administrative procedure, or shortly said in our case, during Government meetings.

145. At the end of the comments submitted by the Parliamentary Group of the VETËVENDOSJE Movement! It was emphasized that the Government, when issuing the challenged Decision, has fully respected the Constitution and the case law of the ECHR, *"specifically Articles 22 and 53, including Article 55, by basing the Decision upon the Law."*

Comments submitted by Mr. Abelard Tahiri, Member of Parliament

146. The Member of Parliament Abelard Tahiri considers that the Government, through the issuance of the contested Decision, has acted in contradiction with Articles 35, 43 and 55 of the Constitution.

147. He further states that the Government has based the challenged Decision on the Law for Prevention and Fighting against Infectious Diseases even though it *"does not provide in any of its provisions for the responsibility or authorization of the Government to limit fundamental rights and freedoms."* Moreover, according to the MP in question, the Government, by referring to Articles 41 and 44 of the Law for Prevention and Fighting against Infectious Diseases, has also "*clashed with Chapter XIX "Healthcare during Emergencies" , Article 89 "Responsibilities of the Ministry" , of the Law No. 04/L-125 on Health, according to which law, the responsibilities of the Ministry of Health during the emergency situation are expressly foreseen , as well as the responsibilities of the Government during the State of Emergency provided by article 90 of this law."*

148. In this regard, the Member of Parliament in question alleges that the Law on Health, in accordance with the Constitution, *"has separated in a proper and clear manner the "Emergency State" from the "State of Emergency", and moreover, has reserved only for the second the role of the Government in the activities that are within its responsibility and in accordance with the Constitution."* According to Article 89.3 of the Law on Health, the claim continues, "even during emergencies, the citizens' rights defined by the law (let alone the rights provided by the Constitution), will be guaranteed to the extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situations." He refers to Article 89 of the Law on Health, which defines the responsibilities of the Ministry, and Article 90, which defines the responsibilities of the Government.

149. In the end, according to the allegation of the member of parliament in question, the Government has exceeded its mandate and its constitutional responsibilities for the proper implementation of the emergency state which it had declared by Decision 01/11 of 15 March 2020 (cited above) because the measures taken *"limit the Freedom of Movement and Freedom of Gathering guaranteed under Articles 35 and 43 of the Constitution, the limitation of which, as a rule, can be done by law and only under the circumstances of the State of Emergency, as well as under the conditions of circumstances that justify such a limitation, and only after the declaration of a state of emergency by the Decree of the President [...] and with the consent of*

the Members of the Assembly [...], according to Article 131 (paragraph 1 (3), paragraph 4), of Constitution."

The legal basis on which the challenged Government Decision was issued

150. The Court recalls paragraph 22 of this Judgment which specifically states the legal basis on which the challenged Government Decision was issued. In the following, the Court will present the content of all articles on the basis of which the challenged decision of the Government has been issued and, subsequently, in the part concerning the merits will comment on each of them in light of the competencies that those articles provide to the Government for limiting the rights and fundamental freedoms. All this in order to finally reach the key conclusion of this case, whether the referred legal basis authorizes the Government to take the actions undertaken by the challenged decision.

Constitution of the Republic of Kosovo

Chapter II – Fundamental Rights and Freedoms

Article 55
[Limitation of Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Chapter VI – Government of the Republic of Kosovo

Article 92
[General Principles]

[...]
4. The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it.

Article 93
[Competencies of the Government]

The Government has the following competencies:
[...]
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;
[...]

Law No. 04/L-125 on Health, Official Gazette no. 13, 7 May 2013

Neni 12
[Measures and activities]

1. Healthcare shll be implemented through the following measuresa and actions:
[...]
1.11measures for prevention and elimination of health consequences caused by emergency conditions;
[...]

CHAPTER XIX [of the Law on Health]
HEALTHCARE DURING EMERGENCIES

Article 89
[Responsibilities of the Ministry]

1. During the state of emergency, the provision of healthcare is ensured by the Ministry in compliance with the law and other legislation in power.
2. Healthcare activities in case of emergencies from paragraph 1 of this Article include:
2.1. the implementation of legal provisions in force;

2.2. adapting the healthcare system in compliance with the emergent planning;
2.3. implementing changes within referral and management system;
2.4. provision of emergency healthcare for citizens;
2.5. functioning of the provisional healthcare institutions;
2.6. activating supplementary and reserve resources.
3. During emergency situations, the citizens' rights defined by the law shall be guaranteed to an extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situation.
4. The human dignity shall in general be respected, regardless of the limitations from paragraph 3 of this Article.

Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, Official Gazette no. 40, 15 October 2008

SAFETY MEASURES FOR POPULATION PROTECTION FROM THE INFECTIOUS DISEASES

Article 41
[No title]

41.1 In order to protect the country from cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases will be taken the foreseen measures by this Law and international sanitary conventions and other international acts.
41.2 In order to prohibit the entrance and spreading of cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following:
a) Prohibition of travel in that country where the epidemic of one of the abovementioned diseases is spread;
b) Prohibition of circulation in the infected regions or directly endangered;
c) Limitation of circulation prohibition for specific types of goods and products;
d) Obligatory participation of health institutions and other institutions and citizens in fighting against the disease and use facilities, equipments and transportation means in order to fight against the infectious disease;
41.3 For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.

Article 44
[No title]

In order to apply the prohibition control and fighting against the infectious diseases, the SIK competent authorities, apart the stated measures in articles from 41 to 43 of this Law, performs these tasks, too:
a) Persons being sick from a specific infectious diseases and bacillus suckle of these diseases (microbe –bearers) will prohibit exercising their work activities and duties where they can endanger the other persons' health;
b) Prohibit circulation of persons for whom is ascertained or suspected of being sick from specific infections diseases;
c) Prohibit persons meeting in schools, cinema, public premises and other public places to the epidemic danger passes;
d) Orders disinfection, disinsection and deratization with purpose of prohibition and fighting against the infectious diseases;
e) To order persons isolation who are sick from any specific infectious diseases and their treatment;
f) To order taking of other foreseen general or special technical-sanitary and hygienic measures.

Regulation no. 05/2020 on the areas of administrative responsibility of the Office of the Prime Minister and Ministries, adopted at the 3rd meeting of the Government by Decision no. 01/03 of 19 February 2020

Article 4
[Government]

1. The Government shall exercise its executive power in accordance with Constitution and legislation in force.
2. In order to exercise its competences, the Government shall:
2.1. make decisions on the proposal of members of the Government and other institutions in accordance with the Constitution and the legislation in force;
2.2. issue legal acts or regulations, necessary for the implementation of laws;
2.3. discuss problems and make decisions on other issues that it considers important within its competencies;
2.4. decide on appointments and dismissals within its competencies, and
2.5. perform all duties and responsibilities set forth in the Constitution and legislation in force.

Regulation no. 09/2011 of Rules and Procedure of the Government of the Republic of Kosovo, Official Gazette no. 15, 12 September 2011

Article 17
[Correspondence Meetings]

1. In urgent cases when it is not possible to convene a meeting of the Government, at the proposal of the Prime Minister, the Government may decide an individual matter without meeting in session (at a correspondence meeting).
[...]
4. Material shall be deemed adopted at a correspondence meeting of the Government if the members of the Government have not raised any objections on the material within the set time.
[...]

Article 19
[Decision Making]

1. The Government may adopt a decision – if it has previously been prepared in accordance with this Regulation.
2. Decisions in the Government meeting shall be taken with the majority vote of members present in the meeting where such decision is voted.
[...]
4. Voting at a meeting of the Government shall be open.
5. The result of the voting shall be established by the Prime Minister.
6 Upon completion of its deliberation the Government shall:
6.1. adopt a decision on the material and, if necessary, instruct the Secretariat to supplement it in accordance with the positions and decisions adopted at the meeting;
6.2. adopt the draft law, or other general acts which are introduced for debate in the Assembly, or adopt other secondary legislation and measures within its own competency;
[...]

The other constitutional and legal basis (domestic and international) important for the constitutional analysis in the circumstances of the concrete case

Constitution of the Republic of Kosovo

Chapter II – Fundamental Rights and Freedoms

Article 21

[General Principles]

1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.
2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.
3. Everyone must respect the human rights and fundamental freedoms of others.
4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Article 22
[Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

(1) Universal Declaration of Human Rights;
(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
(3) International Covenant on Civil and Political Rights and its Protocols;
(4) Council of Europe Framework Convention for the Protection of National Minorities;
(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Article 35
[Freedom of Movement]

1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.
2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.
3. Citizens of the Republic of Kosovo shall not be deprived the right of entry into Kosovo.
4. Citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements.
5. The right of foreigners to enter the Republic of Kosovo and reside in the country shall be defined by law.

Article 36
[Right to Privacy]

1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.
2. Searches of any private dwelling or establishment that are deemed necessary for the investigation of a crime may be conducted only to the extent necessary and only after approval by a court after a showing of the reasons why such a search is necessary. Derogation from this rule is permitted if it is necessary for a lawful arrest, to collect evidence which might be in danger of loss or to avoid direct and serious risk to humans
and property as defined by law. A court must retroactively approve such actions.
3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law.
4. Every person enjoys the right of protection of personal data. Collection, preservation, access, correction and use of personal data are regulated by law

Article 43
[Freedom of Gathering]

Freedom of peaceful gathering is guaranteed. Every person has the right to organize gatherings, protests and demonstrations and the right to participate in them. These rights may be limited by law, if it is necessary to safeguard public order, public health, national security or the protection of the rights of others.

Article 56
[Fundamental Rights and Freedoms During a State of Emergency]

1. Derogation of the fundamental rights and freedoms protected by the Constitution may only occur following the declaration f a State of Emergency as provided by this Constitution and only to the extent necessary under the relevant circumstances..
2. Derogation of the fundamental rights and freedoms protected by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.

European Convention on Human Rights

Article 8
(Right to respect for private and family life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 11
(Freedom of assembly and association)

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection

of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 2 (Freedom of movement) of Protocol no. 4 of ECHR

1. Everyone lawfully with the territory of a Stat shall, within the territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and necessary in a democratic society in the interest of national security or public safety, for the maintenance of *ordre public,* for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with the law and justified by the public interest in a democratic society.

Universal Declaration of Human Rights

Article 13 [no title]

1. Everyone has the right to freedom of movement and residence within the borders of each State.
2. Everyone has the right to leave any country, including his wn, and to return to his country.

International Covenant on Civil and Political Rights

Article 12 [no title]

1. Everyone lawfully with the territory of a Stat shall, within the territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Admissibility of the Referral

151. In order to decide on the Applicant's Referral, the Court must first assess whether the admissibility requirements established by the Constitution and further specified by the Law and Rules of Procedure have been met.

152. In this respect, the Court first refers to Article 113 [Jurisdiction and Authorized Parties] of the Constitution which also determines the jurisdiction of the Constitutional Court to decide on cases raised by the Applicant, namely the President.

153. More specifically, the Court refers to the respective constitutional provision according to which the President, in the circumstances of the present case, may appear before the Court as the Applicant:

Article 113
[Jurisdiction and Authorized Parties]

[...]

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government.

[...]

154. The Court also refers to paragraph (9) of Article 84 [Competencies of the President], in conjunction with the above provision, which provides:

The President of the Republic of Kosovo:

[...]

(9) may refer constitutional questions to the Constitutional Court;

[...]

155. According to the Constitution and the case law of this Court, the authority of the President to refer questions to the Constitutional Court should be understood only in relation to the provisions of the Constitution relating to the jurisdiction of the Court defined in Article 113 of the Constitution and that the constitutional provision defined by paragraph (9) of Article 84 of the Constitution stating that the President may *"refer constitutional questions"* - is related to Article 113 of the Constitution. (See, cases of the Constitutional Court: KO79 / 18, Applicant *the President of the Republic of Kosovo*, Request for interpretation of Article 139, paragraph 4, of the Constitution of the Republic of Kosovo, Resolution on inadmissibility, of 3 December 2018, paragraphs 72, 74, 77, 78 and 82; see also cases KO181/18, Applicant *the President of the Republic of Kosovo*, Resolution on inadmissibility, of 3 December 2018, paragraphs 47-48; and KO131/18,Applicant *the President of the Republic of Kosovo*, Resolution on inadmissibility, of 6 March 2019, paragraph 90).

156. In this respect, the Court reiterates that the President's claim that his right to refer cases to the Constitutional Court under paragraph (9) of Article 84 of the Constitution does not constitute *"a broad competence which is not subject to any restriction , including but not limited to the specific cases listed in Article 113 of the Constitution"* does not stand. The case law of this Court has already made it clear that Article 113 of the Constitution is the only basis on which the President can refer cases to the Constitutional Court.

157. Consequently, the admissibility of this Referral will be addressed only on the basis of Article 113 of the Constitution, more specifically sub-paragraph (1) of paragraph 2, cited above and that are applicable in the circumstances of the present case as it shall be explained below.

158. In this regard, the Court notes that the President, in his capacity as Applicant, has sought the constitutional review of Decision no. 01/15 of the Government, of 23 March 2020 on the basis of sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution. The Government has challenged the admissibility of the Referral, claiming that the conditions of admissibility have not been met due to the fact that: (i) The President is not an authorized party to challenge Government decisions; (ii) has not specified his request; and, (iii) has not filed any substantive objections about his claims.

In relation to the authorized party

159. In this regard, the Court notes that paragraph 2 of Article 113 of the Constitution authorizes, among other authorized parties, the President to raise a matter concerning *"the issue of compliance of the laws, decrees of [...] of the Prime Minister and of Government regulations, with the Constitution."* Based on this it results that the President, according to these two constitutional provisions, can challenge before this Court: (i) law of the Assembly; (ii) decree of the Prime Minister; or (ii) Government regulations. When submitting the challenge, the President is authorized to request from the Constitutional Court to assess whether the same are in compliance with the Constitution or not.

160. In the circumstances of the present case, options (i) and (iii) are not applicable as the President is not challenging either a "law" of the Assembly or a "regulation" of the Government. The President, through the Referral KO54 / 20 has challenged a Government Decision, signed by the Prime Minister, respectively Decision no. 01/15 of 23 March 2020. This challenged decision falls within the determination of the "decree" of the Prime Minister, option (ii), mentioned above as possible.

161. Moreover, the Court in its case law, in essence, has already decided that it should not focus only on the name of an act but on its content and effects. The challenged decision consequently falls within the scope of the Prime Minister's decree. [See, *mutatis mutandis*, cases of the Constitutional Court: KO12 / 18, applicant *Albulena Haxhiu and 30 other members of the Assembly of the Republic of Kosovo*, Judgment of 29 May 2018, paragraph 51 and paragraphs 84-88; and KO73 / 16, Ombudsperson, paragraphs 39-50. Regarding the case cited by the Court, KO73 / 16], the Government has emphasized that this case law is wrong and that it should be reconsidered by the Court. According to the Government, the Constitution does not foresee that the President can challenge Government decisions because according to them the word "Prime Minister's decrees" cannot be interpreted to imply a Decision signed by the Prime Minister.

162. If the Court were to accept the Government's interpretation that the Prime Minister's decisions could not be challenged by the President solely because they are not called "decree" but "decision" - this would mean that the decision-making of the Government, respectively the Prime Minister, would be left out constitutional control and that the Constitutional Court could not examine the constitutionality of any Government decision in any form. Such a conclusion is clearly not the

purpose of Article 113.2 (1) of the Constitution, where in addition to the President, the Assembly and the Ombudsperson have the right to challenge the "decrees of the Prime Minister", respectively the decisions issued by the Prime Minister.

163. If the Court would accept the Government's proposal for the interpretation of this constitutional provision, we would reach a situation where, in addition to the President, neither the Assembly nor the Ombudsperson could challenge the constitutionality and decisions signed by the Prime Minister. The Court cannot agree with this proposal because the purpose of Article 113.2 (1) of the Constitution is not to exclude constitutional review only for decisions of the Prime Minister. The purpose of this constitutional provision is to give the constitutional opportunity to all parties to challenge each other's acts in order to guarantee the constitutionality of the respective decision-making of each constitutional institution, respectively the Assembly, the President and the Government.

164. Furthermore, the Court notes that Article 113.2 (1) of the Constitution jointly mentions the words *"decrees of the President and the Prime Minister"* which clearly imply decisions taken by the President and the Prime Minister, regardless of their specific name. Therefore, the Government's claim that the President is not an authorized party to challenge Government decisions, signed by the Prime Minister - is unfounded. (See *mutatis mutandis,* KO12/18*, Applicant: Albulena Haxhiu and 30 other members of the Assembly of the Republic of Kosovo,* cited above, paragraphs 84-87).

165. As a result, the Court finds that the President is an authorized party to raise the matter of compliance with the Constitution of the challenged Government Decision, signed by the Prime Minister.

In relation to the specification of the Referral and the specification of the objections

166. Furthermore, sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution is further specified by Articles 29 and 30 of the Law and Rule 67 of the Rules of Procedure, which specify the following:

Article 29 of the Law
[Accuracy of the Referral]

1. *A referral pursuant to Article 113, paragraph 2 of the Constitution, shall be filed by […] the President of the Republic of Kosovo […].*

2. *A referral that a contested act by a virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.*
3. *A referral shall specify the objections put forward against the constitutionality of the contested act.*

Article 30 of the Law
[Deadlines]

1. *A referral ma e pursuant to Article 29 of this Law shall be filed within a period of six (6) months form the day upon which the contested act enters into force.*

Rule 67 of the Rules of Procedure
[Referral pursuant to Article 113.2(1) and (2) of the Constitution and Article 29 and 30 of the Law]

(1) A referral filed under this Rule must fulfil the criteria established under Article 113.2(1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filing a referral pursuant to Article 113.2 of the Constitution, and authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution..
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.

167. The above provisions of the Law and the Rules of Procedure require that the referrals submitted under sub-paragraph (1) of paragraph 2 of Article 113 of the Constitution must meet three additional conditions, in addition to those provided by the Constitution, in order for the referral to be considered admissible for examination by the Court on the basis of merits.

168. The first condition is the necessity for the Applicant to clarify whether the constitutionality of the whole act or a particular part of the act has been contested. As to what that act might be, that was explained above. This condition, in the circumstances of the present case, has been met by the President, in the capacity of the Applicant, as the latter has

clearly specified that he challenges the entire contested Government Decision. Consequently, the Government's claim that the President did not specify his request is unfounded.

169. The second condition is the necessity for the Applicant to specify the objections about the constitutionality of the contested act. This condition, in the circumstances of the present case, was met by the President, as the Applicant, since the President has clearly specified his objections against the constitutionality of the challenged Government Decision, by having clearly specifed the constitutional articles correctly and justifying the manner in which he considered that the challenged decision contradicts those constitutional provisions. Consequently, the Government's claim that the President did not specify his objections is unfounded.

170. The third condition is the necessity for the Applicant to submit the referral within a period of six (6) months from the moment of entry into force of the challenged act. This condition, in the circumstances of the present case, has been met by the President, in the capacity of the Applicant, as the latter has submitted his Referral one (1) day after the receipt of the challenged Decision - consequently within the prescribed time limit.

Conclusions regarding the admissibility of the Referral

171. The Court finds that the Applicant: (i) is an authorized party; (ii) challenging an act which he is entitled to challenge; (iii) has specified that he challenges the act in its entirety; (iv) has submitted constitutional objections to the challenged act; and, (v) has challenged the act within the prescribed time limit.

172. Consequently, the Court declares the application admissible and shall examine its merits in the following.

Merits of the Referral

I. Introduction

173. The Court initially recalls that the Applicant, namely the President, alleges that the challenged Decision [No. 01/15] *o*f the Government of 23 March 2020, is not in compliance with Articles 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of

Emergency] of the Constitution; Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights, Article 13 [without a title] of the UDHR; and Article 12 [without a title] of the ICCPR. In addition to these articles, the Court has taken into account, in the circumstances of the present case, Article 36 [Right to Privacy] of the Constitution and, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, also Articles 8 (Rights to respect for private and family life) and 11 (Freedom of assembly and association) of the ECHR. The content of all these articles is cited above. [Clarification of the Court: for clarity of reading, the Court for *"freedom of movement"* will refer to Article 35 of the Constitution; for the *"right to privacy"* will refer to Article 36 of the Constitution; for *"freedom of gathering"* will refer to Article 43 of the Constitution – emphasizing that all three of these articles will be read within the meaning of the respective articles of the ECHR, 8, 11 and 2 of Protocol No. 4 as well as the equivalent articles of the UDHR and the ICCPR].

174. The Court notes that, in essence, the Applicant alleges that the Government in an unconstitutional way limited the human rights and freedoms by the challenged decision as, according to the President, such general limitations for all citizens without distinction can only be made by law and after the declaration of the State of Emergency, as established in Article 131 of the Constitution. The Government opposes the President's allegation, emphasizing that human rights and freedoms can be restricted even without the declaration of the State of Emergency. In this regard, the Government in substance alleges that the limitation of rights and freedoms by the challenged Decision was made in accordance with Article 55 of the Constitution and that the legal basis cited in this Decision has given the Government the necessary authorization. The Government agrees that in the circumstances of the present case there has been interference in "freedom of movement" and in "freedom of gathering"; but considers that the restriction in question has been made in accordance with Law for Prevention and Fighting against Infectious Diseases and Law on Health, namely in accordance with Article 55 of the Constitution.

175. As a result, on the one hand, the President requests the Court to repeal the challenged Decision as unconstitutional because it is rendered contrary to Articles. 21, 22, 35, 43, 55 and 56 of the Constitution; and, on the other hand, the Government requests the Court to uphold the challenged Decision because the latter is constitutional and is rendered in accordance with Article 55 of the Constitution in conjunction with Articles 35 and 43 of the Constitution.

176. In this regard, the Court emphasizes that the constitutional issue entailed in this Judgment is compliance with the Constitution of the challenged Decision of the Government, namely whether by its issuance, the Government has restricted the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers prescribed by law. In this context, regarding the assessment of whether the restrictions made at the level of the entire Republic of Kosovo through the challenged Decision of the Government are prescribed by law, the Court will focus on assessing the authorizations established in Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of the Law on Health. In addition to this legal basis mentioned in the challenged Decision by the Government, the Court, to determine whether the limitations on fundamental rights and freedoms through the challenged Decision are prescribed by law, will also assess all other articles on the basis of which it is stated that the challenged decision has been rendered.

177. Before analyzing and assessing the issue included in this case, the Court, aware of the situation in which the state of the Republic of Kosovo is after the spread of pandemic COVID-19 at the world level and in our country, finds it necessary to explain to the public and the citizens of the Republic of Kosovo that:

(i) With this Judgment, the Court will not assess whether the measures taken by the Government to prevent and fight pandemics COVID-19 are adequate and necessary or not. This is not the role of the Constitutional Court. Public health policies and decision-making do not enter, and are not part of the competencies and authorizations of this Court. On public health issues, the Constitutional Court itself refers to relevant health and professional institutions at the state and world level. Moreover, the Court notes that the need to take measures to prevent and fight COVID-19 pandemic and their necessity has not been challenged by either party in this case.

(ii) The Court with this Judgment, as defined in Article 113.2 (1) of the Constitution, will only assess the constitutionality of the challenged Decision of the Government. All other public institutions must play their constitutional role in accordance with their constitutional and legal authorizations.

(iii) Consequently: following and until the end of this Judgment, without any prejudice to the opinions and recommendations of experts and health professionals at the state and world level

about pandemics COVID-19, the Court will focus only on whether the Constitution and the applicable law have been respected in the case of the issuance of the challenged Decision by the Government, and the fact whether the Government has only acted "in the implementation of law" when limiting the rights and freedoms or went "beyond the authorizations given through the applicable law" issued by the Assembly.

178. To decide on the allegations raised in this Referral and the constitutional issue defined above, the Court must first clarify on the basis of which Articles the constitutional analysis should be made. As stated above, the President has raised allegations of violations of articles 21, 22, 35, 43, 55, 56 of the Constitution and also mentioned Article 131 of the Constitution to support his arguments. The Government, on the other hand, has stated that Article 56 is not applicable and that Article 35 and 43 in conjunction with Article 55 are applicable but the latter have not been violated in the circumstances of the present case.

179. As a result, the Court will further clarify: (i) the applicability of Articles 21 and 22 of the Constitution; (ii) the applicability of Article 56 of the Constitution; and (iii) the applicability of Article 55 of the Constitution in conjunction with other relevant articles of the Constitution, namely 35, 36 and 43. Subsequently, the general principles of Article 55 of the Constitution supported by the case law of the ECtHR and the Court itself, the latter will apply in the circumstances of the present case by conducting the analysis of "prescribed by law", namely the legal basis on which the challenged Decision was rendered, in order to respond to the constitutional issue defined above. After this constitutional assessment, at the very end, the Court will: (i) reason its decision-making regarding the legal moment of entry into force of this Judgment, namely the date of 13 April 2020; (ii) remaining without subject of the request for interim measure; and, (iii) before the operative part of this Judgment, it will present the main conclusions of the Court in this case.

II. With regard to Articles 21 and 22 of the Constitution

180. In this regard, the Court clarifies that Articles 21 and 22 of the Constitution are not articles that in themselves entail a fundamental right or freedom.

181. Article 21 stipulates that the fundamental rights and freedoms guaranteed by the Constitution are *"the basis of the legal order of the Republic of Kosovo"* and that the latter protects and guarantees these

rights and freedoms. According to the principles of Article 21 of the Constitution, everyone must respect the human rights and fundamental freedoms and the same are applicable, in addition to natural persons, also to legal persons, to the extent applicable.

182. Article 22 lists all international agreements and instruments that are guaranteed by the Constitution and are directly applicable in the Republic of Kosovo and stipulates that they have priority over the provisions, laws and other acts of public institutions, in case of conflict.

183. Both of the above articles are therefore not articles that can be interpreted independently of other constitutional provisions relevant to this case. However, in considering this case, the Court has taken into account the principles emphasized in Article 21 of the Constitution, but also the international agreements and instruments set out in Article 22 of the Constitution, in particular Articles 2 of Protocol No. 4, 8 and 11 of the ECHR which, in conjunction with the respective articles of the Constitution, will be interpreted for constitutional review of the challenged Decision.

III. Regarding Article 56 of the Constitution

184. The Court recalls that, on the one hand, the President, in a capacity of the Applicant, claims that the Government has violated Article 56 of the Constitution, because no limitation of fundamental rights and freedoms can be made without the declaration of the State of Emergency; the Government, on the other hand, states that Article 56 of the Constitution is not applicable because the limitation of fundamental rights and freedoms has been made on the basis of Article 55 of the Constitution and that such a limitation is possible without the declaration of the State of Emergency.

185. Regarding the applicability of Article 56 of the Constitution, the Court: (i) agrees with the Government's finding that this article does not apply in the circumstances of the present case; and (ii) does not agree with the President's allegation that the limitation of fundamental rights and freedoms can be made only after the declaration of the State of Emergency. The truth is that, as will be explained below, the restriction of human rights and freedoms can be made "only by law" of the Assembly, but this does not mean that the limitation of rights can be made only after the declaration of the State of Emergency. The limitation of human rights and freedoms, as far as it is in accordance with the Constitution, can be done even without declaring the State of Emergency..

186. The Court deems it necessary in this regard to clarify, *strictu sensu* only to the extent necessary for the circumstances of the case and in response to contradictory allegations, the meaning of term "limitation" used in Article 55 of the Constitution and the term "derogation" used in Article 56 of the Constitution. This brief explanation serves to show that, in the circumstances of the present case, Article 56 of the Constitution is not applicable, while Article 55 of the Constitution is.

187. The term "limitation" used in Article 55 of the Constitution implies the fact that the Assembly has the right to impose limitations on fundamental rights and freedoms, by law, as long as it is permitted by the Constitution. The Government, on the other hand, issues decisions, regulations or other legal acts necessary for the implementation of these laws. The term "derogation", on the other hand, used in Article 56 of the Constitution, means the derogation from the fundamental rights and freedoms protected by the Constitution, after the declaration of the State of Emergency, according to the procedure set out in Article 131 of the Constitution. The legal doctrine also recognizes *"*limitation*"* and "derogation*"*. The first implies a lighter degree of interference and this can be done even without declaration of the State of Emergency; the second implies a more severe degree of interference since it can never be done without a declaration of the State of Emergency. However, even after the declaration of the State of Emergency, derogation from some articles of the Constitution is prohibited. Paragraph 2 of Article 56 specifically lists all articles of the Constitution from which derogation is not permitted in *"any circumstances"*.

188. Given that in the circumstances of the present case we are not dealing with "derogation" according to Article 56 of the Constitution, but with "limitation" according to Article 55 of the Constitution; it results that the first is not applicable, while the second is. That said, the Court will no longer enter further interpretation of Article 56 of the Constitution, but will focus on Article 55 and will assess whether the limitations on fundamental rights and freedoms guaranteed by Articles 35, 36 and 43 of the Constitution, by the challenged Decision of the Government, are in accordance with the criteria set out in Article 55 of the Constitution.

IV. Regarding Article 55 of the Constitution

189. As to the application of Article 55 of the Constitution in the circumstances of the present case, the Court will, in the following, explain: (i) the contents of Article 55 of the Constitution; the general

principles contained in this article, with a special focus on the criterion "*prescribed by law*"; (ii) the constitutional test of this Article; and, (iii) the connection of this article with Articles 35, 36 and 43 of the Constitution.

190. Article 55 is the next to last Article of Chapter II of the Constitution which provides for "Fundamental Rights and Freedoms" and contains a total of five paragraphs.

191. In the first paragraph of this article, it is specifically stated that the fundamental rights and freedoms guaranteed by this Constitution *"may only be limited by law"*. Thus, the limitation of the rights already guaranteed by the Constitution is possible, but this limitation must be done *"only by law"*. The Court emphasizes that the word "law" used in the first paragraph of Article 55 of the Constitution, means a law issued by the Assembly, according to the relevant legislative procedures. First, it means that no limitation of freedoms and rights can be made unless such limitation is "prescribed by law" of the Assembly. Second, this means that the authorities called upon to implement a law of the Assembly where limitations are envisaged may apply the limitations only to the extent that it is "prescribed by law" of the Assembly. This consequently represents the first and essential requirement which must be met in order to determine whether a "limitation" of fundamental rights and freedoms is constitutional or not.

192. The second paragraph of Article 55 of the Constitution emphasizes three additional requirements, in addition to the first requirement, under which the fundamental rights and freedoms guaranteed by the Constitution may be limited. The second requirement, after the first one, is that the limitations, in addition to being made and determined by "law" of the Assembly; the latter can only be limited *"to the extent necessary"*. This is the requirement for the Assembly itself to limit the fundamental rights and freedoms guaranteed by the Constitution to the extent necessary. The second requirement, in relation to the entire spirit of Article 55 of the Constitution, reflects "the principle of proportionality" which should be tested in any case where we are dealing with a limitation of a right or freedom. The third requirement is that through the limitation of a freedom or right is necessary to *"meet the purpose for which the limitation is permitted",* therefore, the interference and restriction of a right or freedom must have and pursue a "legitimate aim". This requirement, in conjunction with the entire spirit of Article 55 of the Constitution, reflects "the principle of legitimacy" of interference or restriction which should also be tested in any case where we are dealing with a limitation of a freedom or right. Finally, the fourth requirement is that the limitations made by

law must be such as to be considered necessary in an *"open and democratic society"*. This condition, in conjunction with the entire spirit of Article 55 of the Constitution, reflects the principle of the necessity for limitation in a democratic society and should also be tested in any case where we are dealing with a limitation or interference with fundamental rights and freedoms.

193. The third paragraph of Article 55 of the Constitution states that the rights and freedoms guaranteed by the Constitution *"may not be limited for purposes other than those for which they were provided."* This paragraph implies that the purpose of a limitation must be clearly determinable and no public authority may limit any right or freedom on the basis of another purpose beyond that which is already specified in the law of the Assembly in which the limitation is permitted in accordance with Article 55 of the Constitution.

194. The fourth paragraph of Article 55 of the Constitution emphasizes the fact that in cases of limitation of fundamental rights and freedoms, a constitutional responsibility is created for the institutions of public power, and especially for the courts that during the interpretation and decision in cases before them, pay attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the aim to be achieved, and to consider the possibility of achieving the purpose with a lesser limitation.

195. The fifth paragraph of Article 55 of the Constitution emphasizes that the limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right. What is the essence of a guaranteed right depends on the type of right or freedom in question.

196. In this regard, it follows that the substance of the constitutional test of Article 55 of the Constitution is a four (4) step test which should be done in all cases when it is necessary to confirm whether we are dealing with a constitutional limitation of freedoms or rights or such a limitation is unconstitutional. Before describing in detail all four steps of the test in question and how to apply them, it should be noted that the test in question is not cumulative. This means that in all instances where the condition or the first step of the test is not passed, the constitutional analysis ends there and it is not necessary to analyze the applicability of three, two, or another remaining step of the test. This interpretive approach, as will be explained below, is also used by the ECtHR itself in interpreting the limitations on freedoms and rights guaranteed by the ECHR.

197. The test of Article 55 of the Constitution means that immediately after determining whether we are dealing with a "limitation" of a freedom or right, namely whether we have "interference" with a freedom or right – which should be determined in each case - the following four (4) non-cumulative questions [special emphasis] should be given to Article 55 of the Constitution:

(1) Question 1 of the test: Was the limitation of a right or freedom guaranteed by the Constitution "prescribed by law"? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the Constitution can be done otherwise than by "law" of the Assembly and to the extent permitted by law - always under the presumption that the latter is in accordance with the Constitution. If the answer is affirmative, then it is moved on the second question of the test because the requirement that the limitation was made by law or that the limitation was "prescribed by law" of the Assembly is met.

(2) Question 2 of the test: Has the limitation of a certain right or freedom followed a legitimate aim, namely through the limitation in question, is the purpose for which the limitation is permitted fulfilled? If the answer is negative, then the constitutional analysis ends here – as no limitation of the rights and freedoms guaranteed by the Constitution can be done without determining and legitimizing the legitimate aim of such a limitation and without fulfilling the purpose for which the limitation is made. If the answer is affirmative, that is, the test of legitimate aim is passed, then it is moved on the third question of the test.

(3) Question 3 of the test: Was the limitation of a certain right or freedom proportional, namely was the limitation made only to the extent necessary? If the answer is negative, then the constitutional analysis ends here - as no limitation of the rights and freedoms guaranteed by the Constitution can be made beyond the extent of necessity and proportionality. If the answer is affirmative, then the proportionality/necessity test is passed, then it is moved on the fourth and final question of the four-step test.

(4) Question 4 of the test: Is the limitation made necessary in an open and democratic society? Regardless of whether the answer to this question is negative or affirmative, the

constitutional analysis ends here. If the answer is negative, then it means that the limitation of that right or freedom is not constitutional because no limitation can be made if it is not necessary in an open and democratic society. If the answer is affirmative, that is, the test is passed, then it is considered that the limitation made was constitutional because all four steps of the test provided by Article 55 of the Constitution were affirmatively fulfilled.

198. In the abovementioned context and in the summary, the Court emphasizes that the test of Article 55 of the Constitution stipulates that the limitation of a right or freedom: (i) may be done only by "law" of the Assembly; (ii) there should be a "legitimate aim"; (iii) it should be "necessary and proportional"; (iv) it should be "necessary in a democratic society". For interpretive purposes of these notions and concepts, the Court invokes the fact that the ECtHR also uses such tests to determine whether in a particular case there has been a limitation and violation of human rights and freedoms guaranteed by the ECHR. (In this regard, see the ECtHR Guide on Articles 8 to 11 of the ECHR and the ECtHR cases cited there - which clearly explain the use of concepts: "*prescribed by law*"; "*legitimate aim*"; "*proportionality*"; "*necessary in a democratic society*", the concepts that are also reflected in the test of Article 55 and some other articles of the Constitution for which it is stipulated that may have limitation).

1. Connection of Article 55 of the Constitution with Articles 35, 36 and 43 of the Constitution

199. Returning to the circumstances of the present case, as important parentheses, the Court emphasizes that Article 55 of the Constitution does not in itself contain rights that can be interpreted in an abstract manner without having any connection with other articles of the Constitution. Thus, Article 55 does not have an independent existence - but is dependent on other articles of the Constitution that guarantee fundamental rights and freedoms, which may be limited in accordance with the Constitution.

200. For the circumstances of the present case, as will be further clarified, the limitation of the rights and freedoms imposed by the challenged Decision affects the right *"of freedom of movement"*, guaranteed by Article 35 of the Constitution; *"right to privacy"* guaranteed by Article 36 of the Constitution; and *"freedom of gathering"* guaranteed by Article 43 of the Constitution. For the fact that the challenged Decision "limits" and "interferes" with the rights guaranteed by Articles 35 and 43 of the Constitution, namely "freedom of movement" and "freedom

of gathering", the parties to the dispute, the Government and the President, have no disagreements. Both sides claim that there is a "limitation" as a fact in the circumstances of the present case. In this regard, the Court also agrees that in the circumstances of the present case there has been a "limitation" or "interference" with the enjoyment of the rights guaranteed by Articles 35 and 43 of the Constitution.

201. Regarding Article 35 of the Constitution, namely "freedom of movement", the Court recalls that it has a total of five paragraphs. The first paragraph of this article guarantees the citizens of the Republic of Kosovo and foreigners who are legal residents of the Republic of Kosovo, *inter alia*, the right to free movement within the country and their right to leave the country. All limitations of this right under paragraph 2 of Article 35 of the Constitution, *"are regulated by law"* in cases when such limitations *"are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation."* Paragraphs 3, 4 and 5 of Article 35 of the Constitution are not relevant to the circumstances of the present case and, therefore, the Court will not comment them. However, paragraphs 1 and 2 as explained above, which are relevant to the circumstances of the present case, very clearly state that any limitation on this freedom "is regulated by law". This article, the Court, based on Articles 22 and 53 of the Constitution, reads and interprets in relation to the equivalent article of the ECHR, namely Article 2 of Protocol No. 4 of the ECHR.

202. Regarding Article 43 of the Constitution, namely "freedom of gathering", the Court recalls that the latter has a total one paragraph in which the freedom of peaceful gathering is guaranteed. Every person, according to this Article, has the right to organize gatherings, protests and demonstrations and the right to participate in them. Such rights, according to Article 43 of the Constitution may be limited "only by law" in cases when it is necessary, *inter alia*, to safeguard "public health". This Article the Court, based on Articles 22 and 53 of the Constitution, reads and interprets in relation to the equivalent article of the ECHR, namely Article 11 of the ECHR.

203. Regarding Article 36 of the Constitution, namely "right to privacy", the Court recalls that an allegation of limitation of this right was not raised by the Applicant but was mentioned by the Ombudsperson in his Opinion submitted in the form of comments. We remind that the Ombudsperson stated that item 4 of the challenged Decision of the Government *"which speaks about the prohibition of gatherings in private settings*" remains unclear and the issue of implementing supervision of this limitation remains essential. In this respect, the

Court recalls that item 4 of the challenged Decision states: *"Gatherings shall be prohibited in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral"*. Article 36 of the Constitution, the Court, based on Articles 22 and 53 of the Constitution, also reads and interprets in relation to the equivalent article of the ECHR, namely Article 8 of the ECHR.

204. In addition to the aforementioned three fundamental rights and freedoms guaranteed by Articles 35, 36 and 43 of the Constitution - which are clearly applicable and for which the limitation and interference clearly exist, the Court emphasizes that the possibility that the Decision in question is applicable to any other limitation of fundamental freedoms and rights guaranteed by the Constitution and the ECHR is not excluded, depending on how the challenged Decision is implemented and depending on the legal consequences that persons (natural and legal) may or may not suffer as a result of its implementation.

205. The Court emphasizes that the respective and equivalent articles of the ECHR, Article 2 of Protocol No. 4 and Articles 8 and 11 of the ECHR are essentially built on a similar structure, on the basis of which, each of these articles first define the relevant right and then the legitimate aims on the basis of which such a right may be limited, provided that the latter is "prescribed by law", to pursue a legitimate aim, to be proportionate and necessary in a democratic society.

206. "Protection of health" it is specifically defined as one of the legitimate aims on the basis of which the relevant rights may be limited, however, always provided that such a limitation has been "prescribed by law". On the contrary, even if the limitation may have been made for the purpose of protecting public health, if the authorization for such a limitation is not prescribed by law, the interference, namely the limitation of the respective right will not be in accordance with the ECHR. This is because, based on the structure of Article 55 of the Constitution, Articles 35, 36 and 43 of the Constitution in conjunction with the respective articles of the ECHR, "prescribed by law" is what constitutes the first link of a non-cumulative test of the assessment of compatibility with the Constitution and the ECHR of a limitation of a right, as explained above.

207. Consequently, and considering that "prescribed by law" of a limitation is the first point of assessment of compliance with the Constitution of a limitation on fundamental rights and freedoms, the mere passing of which, results in the assessment of other aspects of the test that Article 55 of the Constitution and the case law of the ECtHR and the Court itself include. The Court will further, focus on: (i) elaboration of general principles of the case law of the ECtHR and the Court, insofar as it is necessary for the circumstances of the present case, with respect to "prescribed by law"; and (ii) the applicability of these principles in the circumstances of the present case. The passing of this test will or will not result in the assessment of other aspects of the test, namely, the existence of a legitimate aim, proportionality, and the necessity for such a limitation in a democratic society.

1.1. General principles of the ECtHR reflected in the case law regarding the term "prescribed by law"

208. The Court will further present four cases of the ECtHR, among many others, which specifically clarify the criterion "prescribed by law" and the manner how the ECtHR analyzes whether there a limitation or interference taken is prescribed by law or not. Although the factual issues of those cases differ from the circumstances of the present case, the general interpretation of the criterion "prescribed by law" remains important that the ECtHR does in its case law. The Court notes that in the ECtHR case law there is still no case that specifically addresses the interferences and limitations made on fundamental rights and freedoms during pandemics COVID-19. As a result, the Court will use other cases of the ECtHR in which the concept of "prescribed by law" is explained.

209. In case *Tommaso v. Italy,* the ECtHR, *inter alia*, stated that: "*The expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects".* The ECtHR further stated that: "*a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities"* and that a law "*which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law"* (See, *Tommaso v. Italy*, application no. 43395/09, Judgment of 23 February 2017, paragraphs 106-109 and references cited therein).

210. In case *Dubrovina and others v. Russia,* the ECtHR reiterated that: "*the expression "prescribed by law" not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. For domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise*. Further, regarding the substance of the case before it, the ECtHR reasoned that the public authorities that interfered had not clarified how *"the interference with the applicants' right to freedom of assembly was based on a legal provision that was accessible and foreseeable in its application"*. Therefore, the ECtHR came to conclusion that "*the interference was not "prescribed by law"* and such a fact suffices to constitute "*a violation of Article 11"*. Finally, the ECtHR stated that such a finding would prevent it from further analysis to determine whether the limitation or interference *"pursued a legitimate aim and was necessary in a democratic society"*. (See, *Dubrovina and others v. Russia*, application no. 31333/07, Judgment of 25 February 2020, paragraphs 43-46 and the references cited therein).

211. In case *Kudrevičius and others v. Lithuania,* the ECtHR reiterated its case law "*to the effect that the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention"* emphasizing that this expression "*not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects."* The ECtHR stated that: "*a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*" The ECtHR further stated that: "*The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."* (See, *Kudrevičius and others v. Lithuania,* application no. 37553/05,

Judgment of 15 October 2015, paragraphs 108-110 – and the references cited therein).

212. In case *Navalnyy v. Russia,* the ECtHR reiterated that: "*that for domestic law to meet the qualitative requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention."* Regarding the legal discretion of the executive power, the ECtHR stated that: "*In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".* (See, *Navalnyy v. Russia,* applications no. 29580 and 4 others, Judgment of 15 November 2018, paragraphs 115-119 – and references cited therein).

213. As it has already been pointed out, regardless of the fact that the cases referred to here, do not in themselves include the factual circumstances comparable to those of the case in the circumstances of the present case, the common denominator of the assessment of prescribed by law, it follows to contain at least the following elements: (i) the existence of a clear legal basis; (ii) foreseeability of the respective limitation; (iii) the existence of protective measures against interference, namely the limitation of rights by public authorities; and (iv) sufficient clarity in the law regarding the discretion of the public authority as to the possibility of limitation and the manner of exercising this discretion.

214. Specifically for the executive, namely the Government, for the circumstances of the present case, it is important to emphasize the position of the ECtHR that in matters which affect fundamental rights and freedoms *"legal discretion"* given by law in favor of the Government must clearly indicate the scope of any such discretion and the manner in which it is exercised. The opposite, namely not clarifying such a discretion, would be contrary to the principle of the rule of law as one of the fundamental principles of a democratic society guaranteed by the ECHR, but also by the Constitution.

215. This finding of the ECtHR, expressed in more than one case, is important for the circumstances of the present case, because the Government in the comments submitted to the Court, has several times emphasized that Law for Prevention and Fighting against Infectious Diseases *"gives health authorities a broad discretion to stop gatherings aimed at controlling, preventing and fighting*

infectious diseases." The Court will return again to the discussion on this discretion, and extensively to the part of the Judgment where the authorizations that the Law on Prevention and Fighting against Infectious Diseases has given to the Government are assessed.

216. The so far practice of the Constitutional Court in terms of assessing the constitutionality of the limitation of fundamental rights and freedoms, is also based on these principles, and the latter will be clarified in the following.

1.2. Case law of the Constitutional Court in interpretation of Article 55 of the Constitution

217. The Court recalls at least four cases in which it has interpreted the meaning of Article 55 of the Constitution and applied the same in the specific circumstances of those cases. Although, just as in the referred cases of the ECtHR, the factual issues of these cases differ from the circumstances of the present case, the general interpretation of the principles that this article encompasses according to the case law of this Court remains important.

218. In case KO01/17, in paragraph 90, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"the alleged limitation of the KLA Veteran's right to a pension is foreseen by Article 3 (2) of the challenged Law adopted by the Assembly, which is the state institution vested by the Constitution with the exercise of the legislative power. Thus, the Court considers that such limitation complies with the requirements contained in Article 55 (1) of the Constitution. Therefore, the Court concludes that the limitation of the KLA Veteran's right to pension has been foreseen by law"* (See, KO01/17, *Applicant Aida Dërguti and 23 other deputies of the Assembly*, Judgment of the Constitutional Court of 28 March 2017). Thus, in this case, the Court found that the answer to the first question of the test of Article 55 was affirmative and as a result the Court continued to analyze other points of the test - these analyzes are not relevant to the present case.

219. In case KO157/18, paragraphs 93-96, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"the Constitution in Chapter II has given special importance to human rights and freedoms and has also provided for cases where such rights may be restricted by law, if this is required by the general interest of society and State."* However, in the following paragraphs where it made the analysis that for the circumstances of that case was the limitation prescribed by law, the Court stated that: *"95. With*

regard to the limitation provided by law, the Court notes that the limitation of the rights in the present case was foreseen by Article 14, paragraph 1.7 of the challenged Law, which was approved by the Assembly on 10 June 2010, an institution in which the Constitution vested the exercise of legislative power. 96. Therefore, given that a right guaranteed by Chapter II of the Constitution may be limited by law, where this is required by the general interest, the Court considers that the limitation of the rights is in accordance with the requirements of paragraph 1 of Article 55 of the Constitution. The Court finds that the obligation of the insurance companies to pay one percent (1%) of the prim from vehicle insurance in the present case, was provided for by law." Thus, in this case, the Court found that the answer to the first question of the test of Article 55 was affirmative and as a result the Court continued to analyze other points of the test - these analyzes are not relevant to the present case. (See case KO157/18, Applicant *the Supreme Court of the Republic of Kosovo,* Judgment of 13 March 2019).

220. In case KO108/13, in paragraphs 133-134, regarding the requirement that the limitation must be prescribed by law, the Court referred to the ECtHR case, *Centro Europa 7 S.R.L. and di Stefano v. Italy* (shih application no. 38433/09, ECtHR Judgment of 7 June 2012), and reiterated that: "*a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able -if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [...]"* (See case KO108/13, Applicant Albulena Haxhiu and 12 other deputies of the Assembly, Judgment of 3 September 2013).

221. In case KO131/12, in paragraph 130, regarding the requirement that the limitation must be prescribed by law, the Court stated that: *"The alleged limitation on the right to work is included in a law approved by the Assembly of Kosovo, which is a state institution vested with legislative power by the Constitution. As such, the limitation complies with the requirement that the limitation is granted by law, as described in paragraph 1 of Article 55."* Thus, in this case, the Court found that the answer to the first question of the test of Article 55 was affirmative and as a result the Court continued to analyze the other points of the test. – these analyzes are not relevant to the present case. (See case KO131/12*, Applicant Shaip Muja and 11 Deputies of the Assembly*, Judgment of 15 March 2013).

1.3. *Application of general principles and case law of the ECtHR and of the Constitutional Court, to the present case*

222. To return to the circumstances of the present case, the Court recalls its initial conclusion that in the circumstances of the present case there has been an "interference" or "limitation" in at least three rights or freedoms, namely, "freedom of movement" under Article 35; "right to privacy" under Article 36, and "right to gathering" under Article 43. Now, the Court must assess whether in the issuance of the challenged Decision, through which it has interfered with these fundamental rights and freedoms, the Government is based on the legal authorizations given by law of the Assembly.

223. In this regard, the Court recalls that the challenged Decision of the Government is based on the following legal basis (see part "Legal basis on which the challenged Decision was rendered" following paragraph 150 of this Judgment stating the content of all subsequent articles; see also paragraphs 20-21 where Decision No. 01/11 of the Government and its contents is cited):

(i) Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution;
(ii) Paragraph 4 of Article 92 [General Principles] of the Constitution;
(iii) Paragraph 4 of Article 93 [Competencies of the Government] of the Constitution;
(iv) Article 41 [Without a title] and Article 44 [Without a title] of the Law for Prevention and Fighting against Infectious Diseases;
(v) Paragraph 1.11 of Article 12 [Measures and activities] and Article 89 [Responsibilities of the Ministry] of the Law on Health;
(vi) Article 4 [Government] of Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries;
(vii) Article 17 [Correspondence Meetings] and 19 [Decision Making] of the Regulation of Rules and Procedure of the Government No. 09/2011; and,
(viii) Pursuant to Government's Decision No. 01/11 of 15 March 2020 [cited above] to declare a public health emergency.

224. The Court notes that the challenged decision of the Government is based on eight (8) legal bases and that the latter, the Government claims, have been strictly enforced. The content of this legal basis will

be elaborated in detail below in order to reach a key conclusion as to whether the aforementioned legal basis authorize the Government to impose limitations on the rights and freedoms made by the challenged Decision.

225. In this regard, the Court initially states that as regards the first legal basis provided in item (i), the Court has already disclosed its analysis of Article 55 of the Constitution and the authorizations that the Government may have based on that article. Further, the Court notes that the legal bases referred to in the abovementioned items (ii), (iii), (vi), (vii), are merely legal bases indicating the specific articles of the Constitution on which the Government, *inter alia*, is authorized to make decisions *"in compliance with the Constitution and the law"* and that the Government has a competence, *inter alia*, to *"make decisions [...] necessary for implementation of laws"*. Whereas, with regard to item (viii) cited above, the Court notes that the Decision of the Government by which it declared "public health emergency" does not present a legal basis that justifies the limitations made beyond what is prescribed by law of the Assembly.

226. Consequently, according to the Court, the analysis should be focused on the legal basis mentioned in the items (iv) and (v) – cited above. These two legal bases are necessary to determine whether there has been an authorization in a "law" of the Assembly, in order that the Government takes action. Therefore, the Court will focus its analysis on the laws mentioned as the legal basis for the limitation of rights, namely: Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases; and, Articles 12 (1.11) and 89 of the Law on Health.

1.4. Law for Prevention and Fighting against Infectious Diseases – as a legal basis for the challenged Decision of the Government: Article 41 [without a title] and Article 44 [without a title]

227. In this regard, the Court emphasizes that for the circumstances of the present case are relevant "First question" of the test of Article 55 of the Constitution, namely *"Was the limitation of a fundamental freedom or right guaranteed by the Constitution "prescribed by law"?*". Therefore, in the following, the Court will answer this question first. As stated above, if the answer is negative, then answers to questions two, three and four of the test of Article 55 of the Constitution will not be necessary.

228. The Court recalls that the Law for Prevention and Fighting against Infectious Diseases is a law which entered into force in 2008. The purpose of this Law, according to its Article 1, is to *"determine the infectious diseases and regulates the activities for their timely discover, emergence recording, prevention, spreading prohibition and their treatment"*.

229. Article 41 and 44 of the Law for Prevention and Fighting against Infectious Diseases are part of Chapter IV of this Law speaking about "Safety Measures for Population Protection from the Infectious Diseases" which has a total of seven (7) paragraphs. In addition to Articles 41 and 44, this Chapter on Security Measures also contains Articles 42, 43, 45, 46 and 47.

230. The Court notes that only Articles 41 and 44 are cited as legal basis and will be analyzed in detail below. However, in order to understand the legislative spirit of this Chapter of the Law that regulates security measures, it is necessary to look at what other provisions related to Articles 41 and 44 regulate.

231. In this regard, the Court notes that Article 42 of the Law provides that to protect the country from the entry and spread of infectious diseases *"will be organized and carried out the sanitary control for passengers and their personal luggage and transportation means"* in the borders of the country. For the manner of exercising this border control that aims to prevent the entry of diseases, the legislator refers to the provisions of another law, namely *"Law of Sanitary Inspectorate of Kosovo No. 2003/22"*.

232. Article 43 of the Law states that for the implementation of sanitary control at the border according to paragraph 41.2 [special emphasis"] and Article 42 of the Law, the Sanitary Health Inspector is obliged: to order sanitary control of the persons and materials for infectious diseases ascertainment; to prohibit the circulation of those persons for whom is ascertained or suspected that can be infected from diseases specified there; and to order taking of other foreseen technical-sanitary and hygienic measures against the infectious diseases in compliance with this Law and obligations based on the international sanitary conventions and other international treaties. The reference made in Article 43 of the Law to Article 41.2 of the Law is very significant. This is because Article 43 of the Law regulates the implementation of sanitary control at the border in order to prevent the entrance and spread of infectious diseases. "in the whole the country" and Article 41.2 referred to in Article 43 states that: *"In order to prohibit the* ***entrance*** *and* ***spreading*** *of [...] and other infectious*

*diseases **in the whole country**, Ministry of Health with sub legal act will determine the special emergency measures for protection from these diseases as following [...]"*. After the word as following are specifically mentioned the limitation measures that may be taken **not** "in the whole country" but **in** certain regions of the country where the epidemic has spread; **in** infected regions; or, **in** directly endangered regions - in order to prevent the entrance and spread of these diseases "in the whole country". So, these provisions do not talk about the instance when the whole country is seized by an epidemic but about the restrictive measures that can be taken to prevent the spread of the epidemic in the whole country. And this makes the key difference in this law in terms of government authorizations "prescribed by law", as will be further explained.

233. Article 45 of the Law specifies that all measures described in Articles 41 and 44 of this law [emphasis on the fact where is stated the prescribed measures], towards individuals and institutions, are ordered by a decision with administrative procedure. This article is relevant to show what procedures should be followed for the measures described in Articles 41 and 44 for individuals and institutions.

234. Article 46 of the Law regulates the manner of reporting to the Ministry of Health by the municipal health authorities and the municipal administration of the Sanitary Inspectorate. These bodies, at the municipal or local level, are obliged to send to the Ministry of Health. *"reports relating to this Law application and approved dispositions based on it as well as data in relation to disease emergence and measures taken for infections diseases prevention and fighting"*. This article is relevant to show that the authorized restrictive measures of Article 41 and 44 are measures of local level and not of state-level level, because it requires reporting by municipal bodies and municipal administration of the Sanitary Inspectorate and not central level reporting for the whole Republic of Kosovo.

235. Article 47 clarifies that the Ministry of Health is competent for *"for application of this Law and approving the foreseen dispositions in it"*. In accordance with this authorization, the legislator has given the right and obligation to the Ministry of Health: to give the mandatory instructions to Kosovo competent administration authorities when this is *"in the whole country's interest"* and necessary to have an uniform application of provisions; as well as, to notify the Government for the failure to perform the assigned administrative work based on this Law's authorization if the failure to perform can cause the epidemic appearance or spreading of any infectious diseases.

236. In the following, the Court will examine and analyze the two key legal bases of the Law for Prevention and Fighting against Infectious Diseases on which it is specifically based the challenged Decision of the Government, namely Articles 41 and 44 of this Law.

1.4.1. Article 41 of Law for Prevention and Fighting against Infectious Diseases

237. The Court notes that Article 41 of the Law for Prevention and Fighting against Infectious Diseases has no title and contains a total of three paragraphs.

238. In the first paragraph is stated that in order to protect the country, namely the Republic of Kosovo, also from other infectious diseases, in addition to those specifically mentioned in this paragraph *"will be taken the foreseen measures by this Law and international sanitary conventions and other international acts"*. At this point, the Court notes that the virus COVID-19 does not appear in the list of infectious diseases but that the definition "other infectious diseases", suffices to ascertain that this Law is also applicable to COVID-19.

239. Paragraph 2 states that in order to prevent *"the entrance and spreading"* of infectious diseases *"in the whole country"*, the Ministry of Health is authorized to determine *"by sub legal acts" "the special emergency measures for protection from these diseases"*, which according to the Law in question are a total of four, namely:

"a) Prohibition of travel ***in the country where the epidemic is spread*** *of one of the above mentioned diseases;*
b) Prohibition of circulation ***in the infected regions*** *or* ***directly endangered****;*
c) Prohibition of circulation in the infected regions or directly endangered;
d) Obligatory participation of health institutions and other institutions and citizens in fighting against the disease and use facilities, equipments and transportation means in order to fight the infectious diseases".

240. In the circumstances of the present case, the Court notes that the items c) and d) are not applicable as the challenged Decision does not prohibit the circulation of certain types of goods and products (as could be prohibited e.g. in case it was considered that infectious diseases could be transmitted through them); and, mandatory participation of health institutions, other institutions or citizens in the

fight against the disease has not been ordered. Such measures are not proposed in the challenged Decision.

241. Meanwhile, in the circumstances of the present case, the Court considers that the items a) and b) of Article 41 of the above-mentioned Law may be applicable, in terms of the legal basis and authorization that this Law gives to the Ministry of Health, namely the Government, to impose the limitations in question.

242. However, the Court notes that the challenged Decision does not prohibit travel *"in the place"* [emphasis on word "**in**"] where the epidemic is spread, as provided by item a) of Article 41, but the travel ban at certain hours has been made in "the whole country", namely throughout the state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. The Court notes that the purpose of the abovementioned item a) is to ban travel "in the place" where the epidemic is spread, for example, to stop going or traveling to a certain village, city, place or geographical location where the epidemic has spread. The purpose of item a) cannot be understood that it authorizes the Ministry of Health, namely the Government to restrict travel throughout the Republic of Kosovo. The purpose of item a) is to ban travel "in the place" where the epidemic is spread in order to prevent the entrance and spread of the epidemic "in the whole country".

243. If the Assembly had chosen to give such authorization in law to the Ministry of Health, namely the Government, could do so by clearly specifying that travel bans can be made not only "in the place" where the epidemic has spread but in "the whole country". In this regard, the Court is only interpreting the norm in relation to the authorizations of the Government and is not assessing whether this norm is adequate or not for the circumstances in which is the state of the Republic of Kosovo. Therefore, at this point, the Court cannot agree with the Government's claim that the sentence "*the travel ban **in** the place where the epidemic has spread*" means the whole territory of the Republic of Kosovo.

244. This argument is further strengthened by the fact that the legislator, namely the Assembly, where it has chosen to use the phrase "the whole country" or "throughout the country" instead of the words "in the place" did it. An analysis of the Law in question shows that the Assembly in seven instances throughout the specific provisions of the Law referred to the words "the whole country" or "throughout the country". (See Articles of the Law: 3.2; 4.1; 41.2; 47 a), 48 b); 48 c) and 49). Meanwhile, when the legislator referred to special and

extraordinary measures for protection against infectious diseases, it specifically allowed: (i) the travel ban ***in*** the place where the epidemic has spread; and (ii) prohibition of movement ***in*** the infected regions or ***in*** the regions directly endangered. With another provision, the Assembly could very clearly give the authorization to stop the movement ***"in the entire state"*** of the Republic of Kosovo for cases of world pandemics – but it has not done so, and this remains merely a choice of the Assembly for which the Court has no further comment, because it is not up to it to determine the elections or the legislative solutions to the Assembly – as long as the latter are not challenged before this Court in the manner prescribed by the Constitution.

245. In this context, the interconnection of the word "epidemic" and "in the place where it has spread", reflects the purpose of the legislator to authorize the limitation of fundamental rights and freedoms in infected regions and places and not at the level of the whole Republic. In this context, the Court recalls three definitions given for the word "epidemic" which epidemic infectious diseases are associated with a specific territory or region precisely specified. First, the Court refers to the definition given by the World Health Organization (hereinafter: WHO), in its official dictionary, for the word epidemic, where specifically states: "*Epidemic: The occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely." (See: definitions made by the WHO: https://www.who.int/hac/about/definitions/en/).*" Secondly, the Law for Prevention and Fighting against Infectious Diseases, in its Article 2, defines the word epidemic as follows: *"Epidemic– appearance of one or more cases of the infectious diseases connected in time and territory or an enormous number increase of the disease cases."* Thirdly, Law No. 02/L-78 for Public Health, in its Article 1, defines the word epidemic as follows: *"e) Epidemic: means occurrence of two or more cases of an infective disease, which are closely related in time and with a certain area-territory, with an enormous cases number increasing of the infectious disease"*. The Court recalls that in addition to the term epidemic, the Law for Prevention and Fighting against Infectious Diseases defines the term "pandemic" as *"the massive infectious disease spreading which overpasses the borders of a state including some states and continents"*; however, beyond the fact that defines this term, the latter is not used anywhere in the Law in question.

246. The use of the word epidemic, and not pandemic, in the context of item a) of Article 41 of this law, can serve as an additional argument to show

that the legislator, namely the Assembly, has limited the powers of the Ministry of Health in interfering with rights and fundamental freedoms "in the place" where the epidemic has spread, meaning a certain and specified territory or region within the Republic of Kosovo and not interfering with fundamental rights and freedoms "in the whole country". In fact, even the Government itself in the challenged Decision does not refer to the word "epidemic" but to "pandemic".

247. The abovementioned provision, namely item a) of Article 41 of the Law, precisely defines the authorization of the Ministry of Health to prohibit travel "*to the place where the epidemic has spread*", limiting the authorization to intervene only in the place where the epidemic has spread, and not in the whole territory of the Republic of Kosovo.

248. Whether or not this was a good legal solution at the time the Law was drafted and whether it is well-founded in terms of public health policies - is not within the competence of the Court to determine. The Assembly has a constitutional discretion on the issues it chooses to regulate and the manner it chooses to regulate certain issues – including those related to public health and prevention of the entrance and spread of epidemics or pandemics and fighting against them. At this point, it is also important to note that the Court is not assessing the constitutionality of any legal provision because the case before it is not about assessing the constitutionality of the legal provisions in question. The Court is simply assessing the constitutionality of the challenged Decision of the Government which is stated to have been issued on the basis of this legal provision and others referred to in the legal basis of the challenged Decision.

249. As noted above, the limitations on fundamental rights and freedoms beyond the scope of the law can only be made for the purposes for which they were established. Moreover, and based on the ECtHR case law, the law by which the authorization to interfere with a right is determined must have protective measures against the interference of public authority, and in this context the Government, beyond the purpose for which the possibility of interference is determined. Also, the discretion of this interference should be sufficiently clear along with the manner of exercising this discretion. This is confirmed by the case law of the ECtHR, which speaks about the extent and quantity of *"legal discretion"* which may be granted to the Government pursuant to a law. In this respect, the Court cannot agree with the Government's claims *"the discretion of the Government to act is at the highest possible level"* because for the issues that affect fundamental rights and freedoms the *"legal discretion"* provided by law in favor of the Government must clearly indicate the scope of any such discretion and

the manner in which it is exercised. The Assembly, by Law for Prevention and Fighting against Infectious Diseases, nor has it given the Government broad legal discretion, nor has it clearly indicated the scope of its discretion and exercise. In such circumstances, allowing a discretion required by the Government would be contrary to the principle of the rule of law as one of the fundamental principles of a democratic society guaranteed by the Constitution and the ECHR.

250. Consequently, and based on the abovementioned clarifications, the Court considers that the Government has acted beyond the authorization given in item a) of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, prohibiting the travel to all citizens of the Republic of Kosovo in the whole of its territory.

251. The same reasoning applies to item b) of Article 41 of the Law in question because by the challenged Decision the prohibition of circulation was not made only *"in the infected regions or directly endangered"*, but, the prohibition of travel at certain hours has been imposed at the level of the entire state of the Republic of Kosovo and for all citizens and persons living or located in the territory of the Republic of Kosovo. The Court notes that the purpose of the abovementioned item b) is to prohibit circulation in the "infected regions" and in the "directly endangered" regions, and referring specifically to the regional context, has excluded the possibility of prohibition of movement throughout the territory of the Republic of Kosovo and to all its citizens.

252. Respectively, the purpose of item b) cannot be understood that it authorizes the Ministry of Health, namely the Government, to prohibit the movement in the whole Republic of Kosovo. Therefore, at this point, the Court cannot agree with the allegation of the Government that "prohibition of circulation in infected or directly endangered regions" means the entire territory of the Republic of Kosovo. If the Assembly had chosen to give such authorization in law to the Ministry of Health, namely the Government - it could have done so.

253. Therefore, the Court considers that the Government has acted beyond the authorization given in item b) of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, prohibiting the movement to all citizens of the Republic of Kosovo in the whole of its territory.

1.4.2. Article 44 of the Law on Prevention and Fighting against Infectious Diseases

254. The Court further notes that Article 44 of the Law on Prevention and Fighting against Infectious Diseases has no title and contains a total of six paragraphs with six items [a) b) c) d) e) and f)].

255. In the first and only paragraph of this Article it is emphasized that for the implementation of the control and prevention of the fight against infectious diseases, the Sanitary Inspectorate of Kosovo, *inter alia*, also performs precisely counted tasks in items a), b), c), d) e) and f) of the Law in question. Thus, this article clearly speaks about the additional tasks that the Sanitary Inspectorate of Kosovo can perform, in addition to those provided in Articles 41-43 of the Law on Prevention and Fighting against Infectious Diseases, which consist of taking the following measures:

> *"a) Persons being sick from a specific infectious diseases and bacillus suckle of these diseases (microbe – bearers) will prohibit exercising their work activities and duties where they can endanger the other persons' health;*
> *b) Prohibit circulation of persons for whom is ascertained or suspected of being sick from specific infections diseases;*
> *c) Prohibit persons meeting in schools, cinema, public premises and other public places to the epidemic danger passes;*
> *d) Orders disinfection, disinsection and deratization with purpose of prohibition and fighting against the infectious diseases;*
> *e) To order persons isolation who are sick from any specific infectious diseases and their treatment;*
> *f) To order taking of other foreseen general or special technical-sanitary and hygienic measures".*

256. In the circumstances of the present case, the Court notes that the items d), e) and f) are not applicable because through the challenged Decision the taking of these measures has not been ordered by the Sanitary Institute of Kosovo. The challenged Decision does not speak about disinfection, disinsection or deratization for the purpose of preventing or fighting infectious diseases, nor does it speak about the isolation of sick persons from any infectious disease. Also, the challenged Decision does not mention the taking of technical-sanitary and hygienic measures.

257. However, in the circumstances of the present case, the Court considers that the applicable items may be a), b) and c) of Article 44 of the

aforementioned Law, in terms of the legal basis and authorization which this law gives to the Sanitary Inspectorate of Kosovo, as one of the authorities that is called to implement measures to prevent and fight infectious diseases together with the Ministry of Health and NIPH.

258. Item a) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the activity, at work and in certain duties, of persons suffering from certain infectious diseases – in case those persons may endanger the health of other persons. The Court notes that this item speaks and gives authorization for detention to special and identifiable persons and does not speak about imposing a general prohibition measure on all citizens of the Republic of Kosovo. This measure also speaks about the prohibition of performing work and certain tasks for certain persons and not about the prohibition of the movement or circulation of all citizens of the Republic of Kosovo. Therefore, the Court finds that item a) is not a legal provision giving the Government authorization to make general limitations made by the challenged Decision and that the Government has not only complied with the application of the provision in question but has gone beyond it.

259. Item b) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the movement of persons for whom is ascertained or suspected of being sick from certain infectious diseases. The Court notes that this point also speaks and gives authorization to prohibit the movement of certain and identifiable persons who have already been found to be sick with an infectious disease or suspected of being sick. Therefore, the Court finds that item b) is not a legal provision giving the Government authorization to impose general limitations by the challenged Decision and that the Government has not complied only with the application of that provision, but went beyond it. Categorization of all citizens of the Republic of Kosovo as "*suspected*" of being sick, could not have been the purpose of a norm which, in no way limits the discretion of the public authority, namely the Sanitary Inspectorate of Kosovo, and the manner of exercising this discretion. Consequently, the meaning and purpose of the norm is related to identifiable persons and not all citizens of the Republic.

260. Item c) stipulates that the Sanitary Inspectorate of Kosovo may prohibit the gathering in schools, cinema, public premises and other public places to the epidemic danger passes. The Court notes that while this item of the Law speaks specifically about the limitation of gathering in: (1) "schools"; (2) "cinema"; (3) "public premises" and (4) "other public places"; the challenged Decision speaks generally about all gatherings *"in all settings - private and public, open and closed"*.

In addition to public settings, the challenged Decision also speaks about private environments, whether open or closed. This reading of this provision clearly leads to the conclusion that item c) also is not a legal provision that gives the Government the authorization to impose general limitations by the challenged Decision and that the Government has not only complied to the application of the provision in question but has gone beyond it.

261. In conclusion and after analyzing each item and legal provision of Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases – considered as a legal basis for imposing limitations on freedoms and rights made by the challenged Decision, the Court finds that these two legal provisions do not authorize the Government to prohibit at the level of the entire Republic of Kosovo the movement of "*of citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration"*; nor the authorization to prohibit at the level of the entire Republic of Kosovo "*movements on the road"* with an order that the latter *"be carried out by no more than two persons together and always keeping a distance of two meters from the others"*.

262. However, and more importantly, as far as the Government's authorization is concerned to prohibit *"gatherings in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two meters distance is permitted between people"* and the fact that "*in the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral",* the Court considers that these limitations of the Government require an additional analysis in light of Article 36 of the Constitution, as rightly mentioned by the Ombudsperson.

263. In this context, the Court emphasizes that even beyond the fact that neither the President, nor the Government, nor any of the interested parties, except the Ombudsperson (see paragraphs 130-132 of this Judgment), mentioned the fact that the challenged Decision "interferes" also with the right to privacy guaranteed by Article 36 of the Constitution, The Court notes that such interference has also

occurred with regard to this right. The Ombudsperson has rightly raised this argument.

264. In this context, and according to paragraph 1 of Article 36 of the Constitution everyone enjoys the right to have her/his private and family life respected. Paragraphs 2, 3 and 4 of Article 36 of the Constitution are not relevant to the circumstances of the present case and therefore the Court will not enter their comment. Furthermore, according to paragraph 1 of Article 8 of the ECHR, everyone enjoys, *inter alia*, the right to respect for private and family life. Meanwhile, according to paragraph 2 of Article 8 of the ECHR, the public authorities - including the Government, as far as it is authorized by law, – may interfere with the exercise of this right only to the extent prescribed by law and when such a thing, *inter alia*, is necessary in a democratic society, in the interests of national security, public safety for the protection of health or morals, or for the protection of the rights and freedoms of others.

265. What does "privacy" mean, the ECtHR case law has described in a number of its cases where, in essence, it has been emphasized that the concept of private life is a broad concept that cannot be given an exhaustive definition. (See ECtHR case, *S and Marper against the United Kingdom*, applications no. 30562/04 and 30566/04, Judgment of 4 December 2008; see also ECtHR Guide on Article 8, II. Private Life, A. Sphere of private life). The concept of private life and family life also includes the right to attend the funeral of family members. (See, one of the ECtHR cases confirming that the right to attend the funeral of a family member falls within the guarantees provided by Article 8 of the ECHR, *Lozovyye v. Russia*, application no. 4587/09, Judgment of 24 April 2018, paragraphs 31-35 and references cited therein).

266. The interference, namely the limitation of this right in question, was made by the Government in item 4 of the challenged Decision which specifically states that gatherings are prohibited in all *"private"* environments be them *"open or closed"*, except when it is necessary to perform work duties to *"perform pandemic prevention and fighting work"* and where two meters distance is permitted between people. From this limitation and from the way the limitation in question was written by the Government in the challenged Decision, it results that the citizens of the Republic of Kosovo, by the challenged Decision, are prohibited from gathering in private settings within their families. A literal reading of this limitation means that the Government, by the challenged Decision has banned all gatherings in private environments, namely in families and houses or private apartments of

the citizens of the Republic of Kosovo, unless those gatherings in private settings are necessary to perform the tasks of preventing and fighting pandemic. It remains unclear what gathering in private settings can be considered necessary to perform work duties to prevent and combat pandemic. The challenged Decision does not shed light on such instances and what exactly is meant by prohibiting gatherings in private, open or closed settings. This wording set out in the challenged Decision sounds like it limits all closed gatherings in private family settings and the Ombudsperson rightly questions the follow-up of the implementation of this measure. After analyzing the entirety of the Law on Prevention and Fighting against Infectious Diseases, the Court did not find any legal provision by which the Government is allowed to control the applicability of this Law to gatherings held in closed private settings – which in other words means, at the very least, family gatherings or other similar.

267. Such a limitation is not provided by the laws of the Assembly which the Government has cited in the challenged Decision as a basis for issuing it. Nowhere in those legal provisions are mentioned the limitations that can be made in *"private settings"*. This shows that although regarding other limitations provided by Article 41 of the Law, the Court had to analyze each provision and precisely substantiate why they do not give specific authorization to the Government. to limit the rights guaranteed by Articles 35 and 43 of the Constitution, on the issue of limitation of the right to privacy and respect for private and family life guaranteed by Article 36 of the Constitution - the lack of a specific authorization in the law is *prima facie* distinct and the limitation imposed by the Government turns out to be arbitrary and not based in law. The Court notes that the Law on Prevention and Fighting against Infectious Diseases in its entirety, in no provision, nor in what is being analyzed, mentions the possible limitations on "private settings". Protection from arbitrariness and arbitrary interference in the enjoyment of this right has been reiterated several times by the ECtHR as "essential purpose" of the guarantees provided by Article 8 of the ECHR. The primary obligation of states is to adhere to non-interference with this right – which implies a negative obligation. (See, *inter alia*, this general principle reflected in the ECtHR cases: *Libert v. France*, application no. 588/13, Judgment of 22 February 2018, paragraphs 40-42; see also ECtHR Guide on Article 8 of the ECHR).

268. In this regard, the Court recalls two cases of the ECtHR in which are clarified the circumstances when public authorities arbitrarily limit the rights and freedoms, invoking legal provisions that clearly do not comply with the restrictive measures taken.

269. In case *C.G. and others v. Bulgaria*, the ECtHR found a violation of Article 8 of the ECHR because it considered that the interference with the enjoyment of this right had not been "prescribed by law" and consequently the Applicant in that case had not enjoyed even the minimum of protection from arbitrariness exercised by the public authorities. (See, *C.G. and others v. Bulgaria,* application no. 1365/07, Judgment of 24 April 2008, paragraphs 49-50). In this case, the ECtHR stopped at this assessment because the interference was not based on law and therefore it was not necessary to continue with other questions of interference assessment.

270. In the similar cases for other articles besides Article 8 of the ECHR, as in the case of *Hakobyan and others v. Armenia*, the ECtHR reiterated the fact that: "*The first step in the Court's examination is to determine whether the measure imposed on the applicants was "prescribed by law", within the meaning of Article 11. This expression requires, first and foremost, that the interference in question have some basis in domestic law*." In application of this principle, the ECtHR analyzed the domestic legislation on which the limitation was imposed and concluded that: "*[...] the measure in question was imposed relying on a legal provision which had no connection with the intended purpose of that measure. The Court cannot but agree with the applicants that an interference with their freedom of peaceful assembly on such legal basis could only be characterised as arbitrary and unlawful.*" (See, *Hakobyan and others v. Armenia,* application no. 34320/04, Judgment of 10 April 2012, paragraphs 106-109 - and references cited therein; see also the case *Huseynli and others v. Azerbaijan*, applications no. 67360/11, 67964/11 and 69379/11, Judgment of 11 February 2016, paragraphs 98-101 - and references cited therein).

271. The case law of the ECtHR in light of the fact established about the complete lack of legal authorization of the Government to limit gatherings in private settings, lead the Court to the conclusion that the limitation of the right provided for in Article 36 of the Constitution cannot be characterized otherwise than *"arbitrary and unlawful",* therefore, unconstitutional.

272. Consequently, the Court finds that the Government has not complied only to the application of the Law on Prevention and Fighting against Infectious Diseases; however, it has gone beyond the specific authorizations given in that Law of the Assembly. Therefore, the limitations cannot be considered to be "prescribed by law", as required by Article 55 of the Constitution.

273. In conclusion, the Court finds that all limitations on the rights and freedoms mentioned above by the Government have been made through a Decision which has exceeded the authorizations established in Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases.

1.5. Law on Health – s a legal basis for the challenged Decision of the Government: Article 12 (1.11) [Measures and activities] and Article 89 [Responsibilities of the Ministry]

274. In this regard, the Court emphasizes that for the circumstances of the present case are relevant "First question" of the test of Article 55 of the Constitution, namely *"Was the limitation of a fundamental freedom or right guaranteed by the Constitution "prescribed by law"?*" Therefore, in the following, the Court will answer this question first. As stated above, if the answer is negative, then answers to questions two, three and four of the test of Article 55 of the Constitution will not be necessary.

275. The Court recalls that the Law on Health is a law which entered into force in 2013. The aim of this Law, according to its Article 1, is *"establishing [...] legal grounds for the protection and the improvement of the health of the citizens of the Republic of Kosovo through health promotion, preventive activities and provision of comprehensive and quality healthcare services"*

276. Article 12 [Measures and activities], paragraph (1.11) of the Law is part of Chapter IV "Healthcare Implementation"; whereas Article 89 [Responsibilities of the Ministry] is part of Chapter XIX "Healthcare During Emergencies".

277. The Court notes that only Articles 12 (1.11) and 89 are cited as legal basis and as such will be analyzed in detail below.

1.5.1. Article 12 [Measures and activities], paragraph (1.11), of the Law on Health

278. The Court notes that paragraph 1.11 of Article 12 of this Law speaks about the measures and activities that can be taken, in which case it is specifically stated that: *"Healthcare shall be implemented through the following measures and actions: [...] 1.11. measures for prevention and elimination of health consequences caused by emergency conditions; [...].*"

279. This legal provision simply explains that the healthcare is implemented by taking certain measures and activities, including the measures which are considered necessary to prevent and eliminate the consequences caused by the state of emergency. There is nothing disputable in this article and the fact that the healthcare is implemented through measures taken to prevent and eliminate the health consequences caused by a state of emergency is true.

280. However, it is unclear how this specific article, in itself, gives the Government the right and legal authority to limit fundamental freedoms and rights according to the challenged Decision. In the interpretation of the Court, and in light of the fact that the limitation of rights should be done only by law of the Assembly, nothing in this legal provision leads to the conclusion that the limitations made through the challenged Decision are in compliance with this legal norm and that the latter do not go beyond the legal authorizations read as a whole under the Law on Health. However, the Court will read this provision in the light of another provision of this Law, namely Article 89.

1.5.2. *Article 89 [Responsibilities of the Ministry] of the Law on Health*

281. Further, the Court notes that Article 89 of the Law on Health speaks about the responsibilities of the Ministry of Health and has a total of 4 paragraphs.

282. Paragraph 1 stipulates that the implementation of healthcare during the state of emergency is provided by the Ministry in accordance with this law and other applicable legislation. This paragraph merely shows that during a state of emergency, the Ministry of Health will ensure that the implementation of medical care is in accordance with applicable law and legislation. This does not provide for any specific authorization for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

283. Paragraph 2 states that healthcare activities in case of emergencies include: the implementation of applicable laws; adapting the healthcare system in compliance with the emergent planning; implementing changes within the referral and management system; provision of emergency health care services to citizens; the functioning of the provisional healthcare institutions; activation of supplementary capacities and reserve resources. Here, too, no specific authorization

is provided for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

284. Paragraph 3 states that during *"emergency situations, the citizens' rights defined by the law shall be guaranteed to an extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situation".* This paragraph reflects the fact that for reasons of public health in case of state of emergencies, the rights of citizens defined by law [including rights considered infringed in the present case] will continue to be guaranteed only to the extent that their guarantee *"to an extent that will not endanger the efficiency of efforts undertaken to overcome"* the emergency situation. Here, too, no specific authorization is provided for the Government - in terms of justifying the limitations made by the challenged Decision by invoking this paragraph.

285. Paragraph 4 states that despite the limitations established in Article 89, the dignity of the citizen will be fully and consistently respected. Here, too, no specific authorization for the Government is provided. The Court emphasizes that human dignity, cited in this paragraph of the Law on Health, is guaranteed by Article 23 of the Constitution and constitutes the basis of all fundamental rights and freedoms. As such, it constitutes an inviolable right under any circumstances. Therefore, this provision simply reflects the constitutional guarantee provided for in Article 23 of the Constitution which prevails in any case.

286. In conclusion and after analyzing each item and special legal provision of Article 12 (1.11) and Article 89 of the Law on Health - considered as a legal basis for imposing limitations on freedoms and rights made by the challenged Decision, the Court finds that these two legal provisions do not give the Government the authorization to prohibit at the level of the entire Republic of Kosovo the movement of "*citizens and private vehicles is prohibited starting from 24 March 2020 between 10:00 - 16:00 and 20:00 - 06:00, except for the one carried out for medical needs, production, supply and sale of essential goods (food and medicines for people and livestock/poultry), and for services and activities related to pandemic management (essential government and municipal management and personnel of the following sectors: health, security and public administration*"; nor the authorization to prohibit at the level of the entire Republic of Kosovo "*movements on the road"* ordering that the latter "*shall be carried out by no more than two persons together and always keeping a distance of two meters from the others";* nor the authorization to prohibit "*gatherings in all settings - private and public, open and closed - except when necessary to perform pandemic prevention and fighting work, and where two*

meters distance is permitted between people. In the event of deaths, only close relatives of the deceased's family and persons performing the funeral service may attend the funeral".

287. Therefore, the Court finds that the Government was not limited to the implementation of the Law on Health; however, it has gone beyond the specific authorizations given in that Law of the Assembly. Therefore, the limitations cannot be considered to be "prescribed by law", as required by Article 55 of the Constitution.

288. In conclusion, the Court finds that all limitations on the rights and freedoms mentioned above by the Government have been made through a Decision which has exceeded the authorizations established in Articles 12 (1.11) and 89 of the Law on Health.

1.6. Conclusion regarding the legal basis on which the challenged Decision is based

289. After analyzing each legal basis referred by the Government as authorization to issue the challenged Decision, the Court finds that the latter, in particular Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of the Law on Health – do not give the Government the competence to limit the freedom of movement, gathering and the right to privacy/family life at the level of the entire territory of the Republic of Kosovo and to all citizens of the Republic of Kosovo in general. Consequently, the limitations made through the challenged Decision cannot be considered to have been made by law of the Assembly nor in accordance with law or in its implementation.

290. More specifically, regarding the limitations on freedoms guaranteed by Articles 35 and 43 of the Constitution, the Court finds that although there are legal provisions of the Assembly that regulate the prohibition of circulation/ movement and gathering to places where the epidemic has spread and to infected, or directly endangered regions - the Government has exceeded its legal authorizations by not only focusing on their implementation but by going beyond them when limiting these freedoms at the level of the entire territory of the Republic of Kosovo and to all citizens of the Republic of Kosovo.

291. Meanwhile, regarding the limitation made on the right guaranteed by Article 36 of the Constitution, the Court finds that the Government has limited this right arbitrarily and without any legal basis provided by law of the Assembly. This is because the articles mentioned as a legal

basis neither regulate nor mention the limitations in "private, open or close settings".

292. In the interpretation of this Court, the Government and, consequently, no other state public authority, can ever go beyond the limitations and regulations provided by a law of the Assembly which limits the guaranteed freedom of movement and gathering and the right to privacy under the aforementioned articles. - much less to make a limitation on its own without having any legal authorization given through a law of the Assembly.

293. The Government, as well as other law enforcement bodies or authorities, may take, apply and implement the restrictive measures only as far as the law of the Assembly determines and only insofar as the law of the Assembly allows. This interpretation is in full compliance with the system of controls and balances in terms of separation of powers where legislative power to create laws in the country belongs only to the Assembly; while the executive to implement the laws of the Assembly, belongs to the Government. The judiciary in this triangle of power has its role to control, among other things, the constitutionality of the laws issued by the Assembly but also the constitutionality of the decisions of the Government through which the laws of the Assembly are implemented.

294. The Government, as one of the three main powers in the legal system of the Republic of Kosovo, cannot go beyond the legal permits and authorizations - which in the circumstances of the present case has occurred, as explained above. The Government, as one of the three main powers in the legal system of the Republic of Kosovo, cannot limit rights by itself without being based on the law of the Assembly – which in the circumstances of the present case happened, as explained above. This is because no law or legal provision from those mentioned as a legal basis for issuing the challenged Decision gives the Government the right to limit in a general way in the whole territory of the Republic of Kosovo, to all citizens and without a fixed deadline: (i) the right of movement and circulation; (ii) the right to privacy; and (iii) the right of gathering.

295. The Government has the competence to make decisions which are considered necessary for the implementation of laws and it is entirely in its constitutional competence to do such a thing. Particular emphasis in this regard should be placed on the phrase "implementation of laws". This means that the Government can never make decisions that go beyond what is considered necessary for the implementation of a law of the Assembly.

296. The Court reiterates that the Assembly is the only body in the Republic of Kosovo that has the constitutional competence to limit, in accordance with Article 55 of the Constitution, fundamental rights and freedoms. Even the Assembly itself is limited by the Constitution to make limitations of the rights in accordance with Article 55 of the Constitution. In this regard, even the Assembly does not have completely free hands to limit the rights and freedoms because Article 55 provides clear requirements which instruct how and to what extent the limitation of fundamental rights and freedoms can be done.

297. In this regard, the Court finds that Decision No. 01/15 of the Government of 23 March 2020, is not rendered in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering]; read in the context of the equivalent guarantees provided by Article 8 (Right to respect for private and family life), Article 11 (Freedom of assembly and association) of the ECHR and Article 2 (Freedom of movement) of Protocol no. 4 of the ECHR.

298. Therefore, the challenged Decision of the Government will be repealed by this Judgment, on the date provided in the enacting clause.

V. Regarding the entry into force of this Judgment

299. As stated above and as emphasized in the enacting clause of this Judgment, the Court found that the challenged Decision of the Government should be repealed as it is not in accordance with the Constitution and the ECHR, according to the reasoning of this Judgment.

300. Regarding the legal moment of entry into force of this Judgment of the Court and consequently the legal moment from which the challenged Decision of the Government is repealed, the Court recalls the relevant constitutional and legal provisions which give the Court the opportunity to set a specific date for entry into force of its decisions, namely of this Judgment.

301. In this regard, the Court first recalls paragraph 3 of the Article 116 [Legal Effect of Decisions] of the Constitution, which establishes as follows: *"If not otherwise provided by the Constitutional Court decision, the repeal of the law or other act or action is effective on the day of the publication of the Court decision"*. This constitutional

regulation enables the Court to set another date for the entry into force of its decision by which an act is repealed.

302. The Court further recalls paragraph 5 of Article 20 [Decisions] of the Law where it is specifically stated that: *"A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision"* and paragraph (5) of Rule 60 [Content of Decisions] of the Rules of Procedure where it is specifically stated that: *The operative provisions shall state the manner of the implementation of the Judgment [...] and when the decision shall take effect [...]."*

303. Based on this authorization that the abovementioned provisions of the Constitution, the Law and the Rules of Procedure give to the Constitutional Court, the latter has decided that Judgment on the case KO54/20 will enter into force on 13 April 2020. Therefore, the challenged Decision of the Government will be repealed on that date.

304. The decision-making regarding the date of entry into force of this Judgment, namely the date of repeal of the challenged Decision, the Court has based on the circumstances created by the declaration of pandemic COVID-19 at the world level; relevant recommendations of health institutions at the state and world level; the potentially harmful consequences for public health as a result of the immediate repeal of the limitations set out in the challenged Decision; and, in the light of the protection of public health and interest until the implementation of this Judgment. In this regard, the Court considers that it is in the public interest to give the necessary time to the Government and the Assembly, to address the findings of this Judgment and to adapt their decision-making in terms of addressing the need to deal with the pandemic in question, in constitutional and legal terms.

305. The Court considers that if the challenged Decision were to be repealed on the date of publication of this Judgment, there is a risk of causing potentially harmful consequences for public health as a result of the immediate repeal of the limitations. With the immediate repeal of the challenged Decision, the state of the Republic of Kosovo and its citizens would be left without any measure that would address the current situation in the country. Such a thing could cause ambiguity about what rules are applicable at this sensitive time for public health.

306. As a result, the Court finds that until the date of repeal of the challenged Decision, the responsible institutions of the Republic of Kosovo, in the first place the Assembly, must take actions, in accordance with the Constitution and this Judgment, which are

considered as appropriate and adequate to continue preventing and fighting pandemics COVID-19 – which in itself constitutes a high interest of public health for all citizens and persons living in the Republic of Kosovo.

VI. As to the request for interim measure

307. The Court recalls that through his referral submitted on 24 March 2020, the President requested that an interim measure be imposed by which the implementation of the challenged Decision of the Government would be suspended until the case is decided on merits by the Court.

308. On the same date, the Court gave the Government, the Assembly (including deputies) and the Ombudsperson the opportunity to comment on the Applicant's request for an interim measure until 22:00 hrs of 24 March 2020. The Government, within the deadline, opposed the President's proposal, claiming that the requirements for imposing the interim measure have not been met and that the President failed to prove that the latter is in the public interest and necessary to avoid irreparable damage. The Parliamentary Group of Movement VETËVENDOSJE! also considered that the interim measure should not be imposed. The deputy of the Assembly, Mr. Abelard Tahiri supported the proposal of the Applicant for the imposition of an interim measure. (See paragraphs 42-72 of this Judgment reflecting the Applicant's request for interim measure; and comments submitted to the Court by the Government and other interested parties regarding the request for interim measure).

309. Given that the Court, by this Judgment, has already decided on the merits of the case as a whole, the request for an interim measure remains without subject of review.

VII. Conclusions

310. As a preliminary issue, the Court in this Judgment clarified that it is not its role to assess whether the measures taken by the Government to prevent and fight the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level.

311. The constitutional question that this Judgment encompasses is the compatibility with the Constitution of the challenged Decision of the Government, namely whether by its issuance the Government has limited the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers provided by law. In this context, regarding the assessment of whether the limitations made at the level of the entire Republic of Kosovo by the challenged Decision of the Government are prescribed by law, the Court has focused on the assessment of the authorizations established in Articles 41 and 44 of Law for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of Law No. 04/L-125 on Health.

312. In this regard, the Court considered: (i) the Applicant's Referral and the allegations presented in this Referral; (ii) the comments submitted by the Government and other interested parties; (iii) the case law of the ECtHR and, in particular, general principles on the applicability of the criterion "*prescribed by law*" as regards the limitation of fundamental rights and freedoms; and (iv) the case law of the Constitutional Court itself.

313. Based on the foregoing considerations and assessments, the Court, unanimously, decided to declare Referral KO54/20 admissible for review on merits as, in the circumstances of the present case, all the admissibility requirements established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure were met.

314. The Court also unanimously decided that Decision [No. 01/15] of the Government of 23 March 2020 is incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] and Article 2 (Freedom of movement) of Protocol No. 4, Article 8 (Right to respect for private and family life) and Article 11 (Freedom of assembly and association) of the ECHR.

315. The Court held that the limitations contained in the challenged Decision of the Government regarding the constitutional rights and fundamental freedoms referred to above, are not "*prescribed by law*", and therefore are contrary to the guarantees contained in Articles 35, 36 and 43 of the Constitution in conjunction with the respective Articles of the ECHR, and Article 55 of the Constitution, which in its first paragraph clearly states that the fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

316. The Court emphasized the fact that the challenged Decision of the Government refers to the implementation of the two abovementioned laws, which authorize the Ministry of Health to take certain measures in those laws in order to prevent and fight the infectious diseases. However, the Court held that the abovementioned laws do not authorize the Government to limit the constitutional rights and freedoms provided by Articles 35, 36 and 43 of the Constitution at the level of the entire Republic of Kosovo and to all citizens of the Republic of Kosovo without exception.

317. In this respect, the Court found that the limitations imposed by the challenged Decision: (i) regarding the freedom of movement and gathering established in Articles 35 and 43 of the Constitution, exceed the limitations permitted by the abovementioned law adopted by the Assembly; and (ii) related to *"gatherings in all settings - private and public, open or closed"* which incorporate aspects of the rights guaranteed by Article 36 of the Constitution, are not based on any of the authorizations prescribed in the aforementioned law or any other law of the Assembly.

318. The Court clarified that the Government cannot limit any fundamental right and freedom through decisions unless a limitation of the relevant right is provided by the law of the Assembly. The Government can only enforce a law of the Assembly that limits a fundamental right and freedom only to the specific extent authorized by the Assembly through the relevant law.

319. With regard to the Applicant's allegations of a violation of Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution, the Court held that this Article is not applicable in the circumstances of the present case, as it is applicable only following the declaration of the State of Emergency.

320. However, with regard to the disagreement between the parties to the dispute, the President and the Government, over the meaning of the constitutional terms "*limitation*" and "*derogation*" that appear in Articles 55 and 56 of the Constitution, the Court clarified that the "*limitation*" of human rights and freedoms can be made "*only by law*" of the Assembly, but this does not mean that the "*limitation*" of rights can only be made through and after the declaration of the State of Emergency. The Court also clarified that the term "*limitation*" used in Article 55 of the Constitution implies the fact that the Assembly has the right to limit the fundamental rights and freedoms, through law, but only insofar and to the extent necessary in order that in an open and democratic society, fulfills the purpose for which the limitation is

allowed. In other words, "*limitation*" implies a lighter degree of interference and this can be done even without declaration of the State of Emergency; whereas "*derogation*" implies a more severe degree of interference since it can never be done without a declaration of the State of Emergency.

321. As to the request for interim measure, the Court finds that following the unanimous decision of the judges to decide in their entirety the merits of the case and to render this Judgment, the latter remained without subject of review.

322. Based on Articles 116.3 of the Constitution, 20.5 of the Law on the Constitutional Court and Rule 60 (5) of the Rules of Procedure, the Court set the date 13 April 2020 as the date of entry into force of this Judgment, namely the repeal of the challenged Decision of the Government.

323. The Court has set another date of entry into force of its Judgment, namely 13 April, 2020 exceptionally and having regard to: (i) the circumstances created by the declaration of the COVID-19 pandemic at the world level; (ii) relevant recommendations of the health institutions at the state and world level; (iii) the potentially harmful consequences on public health as a result of the immediate repeal of the limitations provided by the Decision of the Government; and (iv) the protection of public health and interest until the enforcement of this Judgment by the relevant institutions of the Republic of Kosovo.

324. During this period of time and within the meaning of Article 55 of the Constitution regarding the "*limitation*" of fundamental rights and freedoms, the relevant institutions of the Republic of Kosovo, and, in the first place, the Assembly, should take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to safeguard public health have been made in accordance with the Constitution and this Judgment.

325. Finally, the Court also notes that the Ministry of Health, namely the Government, continues to be authorized to issue decisions with an aim of preventing and fighting the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.2 (1) and 116 of the Constitution, Articles 20 and 59 (2) of the Rules of Procedure, on 31 March 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO DECLARE that Decision No. 01/15 of the Government of the Republic of Kosovo of 23 March 2020, is not in compliance with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy] and 43 [Freedom of Gathering], and Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association) of the ECHR, as well as Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

III. TO HOLD that Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution is not applicable in the circumstances of the present case because it is not about "*derogation*" from fundamental rights and freedoms;

IV. TO HOLD that, based on Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, the limitation of fundamental rights and freedoms may be done "*only by law*" of the Assembly of the Republic of Kosovo;

V. TO DECLARE invalid, in accordance with Article 116.3 of the Constitution, the Decision referred to in item II of this enacting clause, from the date of entry into force of this Judgment;

VI. TO NOTIFY this Judgment to the Parties;

VII. This Judgment, in accordance with Article 116.3 of the Constitution, Article 20.5 of the Law and Rule 60 (5) of the Rules of Procedure, is effective on 13 April 2020; and

VIII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KO61/20, Applicant: Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision [no. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren "*quarantine zone*"; and Decisions [no. 229/IV/2020], [no. 238/IV/2020], [no. 239/IV/2020] of 14 April 2020 of the Ministry of Health *on preventing, fighting and eliminating infectious disease COVID-19 in the territory* of the Municipalities of Prizren, Dragash and Istog

KO61/20, Judgment of 1 May 2020, published on 5 May 2020

Key words*: pandemic COVID-19, institutional referral, referral by 30 deputies, article 113.2 (1) of the Constitution, freedom of movement, limitations on fundamental rights and freedoms, prescribed by law, legitimate aim, proportionality, necessary in a democratic society, Government, Assembly*.

On 17 April 2020, 30 deputies of the Assembly submitted Referral KO61/20 to the Court. Through this Referral, the Applicants requested the constitutional review of four (4) decisions of the Ministry of Health, namely: (i) Decision [no. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren "*quarantine zone*"; (ii) Decision [no. 229/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Prizren*"; (iii) Decision [no. 238/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Dragash*"; (iv) Decision [no. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Istog"*.

The subject matter of the Referral is the constitutional review of the four (4) challenged decisions, which the Applicants allege that are not in compliance with Articles 35 [Freedom of Movement] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 2 of Protocol no. 4 of the European Convention on Human Rights (hereinafter: ECHR). The Applicants also requested the imposition of the interim measure for the suspension of the challenged decisions.

Under heading **VI – CONCLUSIONS** – of this Judgment (see paragraphs 246-263), the Court summarized the essence of the case and stated the following:

On 31 March 2020, the Court decided on case KO54/20 through which Judgment, it declared Decision no.01/15 of the Government invalid, holding that the latter was in contradiction with article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] of the Constitution and the equivalent articles of the ECHR, namely articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), and 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

Through the abovementioned Judgment, the Court emphasized that (i) the Government can only implement a law of the Assembly that limits a fundamental right and freedom, and only to the extent that the Assembly has authorized it through the respective law; and that (ii) the Ministry of Health, namely the Government, is authorized to issue decisions aimed at preventing and fighting the pandemics, only to the extent it is authorized through the Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law no. 04/L-125 on Health. The Court also stated that these two laws do not authorize the Ministry of Health, namely the Government, to limit the rights and freedoms guaranteed by the Constitution at the level of the entire Republic of Kosovo and for all the citizens of the Republic of Kosovo without exception.

Following Judgment KO54/20, on 14 April 2020, through thirty-eight (38) decisions for "*prevention, fighting and elimination of the infectious disease COVID-19*", the Ministry of Health imposed limitations in all municipalities of Kosovo and for all citizens of the Republic of Kosovo. The Court in the present case, namely KO61/20, is not conducting a constitutional review of all thirty-eight (38) abovementioned Decisions, because the Applicants have not challenged all of them.

Only three (3) of them have been challenged before the Court, Decisions [No. 229/IV/2020]; [No. 238/IV/2020]; and [No. 239/IV/2020] of 14 April 2020, for the municipalities of Prizren, Dragash and Istog, respectively. In addition the three abovementioned decision, it is Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health declaring the Municipality of Prizren "*quarantine zone*", has also been challenged before the Court.

Therefore, the constitutional question entailed in this Judgment, KO61/20, is the compatibility with articles 35 and 55 of the Constitution of the four (4)

challenged Decisions of the Ministry of Health. The Court, in assessing their constitutionality, based on article 55 of the Constitution, the case-law of the Court, including the Judgment of the Court KO54/20, and the case-law of the ECtHR pertaining to article 2 of Protocol no. 4 of the ECHR, has reviewed whether the "*interferences*", namely the limitations on the freedom of movement of the citizens in the municipalities of Prizren, Dragash and Istog, respectively (i) are "*prescribed by law*", namely by the Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases; (ii) pursue a "*legitimate aim*"; and (iii) are "*necessary in a democratic society*".

Based on the examinations and assessments of the documents submitted to the Court and its case-law, the Court, unanimously, decided to declare Referral KO61/20 admissible for review on the merits, taking into account that all admissibility criteria established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure, have been met.
The Court decided that the Decisions "*for prevention, fighting and elimination of the infectious disease COVID-19*" in the municipalities of Prizren, Dragash and Istog, respectively, are in compliance with the Constitution, with the exception of the respective points of the enacting clauses which determine the respective administrative minor offences, whereas it declared unconstitutional the Decision declaring the Prizren municipality a "*quarantine zone*".

More precisely, the Court, unanimously, decided that: (i) Decision [No. 229/IV/2020] of 14 april 2020 of the Ministry of Health, "for prevention, fighting and elimination of the infectious disease COVID-19" in the municipality of Prizren (points I, II, III, IV, VI, VII and VIII); and (ii) Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" in the municipalities of Dragash and Istog (points I, II, III, V, VI and VII), respectively, are in compliance with article 55 of the Constitution in conjunction with article 35 of the Constitution and article 2 of Protocol No. 4 of the ECHR. Consequently, all the specified points of the three abovementioned Decisions, were declared constitutional by the Court.

The Court held, that in issuing the abovementioned Decisions, the Ministry of Health, has acted in compliance with the authorizations prescribed by the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens of the municipalities of Prizren, Dragash and Istog, through the abovementioned Decisions, were "*prescribed by law*". The Court also found that the latter, pursue a "le*gitimate aim*", namely the one of the protection of "*public health*", as foreseen in paragraph 3 of article 2 of

Protocol no. 4 of the ECHR; are proportional in relation to "*legitimate aim*" pursued; and are "*necessary in a democratic society*".

However, the Court, by majority, decided that: (i) item V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" for the municipality of Prizren; and (ii) item IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" for the municipalities of Dragash and Istog, respectively, through which the administrative minor offences and the respective sanctions are determined, are not in compliance with article 55 of the Constitution in conjunction with article 35 of the Constitution and article 2 of Protocol No. 4 of the ECHR. The Court reasoned that in determining the non-compliance with the measures provided for by the abovementioned Decisions as "*administrative minor offences*", the Ministry of Health exceeded the authorizations provided by Law No. 02/L-109 or Prevention and Fighting against Infectious Diseases. The Court stated that based on Law No. 05/L-087 on Minor Offences, the minor offenses and the respective sanctions must be determined only by law of the Assembly of the Republic or through acts of the Municipal Assemblies, and that this authorization may not be delegated to other bodies. Consequently, the administrative minor offenses determined through these three challenged Decisions, are not "*prescribed by law*" and consequently, are declared unconstitutional.
The Court, on the other hand, decided, by majority, that Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, declaring the Municipality of Prizren "*quarantine zone*", is not in compliance with articles 35 and 55 of the Constitution and article 2 of Protocol no. 4 of the ECHR. The Court held, that in issuing this Decision, the Ministry of Health has exceeded the authorizations provided by Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens, through the quarantine of the entire municipality of Prizren, are not "*prescribed by law*". The Court clarified that the "*quarantine*" according to Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry of Health, following the recommendation by NIPHK, only for natural persons which are confirmed or suspected to have been in direct contact with the sick persons or suspected of infectious disease. Therefore, the Decision declaring entire municipality of Prizren a "*quarantine area*", was declared unconstitutional.

Pertaining to the request for interim measure, the Court held that following the decision of the judges to decide the merits of the case in their entirety, and to render this Judgment, the interim measure remained without a subject of review.

The Court also recalled that, by Judgment KO54/20, it had set another date for the entry into force of its Judgment, namely 13 April 2020, emphasizing that until that date, the relevant institutions of the Republic of Kosovo, in the first place, the Assembly, must take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to preserve the public health, are made in accordance with the Constitution and Judgment KO54/20.

In addition, the Court emphasizes that despite the specific request addressed to the Assembly requesting information "*regarding all the steps taken by the Assembly of the Republic of Kosovo after the publication of Judgment KO54/20 of 31 March 2020*", the Court did not receive a response from the Assembly. In this regard, the Court initially emphasized the fact that it is a legal obligation of all public authorities "*to support the work of the Constitutional Court and to cooperate with the Constitutional Court upon request of the Constitutional Court*". Furthermore, the Court emphasized that based on Judgment KO54/20, the Assembly was obliged, either through amendment of existing applicable legislation or through the adoption of a new law, to determine the most appropriate mechanisms and the corresponding authorizations, for the competent authorities, including the Ministry of Health, namely the Government, to take the appropriate and necessary measures designed to fight and prevent COVID-19 pandemics, in a manner compliant with the Constitution and Judgment KO54/20. In this aspect, the Court also emphasized article 116 [Legal Effect of Decisions] of the Constitution, based on which, the decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.

In Judgment KO61/20, the Court also addressed the submission of 23 April 2020 of the Acting Prime Minister, submitted to the Court on behalf of the Government, entitled "*submission regarding non-compliance with the legal deadlines and the Rules of Procedure of the Constitutional Court by the Constitutional Court in case no. KO61/20*". Through this submission the Government expressed its "*concerns*" pertaining to "*violation of essential provisions regarding the procedure and deadlines to be followed*" by the Court, while also emphasizing that the "*Government will carefully review the legal violations so far and, depending on their legal qualifications, will take the necessary actions based on the legislation in force*".

The Court has shared this submission, same as other submissions, with all the interested parties in this case. The submission will also be published on its entirety together with Judgment KO61/20, which will also contain the necessary clarifications pertaining to this submission. Nevertheless, the Court strongly emphasizes that the Government's approach towards the

Constitutional Court reflected through this submission, is unacceptable and contrary to the fundamental values of the Constitution of the Republic.

The Court emphasizes that it is an independent body established to protect the Constitution and it is the final interpreter of the Constitution. The Court recalls that the Constitution attributes to it full independence in the performance of its responsibilities. Furthermore, it is a constitutional obligation of the Government and all institutions of the Republic, not to interfere with this independence. The Court also reminds the Government that the Constitution does not attribute to it any competence regarding the decision-making of the judicial power. Respecting the basic constitutional values, pertaining to the separation of powers, the independence of the justice system, the independence and authority of the Constitutional Court and the protection of the rule of law, is a constitutional obligation of all branches of government of the Republic of Kosovo.

Finally, the Court emphasizes the fact that regardless of the situation created with pandemic COVID-19, and which has affected the entire world, the state of law and rule of law, must prevail. This is also emphasized by the Council of Europe in the Information Document SG/Inf(2020)11 of 7 April 2020 on Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, but also in the Opinions of the Venice Commission, including the one on Protection of Human Rights in Emergency Situations and the Rule of Law Checklist. All institutions of the Republic are obliged to act in full compliance with the respective constitutional and legal competences and in compliance with the Judgments of the Court.

JUDGMENT

in

Case No. KO61/20

Applicants

JUDGMENT

in

Case No. KO61/20

Applicants

Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, on declaration of the Municipality of Prizren "*quarantine zone*"; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *on preventing, fighting and eliminating infectious disease COVID-19 in the territory* of the Municipalities of Prizren, Dragash and Istog

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

Applicants

1. The Referral was submitted by thirty (30) deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), namely: Uran Ismaili, Kujtim Gashi, Gazmend Bytyqi, Abelard Tahiri, Blerta Deliu-Kodra, Bajrush Xhemaili, Eliza Hoxha, Bekim Haxhiu, Valdete Idrizi, Besa Ismaili, Sejdi Hoxha, Enver Hoxha, Ferat Shala, Ganimete Musliu, Memli Krasniqi, Elmi Reçica, Floretë Zejnullahu, Ariana Musliu Shoshi, Mërgim Lushtaku, Kadri Veseli, Evgjeni Thaçi-Dragusha, Fatmir Xhelili, Albert Kinolli, Bedri Hamza, Veton Berisha, Duda Balje, Hajredin Kuçi, Haxhi Shala, Endrit Shala and Albulena Balaj-Halimaj (hereinafter: the Applicants).

2. The Applicants were represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by deputy Besa Ismaili.

Challenged decisions

3. The Applicants challenge the constitutionality of four (4) Decisions of the caretaker Ministry of Health (hereinafter: the Ministry of Health), issued by the caretaker Minister of Health, Mr. Arben Vitia (hereinafter: the Minister of Health) as follows: (i) Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren *"quarantine zone"*; (ii) Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health – *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Prizren"*; (iii) Decision [No. 238/IV/2020] of 14 April 2020 of the Ministry of Health – *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Dragash"*; and (iv) Decision [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Istog"*.

4. Hereinafter, the Court will refer to the above-mentioned decisions as "the challenged Decisions" when their entirety is in question; whereas, when any separate decision is in question, the Court will refer to the specific number of that decision.

Subject matter

5. The subject matter of the Referral is the constitutional review of the four (4) challenged Decisions, which the Applicants allege that are incompatible with Articles 35 [Freedom of Movement] and 55 [Limitations on Fundamental Rights and Freedoms] of the

Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 2 of Protocol No. 4 of the European Convention on Human Rights (hereinafter: the ECHR).

6. The Applicants also allege that the challenged Decisions are in contradiction with Judgment of the Constitutional Court in case KO54/20 (see, case KO54/20, Applicant, *the President of the Republic of Kosovo*, *"Constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo"*, Judgment of 31 March 2020, published on 6 April 2020 –hereinafter referred to as: "Judgment KO54/20").

7. The Applicants also request the Court to "*impose as an interim measure immediate suspension of implementation of the challenged decisions until the completion of the procedure of constitutional control and resolution of the case based on merits.*"

Legal basis

8. The Referral is based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction an Authorized Parties] and on paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 27 (Interim Measures), 29 (Accuracy of the Referral) and 30 (Deadlines) of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and on Rules 32 (Filing of Referrals and Replies), 33 (Registration of Referrals and Filing Deadlines), 56 (Request for Interim Measures) and 57 (Decision on Interim Measures) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

9. On 17 April 2020, Friday, at 15:50, the Applicants submitted the Referral to the Court.

10. On the same date, on 17 April 2020, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Reporter and the Review Panel composed of judges: Selvete Gërxhaliu-Krasniqi (Presiding), Bajram Ljatifi and Remzije Istrefi-Peci.

11. On 18 April 2020, Saturday, the representative of the Applicants submitted to the Court the original Referral also in electronic format to the electronic mail of the Court through her electronic address.

12. On the same date, on 18 April 2020, through electronic communication to the electronic mail chosen by the Applicants' representative, the Court notified the Applicants' representative about the registration of the Referral, informing her that Referral KO61/20, cannot be considered complete because it was not signed by deputy Gazmend Bytyqi, whose name and personal number appear in the list of the deputies as Applicants. Based on the earlier practice, the Court invited the Applicants to submit to the Court the signature of deputy Gazmend Bytyqi in order to confirm his consent to be one of the deputies who submitted Referral KO61/20 to the Court.

13. On the same date, on 18 April 2020, the representative of the Applicants submitted to the Court, through electronic communication, the signature of the deputy in question.

14. On 19 April 2020 the Court notified the representative of the Applicants about receipt of the signature and confirmed that it would henceforth continue to communicate directly with her in the capacity of representative of the thirty (30) deputies who have submitted Referral KO61/20.

15. Through this letter, the Court also requested the Applicants to clarify to the Court, if in addition to the Decisions specified in their Referral, namely Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the municipality of Prizren *"quarantine zone"*; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory"* of the municipalities of Prizren, Dragash, and Istog, respectively, whether they also challenge the thirty-five (35) other Decisions of the Ministry of Health of 14 April 2020 *"on preventing, fighting and eliminating infectious disease COVID-19",* as they had referred to the latter in the content and reasoning of the relevant Referral. More precisely, the Court in its letter to the Applicants stated, *inter alia*, as follows:

> *"In your Referral, you have requested the Court to: "Assess the issue of compatibility of Decisions of the Minister of the Ministry of Health of the Government of the Republic of Kosovo: Decision No. 238/IV/2020, dated 14.04.2020; Decision No. 229/IV/2020, dated 14.04.2020; Decision No. 214/IV/2020, dated 12.04.2020; Decision No. 239/IV/2020, dated 14.04.2020 with the Constitution of the Republic of Kosovo. [...]*
> *However, in the reasoning and explanations given in the content of your Referral, you did not refer only to the four (4) above-*

mentioned decisions issued by the caretaker Minister of Health, Mr. Arben Vitia, but you also referred to other decisions issued by this Ministry of Health, namely all thirty-eight (38) decisions issued by this Ministry".

16. Within the deadline set by the Court for submission of the above-mentioned clarifications, namely until 10:00 hrs of 20 April 2020, the Applicants did not submit any clarification to the Court despite the fact that they received the letter of the Court, through electronic communication, in a regular manner in the e-mail selected by them.

17. On 20 April 2020, the Court informed, through electronic communication, the Applicants, to the e-mail address of the representative selected by them, that no response had been received from them within the deadline set by the Court. Consequently, the Court notified the Applicants that "*the proceedings for the review of Case KO61/20 will continue on the basis of existing documentation*."

18. On the same date, on 20 April 2020, the Court notified, through electronic communication, about the registration of the Referral: (i) The President of the Republic of Kosovo, His Excellency, Mr. Hashim Thaçi (hereinafter: the President); (ii) The President of the Assembly, Mrs. Vjosa Osmani-Sadriu (hereinafter: the President of the Assembly) with the request to distribute a copy of the Referral to all deputies of the Assembly (iii) The caretaker Prime Minister, Mr. Albin Kurti (hereinafter: the Prime Minister); (iv) The caretaker Minister of Health: and (v) the Ombudsperson, Mr. Hilmi Jashari. The Court also notified all the above mentioned parties that the Applicants did not respond to the request of the Court for additional clarification and sent them a copy of the original Referral submitted by the Applicants and a copy of all documents submitted up to that moment.

19. In the letter sent to the President of the Assembly, in addition to the invitation to submit her comments, comments of the deputies of the Assembly or those of the Parliamentary Committees regarding Case KO61/20, the Court also sent a specific request as follows: "*Honorable President of the Assembly, lastly, you are kindly asked to notify the Court regarding all steps taken by the Assembly of the Republic of Kosovo following the publication of Judgment KO54/20 of 31 March 2020. Please submit to the Court any relevant information or document in this regard.*"

20. Whereas, in the notification letter sent to the Minister of Health, in addition to the invitation to submit his comments regarding Case KO61/20, the Court also sent a specific request as follows: "*Dear*

Minister, lastly, you are kindly asked to submit to the Court the recommendations of the NIPHK on the basis of which the challenged decisions have been issued."

21. By these letters, the Court invited the interested parties, mentioned above, to submit to the Court their comments, if any, regarding the request for imposition of interim measure and for the merits of the Referral. In relation to the possibility of submitting comments regarding the imposition of interim measure, the Court set for all the above mentioned parties the deadline until 16:00 hrs of 21 April 2020. While for the submission of comments regarding the merits of the Referral, the Court set the deadline until 16:00 hrs of 23 April 2020.

22. After the Court notified all interested parties in this case about the registration of the Referral, the representative of the Applicants sent an e-mail to the e-mail address of the Court whereby she stated that, "*Since your request has not been received in my mail and we have not been informed about the existence of the request until now, we kindly ask you to have the understanding and wait for our response until tomorrow at 10:00hrs.*"

23. After receiving this response after the set deadline, the Court once again reaffirmed the fact that the letter was sent to the e-mail address selected by the representative of the Applicants herself and confirmed the fact that the letter in question was sent in a regular manner and finally replied to the representative of the Applicants by notifying her that the deadline for responding to the letter of the Court dated 19 April 2020 has passed, and all interested parties have already been notified about their referral and all the documents of the Court up to that moment, and consequently the extension of the deadline is not possible.

24. On the same date, on 20 April 2020, the representative of the Applicants responded to the electronic communication of the Court, stating, *inter alia*, as follows: "*Anyway, as stated in the Referral that we have submitted, we stand behind four challenged decisions in the Referral and the constitutional review that we have requested for them. And we consider that they sufficiently clarify the purpose of the submitted Referral.*"

25. Within the deadline set for the submission of comments in relation to the interim measure, the Court received comments only from the Prime Minister.

26. Whereas, within the deadline set for submission of comments in relation to merits of the Referral, the Court received comments only from the Parliamentary Group of VETËVENDOSJE! Movement; meanwhile, the Ombudsperson submitted an Opinion regarding Case KO61/20 together with few additional documents for consideration of the Court.

27. Within the set deadline, the Court (i) did not receive the response requested from the President of the Assembly, regarding the steps taken by the Assembly after the publication of Judgment KO54/20; and (ii) did not receive the response requested from the Minister of Health, regarding the submission of the recommendations of the National Institute of the Public Health of Kosovo (hereinafter: the NIPHK), based on which the challenged Decisions have been taken.

28. On 23 April 2020 the Court received from the Prime Minister, on behalf of the Government, a letter addressed to the President of the Court and the Judges of the Court, titled as: "*Submission regarding the non-observance of the legal deadline and the Rules of Procedure of the Constitutional Court by the Constitutional Court in Case No. KO61/20*". The content of this letter is as follows:

> *"The Government of the Republic of Kosovo has once again carefully reviewed the material sent by the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) and through this submission expresses its concerns regarding the violation of legal provisions concerning the deadlines stipulated by the lawmaker, deadlines that cannot be exceeded by the Court. In addition to this violation, after a careful review of the case law of the Constitutional Court relating to the application of Rule 35 (5) of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure), the Government notes that the Court has avoided the procedure which it should have followed in case No. KO61/20.*
> *These two legal violations of essential importance in the constitutional court proceedings are justified as follows:*
> *The practice of the Constitutional Court of the Republic of Kosovo reveals the fact that the refusal*
> *or supplement the referral submitted to the Constitutional Court is considered as a reason to summarily reject the referral, because the party has not fulfilled the procedural criteria for further review.*
> *For this reason, in all cases where the party has not clarified, specified or supplemented the referral, the Court has summarily rejected the referral pursuant to Rule 35 paragraph 5 and has not even notified the authority whose decision is challenged. For us,*

the refusal to implement the rules established by the Constitutional Court itself in the circumstances of the present case is a serious concern regarding the professionalism and impartiality of the Court.

The Court has specified this manner of proceeding in the Rules of Procedure, because no answer can be sought from the other party, when the Court has no subject of proceedings at all. We cannot behave in the present case, as the Applicants have built a proper claim.
To confirm our claim, please see the decisions of the Constitutional Court in cases No. KI72/19, No.KI89/18, No.KI121/18, No. 74/18, No. 04/18, No. 89/17, No. KI130/17, No 48/17, No. KI109/16, No. 71/16, No.KI94/15, which the Court has summarily rejected, without notifying any public authority, the referrals which did not specify what act of the public authority is being challenged and subsequently did not respond to the Court to supplement the referral. We are aware that we are speaking about an Individual Referral, but Rule 35.5 does not constitute an exception even in the case of referrals addressed by the constitutional bodies.
Secondly, the lawmaker in Article 22 paragraph 2 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo explicitly stipulates that the opposing party in the procedure has 45 days to submit to the Court the response to the referral.
In your notification No. KK79/20 dated 20 April 2020, contrary to the legal deadline, namely the deadline set by the law which must not and cannot be violated by the Court, you have requested from us to submit our comments regarding the "merits of the referral", at latest on 23 April 2020 at 16:00hrs.
In this regard, the Government notes that we are talking about a violation of the essential provisions regarding the procedure and deadlines to be followed by and in the Constitutional Court. Hence, these clear violations of legal provisions and putting pressure on the Government by unlawful notifications, is unacceptable.
The Government of the Republic of Kosovo with all its capacity is committed to the fight against COVID-19 infection and expects the Court, similar to the institutions equivalent to it in Western countries, to show special care for the life and health of citizens.
Therefore, the Government, through this submission, informs the Court that it will send its comments regarding not only the merits, but also the admissibility of the referral, within the legal deadline. It also requests the Court not to privilege Applicants in relation to other citizens of the Republic of Kosovo whose

referrals have been summarily rejected for the same shortcomings as of the Applicants.
The Government will carefully review the legal violations so far and, depending on their legal qualification, will take the necessary actions based on the legislation in force."

29. On 24 April 2020, the Court notified: (i) the Applicants; (ii) the President; (iii) The President of the Assembly, with the request that a copy of the Referral be distributed to all deputies of the Assembly; (iv) The Prime Minister; (v) The Minister of Health; and (vi) The Ombudsperson, about (i) the comments received by the Prime Minister regarding the request for imposition of an interim measure; (ii) the comments received by the Parliamentary Group of the VETËVENDOSJE! Movement regarding the merits of the Referral; (iii) the Opinion received by the Ombudsperson regarding the merits of the Referral and the additional documents submitted by him; (iv) additional comments received from the Applicants regarding the challenged Decisions in case KO61/20; (v) the submission submitted by the Prime Minister addressed to the President and all judges of the Constitutional Court entitled "*Submission regarding non-observance of the legal deadline and the Rules of Procedure of the Constitutional Court by the Constitutional Court in case no. KO61/20"*; (vi) the fact that the Court did not receive the answers requested from the President of the Assembly, regarding the steps taken by the Assembly after the publication of the Judgment KO54/20; and (vii) the fact that the Court has not received the answers requested from the Minister of Health, regarding the recommendations of the NIPHK on the basis of which the challenged Decisions were issued.

30. The Court, as it did in Judgment KO54/20, taking into account the situation created as a result of the COVID-19 pandemic and the constitutional issue that the case entails, and which, in the Court's assessment, "*requires expedited handling*" only notified the interested parties about the comments/documents received and sent them a copy, for their information. The Court considered that the comments/documents received were sufficient to decide on the admissibility and merits of the Referral in question, and there is no ambiguity which would need to be addressed through additional questions or comments.

31. On 1 May 2020, in the session held via electronic means, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

32. On the same date, the Court voted unanimously, and decided that: (i) Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health *"on preventing, fighting and eliminating infectious disease COVID-19"* in the municipality of Prizren (points I, II, III, IV, VI, VII and VIII); and (ii) Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health*, "on preventing, fighting and eliminating infectious disease COVID-19"* in the municipalities of Dragash and Istog (points I, II, III, V, VI and VII), **are in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

33. On the same date, the Court by majority of votes, decided that: (i) point V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health *"on preventing, fighting and eliminating infectious disease COVID-19"* in the municipality of Prizren; and (ii) point IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health*, "on preventing, fighting and eliminating infectious disease COVID-19"* in the municipalities of Dragash and Istog, where the administrative offences and the relevant sanctions are determined, **are not in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

34. The Court, also on the same date, by majority of votes, decided that Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, on the declaration of the municipality of Prizren a "*quarantine zone*", **is not in compliance** with Articles 35 and 55 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. Judge Bekim Sejdiu voted against this finding, and his dissenting opinion will be published together with this Judgment.

35. The Court also decided that the request for interim measure remained without subject of review after the case was decided on merits.

Summary of facts

36. On 15 March 2020, the Government issued the Decision [No. 01/11] for declaration of the "*public health emergency*". In point I of this Decision, the request of the Ministry of Health for the Government to declare "*public health emergency*" was approved. In point II, the Institutions of the Government were obliged to act in accordance with the national response plan and to activate the emergency support function 8 (ESF8 public health and medical services). In point III, the Ministry of Health was obliged to manage the declared situation. In

point IV, it was emphasized that the Decision in question of the Government, signed by the Prime Minister, shall enter into force immediately, namely on 15 March 2020.

37. On 23 March 2020, the Government issued the Decision [No. 1/15], by which approved the taking the measures of a number of restricting measures for the prevention and control of the spread of COVID-19 pandemics, at the level of the Republic of Kosovo [*Court's Note*: this Decision was dealt with in detail in Judgment KO54/20].

38. On 24 March 2020, the President of the Republic of Kosovo submitted Referral KO54/20 to the Court, whereby he requested constitutional review of the above-mentioned Decision of the Government.

39. On 31 March 2020, the Court by Judgment KO54/20 decided that the above-mentioned Decision of the Government, namely [No. 01/15] of 23 March 2020, was not compatible with Article 55 [Limitations on Fundamental Rights and Freedom] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] of the Constitution and equivalent articles of the ECHR, namely Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), and 2 (Freedom of movement) of Protocol No. 4 of the ECHR. (See the operative part of Judgment KO54/20, cited above, as well as the conclusions of the Court for that case, paragraphs 310-325 thereof).

40. On 6 April 2020, the Court published Judgment KO54/20 and sent it to all interested parties, while the operative part of the Judgment and the conclusions of the Court had already been published on 31 March 2020.

41. On 8 April 2020, the caretaker Government (hereinafter: the Government), issued the Decision [No. 01/24] whereby the Ministry of Health was authorized to issue the challenged Decisions. Specifically, the Decision of the Government signed by the Prime Minister, states:

> *"1. The Minister of the Ministry of Health is authorized to issue decisions in order to prevent and fight the spread of COVID-19 disease, pursuant to the provisions of the Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases.*
> *2. The Minister of the Ministry of Health upon recommendations of the relevant professional units and in consultation with the respective municipalities, will determine the schedule of movement / prohibition of movement of citizens*

and vehicles, by having the opportunity to make exceptions to the schedules of limitations set forth in point 1.1 of the Decision No. 02/17 dated 27.03.2020 of the Government of the Republic of Kosovo.
3. Institutions of the Government of the Republic of Kosovo shall be obliged to take all necessary actions for the implementation of this Decision.
4. The decision shall enter into force on the day of signature."

Reasoning
In order to rationalize the time in the process of rendering the decisions, in the context of preventing and fighting the spread of the epidemic of disease COVID-19, it was decided as in the enacting clause of this decision".

42. On 12 April 2020, the Ministry of Health issued a Decision [No. 214/IV/2020] whereby the Municipality of Prizren was declared a "*quarantine zone*". More specifically, this Decision provides as follows:

I. The Municipality of Prizren is declared a quarantine zone, as the residents of this Municipality are suspected to have had direct contact with persons infected with corona virus COVID 19;
II. The village Skorobisht in the Municipality of Prizren is declared Hotbed of Transmission of the Infection;
III. Entry into and exit from the Municipality of Prizren is prohibited;
IV. All residents of Prizren are obliged [to] comply with the measures in accordance with the instructions of the National Institute of Public Health of Kosovo (NIPHK);
V. The decision shall enter into force on the day of signing and it is valid until another decision."

43. On 14 April 2020, the Ministry of Health issued thirty eight (38) Decisions *"on preventing, fighting and eliminating infectious disease COVID-19",* three of which, as explained above, are challenged before the Court, Decisions [No. 229/IV/2020], [No. 238/IV/2020] and [No. 239/IV/2020] for the Municipality of Prizren, Dragash and Istog, respectively.

44. The three abovementioned Decisions, [No. 229/IV/2020], [No. 238/IV/2020] and [No. 239/IV/2020], contain the same enacting clause and reasoning. Having said that, the Court clarifies that the Decision [No. 229/IV/2020] for the municipality of Prizren is identical in content with the Decisions [No. 238/IV/2020] and [No.

239/IV/2020] for the municipalities of Dragash and Istog, with the exception of an additional point, namely point II, which is applicable only to Prizren. Consequently, (i) the points I of the three challenged Decisions are identical; (ii) point II of Prizren is applicable only to Prizren; (iii) points II, III, IV, V, VI and VII are identical for the municipalities of Dragash and Istog, and the same correspond to points III, IV, V, VI, VII and VIII of the Decision for the municipality of Prizren.

45. In the following, the Court will present the content of the Decisions [No. 238/IV/2020] and [No. 239/IV/2020] for the municipalities of Dragash and Istog, respectively:

I. From 15 April 2020 at 6:00 hrs., movement of natural persons outside their houses/apartments in the Municipality of Dragash [Istog] is prohibited, except for the following cases:

(a) For natural persons over the age of 16, movement is allowed for supply with necessary goods (food and medicine for people and animals/poultry, as well as hygienic products) and to carry out financial duties and needs (payments, banking works), only for 1 hour and a half per day, according to the weekly schedule set based on the penultimate digit of their personal number. The schedule is attached to this decision (see Annex 1) and will be subject to rotation twice a week. For foreign nationals who do not have a personal number of the Republic of Kosovo, the allowed time of movement is determined based on the penultimate digit of the passport number or identity card of the foreign state.

(b) During the movement of natural persons, no companionship is allowed, except in three cases:

(1) disabled persons, who may be accompanied only by a member of the same household, or by a medical/health assistant.

(2) persons under the age of 16, provided that they are accompanied by a member of the same household.

(3) pets, provided that they are kept tied at all times during the allowed time of movement.

(c) During the 90-minute free movement time based on personal number, natural persons may leave their apartments/houses to perform physical exercises. Except for the exceptions in point (b), no companionship is allowed while performing physical exercises.

(d) Due to the high risk of COVID-19 to the elderly, it is recommended that persons over the age of 65 not leave the

house/apartment, except in cases of emergency and when necessary.

(e) With an identification document from TAK EDI and only to carry out the needs of economic operators or relevant institutions, it is allowed:

(1) free movement for economic operators and institutions provided in the list attached as Annex 2 and 3 to this decision.

(2) free transportation of goods and services to ensure the operation of the supply chain – as a process involving raw material operations in manufacturing, processing and service up to the transportation of products, distribution and sale to the final consumer – for activities allowed under Annex 2 of this decision.

(f) Free movement is allowed for institutions under the list attached as Annex 3 of this decision, only to perform official duties.

(g) In urgent health cases, it is allowed to leave the house/apartment to seek medical treatment in a health institution.

(h) Movement is allowed for natural persons in cases where leaving the house/apartment is necessary to take care of one or more sick persons, or for one or more disabled persons, only if the sick persons or disabled persons are not able to take care of themselves.

(i) Prohibition of movement of natural persons outside their houses/apartments shall not apply in cases of victims of domestic violence. Victims of domestic violence are allowed to leave their houses/apartments to seek shelter in an alternative location.

(j) In cases of death, leaving the house/apartment is allowed to attend the funeral, but only for close family members of the deceased.

(k) It is strictly forbidden to leave houses/apartments for any reason other than the reasons mentioned above, including social gatherings, family visits, etc.

II. From 15 April 2020 at 6:00 hrs., movement of vehicles in the Municipality of [Prizren /Dragash/Istog] is prohibited, except:

(a) With a confirmation document by TAK EDI system and only to carry out the needs of economic operators, it is allowed:

(1) movement of vehicles for economic operators and institutions provided in the list attached as Annex 2 and 3 of this decision.

(2) movement of workers, only to go to work and return from work, according to the schedule of the respective economic operator. The worker has the right to use his/her personal vehicle as well.

(3) free transportation of goods and services to ensure the operation of the supply chain – as a process involving raw material operations in manufacturing, processing and service up to the transportation of products, distribution and sale to the final consumer – for activities allowed under Annex 2 of this decision.

(b) Schedule of movement for farmers and farm workers is from 06:00 - 20:00. For farmers, at the time of movement is required: (i) Farmer Registration Certificate, (ii) Annex 1 of the Certificate - Farmer's Notes and (iii) Identification Card.

(c) Farm workers will be provided with a confirmation document from the MAFRD only to carry out the work needs of the respective farm.

(d) With a special permission of movement and only to carry out the needs of state institutions, movement of vehicles for the essential staff of these institutions is allowed.

(e) Movement with vehicles is allowed for persons who have the nearest market / pharmacy / bank / payment point more than 2km away. In these cases, it is not allowed to use the vehicle to travel to any market / pharmacy / bank / payment point other than the nearest one.

(f) Only to carry out official duties, movement of vehicles is allowed for the institutions in the list attached as Annex 3 of this decision.

(g) Movement permits in the cases specified above under Annex 3 are issued by the MIAPA.

(h) Movement of vehicles is allowed for disabled persons when the use of vehicles is necessary.

(i) It is allowed to use the vehicle to travel to a health institution for treatment.

(j) In cases of death, the use of vehicle to attend the funeral is allowed, but only for close family members of the deceased.

(k) Except for the reason specified in point I, no more than two persons are allowed in one vehicle.

(l) Exceptionally, media teams working in the field are allowed to have up to 3 persons in the vehicle provided that passengers bear special FFP2 mask plus gloves.

III. During the allowed movement, according to the exceptions provided in points I and II above, natural persons are obliged to:

(a) keep only the mouth and nose covered, by a mask, scarf, or other covering;

(b) at all times, maintain a distance of two meters from other persons.

IV. Failure to comply with the measures set out in this decision is considered, in accordance with the law, an administrative offense and punishable by a fine of 1,000 Euros to 2,000 Euros for natural persons and from 3,000 Euros to 8,000 Euros for legal persons, while the responsible person of the legal person shall be punished from 500 Euros to 1,500 Euros. In accordance with the law, fines are imposed by the competent Inspectorate.

V. The decision shall enter into force on the day of signing and it is valid until 4 May 2020. Upon the entry into force of this Decision, any previous provision that is inconsistent with the provisions of this Decision shall be repealed.

VI. This decision will be reviewed no later than 30 April 2020, in consultation with the National Institute of Public Health, experts and other ministries of the line, to assess the effectiveness and necessity of the measures prescribed, and to decide whether to continue or not with the respective measures.

VII. In addition to point V and VI, the Minister of Health will re-analyze the epidemiological situation every day and in relation to each of the above points and, after prior consultation, may amend, supplement or repeal the prescribed measures."

46. As explained above, the content of the Decisions [No. 238/IV/2020] and [No. 239/IV/2020] for the municipalities of Dragash and Istog, is identical with points I, III, IV, V, VI, VII and VIII, of the Decision [No. 229/IV/2020] for the municipality of Prizren. Having said that, the latter also contains point II, which contains the following:

II. From 15 April 2020 at 6:00 hrs., the entry-exit from the Municipality of Prizren is prohibited, except in these cases:

- *(a) With a confirmation document by TAK EDI system and only to carry out the transport of goods and services to ensure the operation of the supply chain - as a process involving raw material in manufacturing, processing and service delivery to the transport of products, distribution and sale to the final consumer - entry and exit are allowed for permitted activities. according to Annex 2 of this decision.*
- *(b) With a confirmation document by TAK EDI and only to carry out the transport of goods and services, entry and exit are also allowed to workers employed by economic operators,*

except for areas declared by the Ministry of Health as hotbed of the spread of infection.

(c) Entry and exit of farmers and farm workers is allowed, except for areas declared by the Ministry of Health as hotbed of the spread of infection. For farmers, for entry-exit is required: (i) Farmer Registration Certificate, (ii) Annex 1 of the Certificate - Farmer's Notes and (iii) Identification Card.

(d) Only to carry out the work needs, entry and exit are allowed for the institutions in the attached list as Annex 3 of this decision.

(e) Movement permits in the cases specified above under Annex 3 are issued by the MIAPA.

(f) In urgent health cases, entry and exit are allowed to seek medical treatment in a health institution, but only if this treatment is not provided in the municipality where the person for whom treatment is requested is located.

47. Whereas, all three above-mentioned Decisions [No. 229/IV/2020], [No. 238/IV/2020] and [No. 239/IV/2020], respectively, contain the same reasoning which reads as follows:

"On 11.03.2020, approving the request of the Ministry of Health, the Government of the Republic of Kosovo issued Decision No. 01/07, whereby the first measures were taken to prevent and fight COVID-19 infection. Following the confirmation of the first cases of infected persons, in accordance with the recommendations of the NIPHK, the Ministry has requested from the Government to issue other decisions through which additional measures have been taken to prevent and fight COVID-19 disease.

On 23.03.2020, the Government of the Republic of Kosovo issued Decision no. 01/15 whereby the necessary measures have been taken to protect the life and health of citizens throughout the territory of the Republic of Kosovo.

On 31.03.2020, the Constitutional Court of the Republic has notified the public that after challenging Decision No. 01/15 of the Government by the President of the Republic of Kosovo, the Constitutional Court has granted the request of the President and has declared the challenged decision invalid. However, in the same decision, the Constitutional Court reiterated that the Ministry of Health continues to be authorized to issue decisions aiming at preventing and fighting COVID-19 disease, to the extend it is authorized by Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases and Law No. 04/L-125 on

Health. Based on Article 47.1 of the Law for Prevention and Fighting Against Infectious Diseases, "Ministry of Health is competent for application of this Law and approving the foreseen dispositions in it."

Based on Article 41.2 of Law No. 02/L-109 for Prevention and Fighting Against Infectious Diseases, to prevent entrance and spreading of infectious diseases throughout the country, the Ministry of Health is authorized for "Prohibition of movement in the infected or directly endangered regions". On 12.04.2020, the NIPHK proposed to the Ministry of Health to take the measures mentioned in the enacting clause of this decision for the Municipality of Prizren / Dragash / Istog because the NIPHK considers that the infection has spread in that municipality or it is considered directly endangered. In order for the Ministry of Health to fulfill its legal obligations for the protection of the life and health of the citizens, it approved the proposals of the NIPHK as in the enacting clause of this decision.

Therefore, in accordance with the factual and legal situation described in this reasoning, the Minister of Health decided as in the enacting clause.

Legal remedy:
The dissatisfied party may file an administrative conflict lawsuit with the Basic Court in Prishtina, Administrative Affairs Department, within 30 days after the publication of this decision."

48. On 17 April 2020, the Applicants challenged before the Constitutional Court the four (4) above-mentioned Decisions of the Ministry of Health, namely Decision [No. 214/IV/2020] of 12 April 2020 and Decisions [No. 229/IV/2020], [No.238/IV/2020] and [No. 239/IV/2020], of 14 April 2020, respectively.

Applicants' allegations

49. The Court recalls that the Applicants challenge the constitutionality of the challenged decisions, namely: (i) Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health – on declaring the municipality of Prizren a "*quarantine zone*"; (ii) Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Prizren*"; (iii) Decision [No. 238/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and*

eliminating infectious disease COVID-19 in the territory of the Municipality of Dragash"; and (iv) Decision [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Istog*". The content of all these Decisions is mentioned above under the heading of this Judgment: "Summary of facts".

50. In the context of the challenged Decisions, the Applicants also stated: "*We respectfully explain to the recipient of this referral, the Constitutional Court, that the decisions on prohibition of the movement of natural persons and vehicles, in each municipality separately, are not listed in the list of decisions challenged by the applicant only for practical purposes, because by legal nature, both in content and form are identical. The decisions specified and challenged in this referral are only dedicated to the municipalities of the Republic of Kosovo, one by one. See the link below: https://msh.rks-gov.net/vendimet-per-komunat-e-rrezikuara-dhe-per-komunat-e-karantinuara/."*

51. In the following, the Court will present the allegations of the Applicants regarding: (i) the admissibility of the Referral; (ii) the content/substance of the challenged Decisions; and (iii) imposition of the interim measure.

(i) As to the admissibility of the Referral

52. The Applicants emphasize that they submitted Referral KO61/20 based on Article 113.2 (1) of the Constitution. This article of the Constitution, the Applicants emphasize, explicitly gives the competence to at least thirty (30) deputies of the Assembly to raise issues in the Constitutional Court *"to assess the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government"*.

53. Regarding the specific competence of the deputies of the Assembly to raise issues of the constitutional review of decisions of a Ministry, the Applicants state that (i) based on Articles 92 [General Principles] and 96 [Ministries and Representation of Communities] of the Constitution, it is provided that "*The Government consists of the Prime Minister, deputy prime minister(s) and ministers"* and that "*Ministries and other executive bodies are established as necessary to perform functions within the powers of the Government*", and consequently, the Ministry is a part of the Government, which acts enter into the scope of "*Government regulations*". For the purposes of the same argument, namely that the Government consists in its

entirety of its Ministries, they also refer to Articles 3 (Composition of the Government of the Republic of Kosovo) and 8 (Minister) of Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries; and state that (ii) "*The challenged Decisions fall into the category of sub-legal acts of the Government, namely the regulations, and based on the case law of the Court "it should not focus only on the naming of an act but on its content and effects"*. In support of this argument, they refer to the case law of the Court, Judgment in case No. KO73/16, Applicant *The Ombudsperson*, Judgment of 16 November 2016), Constitutional review of the Administrative Circular no. 01/2016, issued by the Ministry of Public Administration of the Republic of Kosovo, on 21 January 2016 (hereinafter: Judgment KO73/16); Judgment in case no. KO12/18, Applicant Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decision No. 04/20 of the Government of the Republic of Kosovo, of 20 December 2017 (hereinafter: Judgment KO12/18); and Judgment KO54/20, cited above, and which in paragraphs 161-163, *inter alia*, states that: "*The purpose of this constitutional provision* [113.2 (1)] *is to give the constitutional opportunity to all parties to challenge each other's acts in order to guarantee the constitutionality of the respective decision-making of each constitutional institution, namely the Assembly, the President and the Government"*. In this context, they also allege that the referral encompasses issues of constitutional importance, taking into account the connection with the right of movement of citizens which has been restricted, allegedly, unconstitutionally by the challenged decisions.

54. The Applicants also state that *"the constitutional and legal conditions and requirements are met for the submission of this referral and consequently the Constitutional Court must interpret the constitutional provisions whenever an issue is addressed before it by the institutions mandated for referral*". In the present case, according to them, *"in order to protect the citizens of the Republic of Kosovo from the unfounded and unconstitutional restrictions of the Government, namely of the Ministry of Health, regarding the limitation of freedom of movement (which according to the Constitution can only be made by law), to accept for consideration on merits and within the foreseen deadlines to declare the challenged decisions of the Government incompatible with the Constitution in entirety, in order to avoid flagrant violations from the restriction of this right as soon as possible and to avoid as much as possible, the legal and other consequences of the limitation of fundamental freedoms, the protection of which, as the highest and final authority*

of the interpretation of the Constitution, the Constitutional Court to do as soon as possible".

(ii) As to the merits of the Referral

55. Regarding the content of the challenged Decisions, namely the merits of the Referral, the Applicants consider that the challenged Decisions are contrary to (i) Articles 35 and 55 of the Constitution; (ii) Judgment of the Court in case KO54/20; and (iii) Article 2 of Protocol No. 4 of the ECHR.

56. In this regard, the Applicants emphasize the fact that (i) the freedom of movement may be restricted only by law, and that through the challenged Decisions, the Ministry of Health has exceeded the legal powers set out in Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases (hereinafter: Law for Prevention and Fighting against Infectious Diseases), consequently, acting contrary to Article 35 and 55 of the Constitution and the above-mentioned Judgment. In support of this argument, the Applicants refer to paragraph 197 of Judgment KO54/20, which clarified the constitutional test contained in Article 55 of the Constitution, according to which an "*interference*" with fundamental rights and freedoms must be "*prescribed by law*", to pursue a "*legitimate aim*", to be "*proportionate*" and "*necessary in a democratic society*"; and that (ii) contrary to these principles, "*the fundamental rights and freedoms are restricted by sub-legal acts, namely administrative decisions, of an arbitrary nature of a government, namely of its minister*".

57. Also, the Applicants emphasize that despite the Judgment of the Court in case KO54/20, the issuance of decisions in thirty-eight (38) municipalities of Kosovo, restricting the freedom of movement in its entire territory, "*has achieved the same legal effect of the restrictions for all citizens without distinction, and for the entire territory of the Republic of Kosovo, in full non-compliance with Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases and the Judgment of this Court in case no. KO54/20, dated 06 April 2020*".

58. The Applicants also allege that (i) the Law for Prevention and Fighting against Infectious Diseases, which has entered into force before the Constitution, does not reflect the basic principles of the latter; (ii) the same Law, in its Articles 41 and 44, does not stipulate any kind of authorization "*to prohibit movement or circulation at the general state or municipal level, without exception and with the same treatment for all municipalities, regardless of their degree of*

infection; nor do they "*authorize the Ministry to issue decisions that have a general effect on all citizens without distinction, and consequently the relevant decisions have produced the same legal effects, uniform for all citizens of the country*"; and (iii) Law No. 04/L-125 on Health (hereinafter: the Law on Health) has distinguished between "*State of Emergency*" and "*Emergencies*", specifying "*explicitly"* the competencies of the Ministry of Health in case of the former, and limiting the powers of the same within the applicable law.

59. More precisely and regarding the challenged Decisions, the Applicants specify that (i) The challenged Decisions have not dealt with the respective municipalities based on the specific particularities of these municipalities regarding the infected and the suspected or endangered with COVID-19, but have treated all municipalities of the Republic of Kosovo in the same way; (ii) the municipality of Dragash, which is subject to the same restrictions as the rest of the territory of Kosovo, until the moment of issuance of the challenged decision regarding this municipality, did not have any COVID-19 infection; (ii) the municipality of Prizren was subject to the same restrictions through the challenged Decision of 14 April 2020, despite the fact that two days earlier, namely on 12 April 2020, the latter by the Decision [No. 214/IV/2020] was also declared a "*quarantine zone*"; while (iii) the municipality of Istog was subjected to the same measures, by the challenged Decision, despite the fact that in this municipality, until the date of issuance of the challenged Decision, only one case was registered with COVID-19. The Applicants consequently emphasize that these three municipalities with different specifics have been treated, "*completely the same by the decisions of the Ministry, dated 14 April 2020, as 35 other municipalities of the Republic of Kosovo have been treated without any distinction*". The Applicants also state that the challenged Decisions, and those in thirty-five (35) other municipalities, "*contain an incomplete, unprofessional reasoning, not based on the factual circumstances of the case*", while for the placement of the quarantine in Prizren, "*it does not contain the reasoning at all, as an essential constitutive element of the administrative act*", while the lack of elements of the administrative act is the basis for its nullity (invalidity). Regarding the challenged Decision related to the determination of the municipality of Prizren a "*quarantine zone*", the Applicants emphasize the fact that based on the Law for Prevention and Fighting against Infectious Diseases, the quarantine can be imposed only "*on persons for whom it is proven or suspected that they have been in direct contact with sick or suspicious persons with the disease, but not on a city as a whole, as the challenged Decision declares the Municipality of Prizren a quarantine zone*".

(iii) As to the interim measure

60. Referring to paragraph 2 of Article 116 [Legal Effects of Decisions] of the Constitution, Article 27 of the Law and Rule 54 of the Rules of Procedure, the Applicants requested the Court *"to impose as an interim measure the immediate suspension of the implementation of challenged decisions until the completion of the constitutional review procedure and the resolution of the case on merits".*

61. In this regard, the Applicants firstly emphasize that they have "*shown* a *prima facie* case*",* while secondly that the interim measure is necessary to avoid "*irreparable damage"* because (i) *"its absence could cause irreversible and irreparable damage to the violation of the constitutional guarantees of fundamental rights and the principles of democratic governance"* and (ii) "*the immediate non-suspension of the challenged decisions by the Court would also result in the loss of jobs of private sector employees, who, for reasons unrelated to them as employees, will not be able to obtain the necessary permits for movement, as a result of the impossibility of obtaining the necessary documents from the state institutions".* Thirdly, the Applicants also state that the sought interim measure is *"in the public interest"* because (i) through the implementation or not of the challenged Decisions *"depends the creation, change or termination of the right in the implementation of the exercise and effective realization of fundamental human rights and freedoms in the Republic of Kosovo";* (ii) *this Government, was intentionally abused by the preliminary decision of this Court in case KO54/20, by not implementing the latter, and proving that through these decisions, is created the conviction of the implementation of decision of this court, deliberately avoiding the valid findings and conclusions of this judgment, and erroneously considering that this judgment only requires that by the decisions for each municipality, which can be issued by the ministry, can be made restrictions on rights";* and (iii) such an approach, according to the Applicants *"disregarding correct and efficient implementation of the judgment of this court, seriously affects the great public trust in the work of this Court, and the principles of the rule of law, and moreover the legal effect of the decisions of this Court, which decisions, while also binding under Article 116 of the Constitution, are respected almost in their entirety and by all, therefore, the violation of the institutional standard to respect the decisions of the Constitutional Court should not be allowed, and not to distort their effects, much less to not implement them".*

Comments submitted regarding the request for interim measure

62. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments regarding the request for imposition of interim measure in case KO61/20 until 16:00 of 21 April 2020. The Court, within the set deadline, received comments only from the Prime Minister, on behalf of the Government. The comments received will be presented below.

Comments submitted by the Prime Minister, on behalf of the Government

63. With respect to the request for an interim measure, the Prime Minister states that the Rules of Procedure provides for three necessary requirements that the Applicants must meet in order for their request for an interim measure to be approved by the Review Panel. Citing paragraphs (a), (b) and (c) of Rule 57 (4) of the Rules of Procedure, the Government states that none of these three conditions have been met in the circumstances of the present case.

64. With regard to the *prima facie* argumentation of the Referral, the Prime Minister alleges that the Applicants' Referral is inadmissible because (i) under Article 113.2 (1) of the Constitution, the Assembly has the right to challenge *"decrees of the Prime Minister (decisions issued by him contrary to his constitutional powers as an individual body) or Government regulations (regulations approved by the Government as a collegial body)"* and (ii) in accordance with Articles 29 and 30 of the Law on the Constitutional Court and Rule 35 (5) of the Rules of Procedure, the Applicants' Referral "*is to be summarily rejected*".

65. With regard to "*unrecoverable damage*", the Government, by specifically citing item (b) of Rule 57 (4) of the Rules of Procedure, states that the Applicants have not raised *"any claim regarding the unrecoverable damage which they - as a party to this proceeding - would have suffered*". Referring to the case of the Court "*KI56/09, Decision of 15 December 2009*", the Prime Minister emphasizes that it is the obligation of the party to the proceedings not only to raise as an allegation for suffering unrecoverable damage, but also to sufficiently justify suffering of such a damage. Furthermore, in support of clarification of the concept "*unrecoverable damage*", through the same letter were cited also some cases of the European Court of Human Rights (hereinafter: the ECtHR), as follows: (i) *Abdollahi v. Turkey*, Application no. 23980/08; (ii) *F.H. v. Sweden*, Application no. 32621/06; (iii) *Abraham Lunguli v. Sweden*,

Application no. 33692/02; (iv) *Soering v. the United Kingdom*, Application no. 14038/88; (v) *Ismoilov and others v. Russia*, Application no. 2947/06; (vi) *Otham (Abu Qatada) v. the United Kingdom*, Application no. 8139/09; *Kotsaftis v. Greece*, Application no. 39780/06; (vii) *Evans v. the United Kingdom*, Application no. 6339/05; (viii) *Ocalan v. Turkey*, Application no. 46221/99; and (ix) *X. v. Croatia*, Application no. 11223/04).

66. With regard to the public interest, the Prime Minister considers that the Applicants *"have not justified the public interest, as a request for the imposition of interim measures with the suspension effect"* of the implementation of the challenged Decisions. Fundamental freedoms and rights, according to the allegation, are not created by the acts of the executive authority but they derive from the Constitution and, according to Article 22 of the Constitution, also the ECHR. Issues of public interest, without limiting to them, according to the letter, are considered public safety; public health; environmental protection; and ensuring the financial stability of the state. In this regard, the Government stated that the Applicants "*have no way of providing any argument as to whether, as a result of the enforcement of the challenged decision, public safety is endangered by internal unrest or external attacks; public health is endangered; the environment is damaged or the financial stability of the Republic of Kosovo is endangered"*.

67. At the end of their comments regarding the interim measure, the Prime Minister emphasized that the Rules of Procedure has clearly stipulated that items (a), (b) and (c) of Rule 57 (4) should be met cumulatively. Consequently, the Applicants, the Prime Minister emphasizes, must cumulatively build the *prima facie* case; to prove that the execution of the decision causes unrecoverable damage; and, to prove that the interim measure is in the public interest.

Comments submitted regarding the merits of the Referral

68. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties to submit their comments regarding the merits of the Referral by 23 April 2020 at 16:00 hrs. The Prime Minister, the President, the Minister of Health and the Assembly, did not submit comments to the Court. Comments were submitted only by the Parliamentary Group of VETËVENDOSJE! Movement and the Ombudsperson. The Court will present all the received comments in the following.

Comments submitted by the Parliamentary Group of VETËVENDOSJE! Movement

(i) Regarding the admissibility of the Referral

69. The Parliamentary Group of VETËVENDOSJE! Movement states that the Applicants requested the constitutional review of the four (4) challenged Decisions of the Ministry of Health.

70. In the procedural aspect, the Parliamentary Group of VETËVENDOSJE! Movement states that (i) as the Applicants have not clarified, specified and supplemented the Referral, the Court must summarily reject the Referral based on Rule 35 (5) of the Rules of Procedure; and (ii) the challenged Decisions are not "*the regulations of the Government"* within the meaning of Article 113.2 (1) of the Constitution, and therefore cannot be considered by the Court.

(ii) Regarding the merits of the Referral

71. Regarding the merits of the Referral, and referring to Judgment KO54/20, namely its paragraphs 189-198, in which the Court clarified the structure and test entailed in Article 55 of the Constitution, the Parliamentary Group of VETËVENDOSJE! Movement states that the challenged Decisions (i) are *"prescribed by law",* because they were issued based on Law for the Prevention and Fighting against Infectious Diseases, namely on its Articles 41 and 44, by which, the movement may be prohibited *"in certain areas, threatened by COVID-19, based on the reporting of cases of the disease in these municipalities*" and which are determined by the recommendations of the NIPHK; (ii) pursue a "*legitimate aim",* namely "*in order to protect public health threatened by the appearance of COVID-19"* (iii) are necessary and proportionate "*in order to protect public health and prevent the expansive growth of infected cases, which has proven to be a bitter reality from the experience of the countries of the region, western and overseas,"* also emphasizing that *"the measures taken will be reviewed after a period of three (3) weeks, which is also reflected in the decisions of the Ministry of Health*" and that *"such revision does not allow arbitrariness in the action of the relevant institutions and guarantees the abrogation of these measures at the moment of giving the first signals of reduce of the number of infected cases*"; and finally (iv) stating, *inter alia,* that *"the need of the society for the imposition of such measures is necessary, in order to maintain the health and thus the continuation of the development of the society".*

72. The Parliamentary Group of VETËVENDOSJE! Movement also focuses on (i) the role of the Sanitary Inspectorate of Kosovo in *"imposing fines for sanitary administrative offenses";* and on (ii) linking the restrictions set out in the challenged Decisions regarding the right to life guaranteed by Article 25 [Right to Life] of the Constitution.

73. Regarding the first issue, the Parliamentary Group of the VETËVENDOSJE Movement! states that based on item (m) of Article 31 of Law No. 2003/22 on the Sanitary Inspectorate of Kosovo (hereinafter: Law on the Sanitary Inspectorate of Kosovo) *"not applying, in full or partially, the measures and/or decisions of the Sanitary Inspectorate of Kosovo*" is a sanitary administrative offence and is pronounced based on the decision/s issued by the Sanitary Inspectorate of Kosovo. Whereas, regarding the second issue, they stated that "*the health protection necessarily leads to Article 25 of the Constitution which guarantees the right to life*". According to the allegation, "*the ECtHR Guide to Article 2 of the ECHR explains that the ECtHR "has emphasized in many cases that the right to life is threatened even when the person to whom the violation of this right has been endangered has not died*"; and that consequently, "*the repeal of the measures taken by the decisions of the Ministry of Health, namely their non-respect and the permission of movement or unconditional movement, "threatens violation of the right to life.*"

Opinion submitted by the Ombudsperson Institution

74. The Ombudsperson Institution submitted an Opinion to the Court in which it emphasized, *inter alia,* that (i) the circumstances created by the COVID-19 pandemic and the danger it poses to the lives and health of citizens*, "require a balance between the right to life, which cannot be limited or derogated from under any circumstances, and other rights for which the Constitution and international human rights instruments allow limitations, under certain circumstances";* and (ii) the COVID-19 pandemic "*falls within the domain of definitions of the threat to the health and life of citizens and that the state is obliged to take measures to protect their lives and health".*

75. The Ombudsperson highlights the fact that *"it is evident that there is a need to take measures to prevent and fight COVID-19";* and such a thing was confirmed by the Court in paragraph 310 of Judgment KO54/20, in which it stated that "*it is not its role to assess whether the measures taken by the Government to prevent and fight the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not*

been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level".

76. In addition, referring to Judgment KO54/20, the Ombudsperson states that the Court (i) "*examined in detail the Law for Prevention and Fighting against Infectious Diseases and the Law on Health, in terms of the competencies of the Ministry of Health and in item 325 of the Judgment, found that the latter continues to be authorized to issue decisions with an aim of preventing and fighting the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health";* (ii) *"emphasized that until the date of repeal of the challenged Decision, the responsible institutions of the Republic of Kosovo, in the first place the Assembly, must take actions, in accordance with the Constitution and this Judgment, which are considered as appropriate and adequate to continue preventing and fighting pandemics COVID-19;* (iii) *"there is a positive obligation of the state to take preventive measures in circumstances of emergency situations that endanger the health of citizens, as well as to take measures to treat and control epidemics, endemics and other diseases*"; and (iv) referring to "*Syracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights",* the Ombudsperson states that *"public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population".*

77. In this regard, the Ombudsperson considers that (i) the challenged Decisions are "*prescribed by law";* however emphasizing that (ii) *"it should only be assessed if the severity of the measures taken is proportionate to the aim to be achieved, always taking into account the recommendations of the institutions authorized by law to assess the sanitary and epidemiological situation in the country".* In this regard, the Ombudsperson refers to Information Document No. SG/Inf(2020)11 published by the Council of Europe on 7 April 2020, on respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis (hereinafter: Information Document of the Council of Europe), in relation to which, *inter alia,* highlights the fact that (i) "*executive authorities must be able to act quickly and efficiently*"; (ii) "*that such a thing may require the adoption of simpler decision-making procedures, as well as the facilitation of certain checks and balances*"; and (iii) "*parliaments,*

however, must keep the power to control executive action in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an ad hoc basis to modify or annul the decisions of the executive".

78. The Ombudsperson states that Judgment KO54/20 *"has remained unimplemented by the Assembly*", stating among other things that *"The Assembly should act in accordance with its constitutional powers, the Judgment of the Constitutional Court and the positions of the Information Document No. SG/Inf(2020)11 published by the Council of Europe on 7 April 2020 regarding the circumstances caused by COVID-19".* In this regard, the Ombudsperson highlights the recommendations of the aforementioned document, according to which *(i) "taking into account the rapid and unpredictable developments of this crisis, the need for relatively extensive legislative delegations may arise, but they should be formulated as narrowly as possible in these circumstances, in order to reduce any potential for abuse*"; as well as (ii) "*if the Parliament wants to authorize the government to deviate from special main legislation (or legislation passed under another special procedure), this must be done by a majority required to pass that legislation, or by following the same special procedure*".

79. Finally and also the Ombudsperson has provided, through some additional documents submitted to the Court, an overview of the statements of various organizations, mechanisms and actors in the field of human rights, regarding the limitations of rights and freedoms during the COVID-19 pandemic, including the declaration of (i) the Ombudsperson of Albania; (ii) the Ombudsperson of Bosnia and Herzegovina; (iii) the Ombudsperson of Croatia; (iv) the Danish Law Institute; (v) the German Institute for Human Rights; (vi) Northern Ireland Human Rights Commission; (vii) Ombudsperson of Portugal; (viii) Northern Ireland Human Rights Commission; (ix) Scottish Human Rights Commission; (x) National Center for Human Rights of Slovakia; (xi) Ombudsperson of Spain; (xii) Institution for Human Rights and Equality in Turkey; (xiii) President of the European Commission; (xiv) OSCE addressed to the OSCE Community; (xv) United Nations High Commissioner for Human Rights; (xvi) United Nations Human Rights Experts; (xvii) International Committee of Lawyers at the COVID-19 Symposium; (xvii) "Amnesty International" regarding the emergency situation; (xviii) Human Rights Watch recommendations; (xix) Position of the European Union Non-Governmental Organizations regarding the restriction of rights; (xx) Statement of the Council of Europe Commissioner for Human Rights;

and letters (xxi) of the Commission on Equality and Human Rights of Great Britain addressed to the Prime Minister; and (xxii) the Luxembourg Human Rights Consultative Commission addressed to the Prime Minister. All these documents, in essence and among other things, emphasize the importance of prompt treatment and taking measures to prevent COVID-19 pandemic, but at the same time, in the balance between protecting the lives of citizens and health and, on the other hand, the protection of citizens' freedom and individual needs.

Additional comments from the Applicants regarding the challenged Decisions in case KO61/20

80. As stated in the proceedings before the Court, the latter had given the opportunity to all interested parties, including the deputies of the Assembly, to submit their comments regarding the content or the merits of the Referral, by 23 April 2020, at 16:00hrs. The Applicants, in the capacity of deputies, have received the letter sent by the Court to the Assembly and decided to respond to that letter for submitting additional clarifications regarding the challenged Decisions.

81. In the additional comments submitted to the Court, the Applicants have reiterated that (i) they had not received the Court's request for clarifications submitted to them, in the e-mail address of their representative, on 19 April 2020. They emphasize that have never received that letter and that "*there was clearly a failure in the internet traffic*"; (ii) that *"as we have stated in the Referral, but also as I have reiterated in my last email, we the Applicants submitting the referral for constitutional review of compliance of the decisions of the Minister of Health (decision no. 238/I 2020, of 14.04.2020, decision no. 229/IV/2020, of 14.04.2020, decision no. 214/IV/2020 of 12.04.2020 and decision no. 239/IV/2020 of 14.04.2020 with the Constitution of the Republic of Kosovo), have never requested the constitutional review by the Constitutional Court of any decision or other act";* (iii) "*the proof of having specified only the four (4) Decisions mentioned on the first page of our Referral is also the clarification of our Referral and claims, when we have quoted in entirety the decisions that constitute the subject of this Referral, decisions whereby same measures were taken in three different municipalities, and with different specifics, such as the Municipality of Dragash, which has not registered any cases affected by the "Covid 19" virus";* and (iv) pursuant to Article 29 of the Law on the Constitutional Court, "*we, the applicants, have specified inter alia, why the four acts mentioned in the referral we claim to be in contradiction with the Constitution, by specifying in the Referral also*

the objections raised against the constitutionality of the challenged decisions".

The legal basis on which the challenged Decisions were issued

82. In the following, the Court will present the content of all articles that are relevant for the constitutional review of the challenged Decisions and on the basis of which the challenged Decisions of the Ministry of Health have been issued and, subsequently, in the part concerning the merits will comment on each of them in light of the competencies and authorizations that those articles provide this Ministry to issue the challenged decisions.

Constitution of the Republic of Kosovo

Chapter VI – Government of the Republic of Kosovo

Article 92
[General Principles]

[...]

4. The Government makes decisions in accordance with this Constitution and the laws, proposes draft laws, proposes amendments to existing laws or other acts and may give its opinion on draft laws that are not proposed by it.

Article 93
[Competencies of the Government]

The Government has the following competencies:
[...]
(4) makes decisions and issues legal acts or regulations necessary for the implementation of laws;
[...]

Chapter II – Fundamental Rights and Freedoms

Article 55
[Limitation of Fundamental Rights and Freedoms]

6. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
7. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the

fulfillment of the purpose of the limitation in an open and democratic society.
8. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
9. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
10. *The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.*

Article 35
[Freedom of Movement]

1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.
2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defense obligation.
3. Citizens of the Republic of Kosovo shall not be deprived the right of entry into Kosovo.
4. Citizens of the Republic of Kosovo shall not be extradited from Kosovo against their will except for cases when otherwise required by international law and agreements.
5. The right of foreigners to enter the Republic of Kosovo and reside in the country shall be defined by law.

European Convention on Human Rights

Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public

safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Law No. 06/L–113 on Organization and Functioning of State Administration and Independent Agencies, Official Gazette No. 7, 1 March 2019

CHAPTER II - STATE ADMINISTRATION
SUB-CHAPTER 1 GENERAL PROVISIONS ON THE STATE ADMINISTRATION

Article 10
[Responsibility for the State Administration]

1 Minister shall be accountable to the Government and Assembly for the activity of the entire ministerial system in the area of state responsibility provided by the relevant legislation.
2. The Minister (hereinafter: "responsible minister") shall lead and control activities of a ministerial system and shall supervise the activity of agencies in the relevant area of state responsibility, in accordance with this Law.
3. Functioning of the system of minister's responsibility for the performance of ministerial system is provided in accordance with legislation on the functioning of the Government.
4. Provisions of paragraphs 1., 2. and 3. of this Article shall also apply to the Prime Minister`s office in relation to executive agencies under its subordination.
5. The area of state responsibility for each ministry shall be defined by Law.

Article 11
[Ministry]

1. The Ministry is responsible for developing public policies, for leading, coordination, control and oversight of the entire ministerial system within the respective area of responsibility.
2. Ministry shall be responsible for all administrative functions in respective area of state responsibility, unless delegated by law to other institutions of state administration.
3. Organization of the ministry includes the ministry and its branches.

Law No. 04/l-125 on Health, Official Gazette No. 13, 7 May 2013

Article 12
[Measures and activities]

1. Healthcare shall be implemented through the following measures and actions:
[…]
1.11 measures for prevention and elimination of health consequences caused by emergency conditions;
[…]

CHAPTER XIX
HEALTHCARE DURING EMERGENCIES

Article 89
[Responsibilities of the Ministry]

1. During the state of emergency, the provision of healthcare is ensured by the Ministry in compliance with the law and other legislation in power.
2. Healthcare activities in case of emergencies from paragraph 1 of this Article include:
2.1. the implementation of legal provisions in force;
2.2. adapting the healthcare system in compliance with the emergent planning;
2.3. implementing changes within referral and management system;
2.4. provision of emergency healthcare for citizens;
2.5. functioning of the provisional healthcare institutions;
2.6. activating supplementary and reserve resources.
3. During emergency situations, the citizens' rights defined by the law shall be guaranteed to an extent that will not endanger the efficiency of efforts undertaken to overcome the emergency situation.
4. The human dignity shall in general be respected, regardless of the limitations from paragraph 3 of this Article.

Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, Official Gazette no. 40, 15 October 2008

SAFETY MEASURES FOR POPULATION PROTECTION FROM THE INFECTIOUS DISEASES

Chapter II

Article 3
[No title]

3.1 The infectious diseases in the sense of this Law where their prevention and prohibition is in the interest of our country are as follows: [the list of diseases is quoted]

3.2 If the danger appears by infectious diseases which are not in the list from paragraph 1 of this article, and they can endanger the whole country, the Ministry of Health, by the proposal made by the KIPH determines the prophylaxis and anti-epidemic measures prescribed by this Law, other measures for protection the population from the infectious diseases and the measure which are foreseen as obligatory under the international health conventions and other international acts.

Article 4
[No title]

4.1 The protection from the infections diseases endangering the whole country will be carried out by KIPH, Sanitary Inspectorate of Kosovo, Kosovo Health Inspectorate, all public and private health institutions, non health institutions, municipalities and citizens supervised by Ministry of Health.
4.2 The measures for prevention and fighting against the infectious diseases are directly applied by health institutions and health professionals in conformity with this law.

QUARANTINE

Article 33
[No title]

33.1 Persons who are proved or suspected to have been in direct contacts with sick persons or suspect of being sick from plague, variola and viral hemorrhage fever will be put into quarantine.
33.2 Holding duration of persons in quarantine under paragraph 1 of this article depends on the maximum period of infectious disease incubation;
33.3 Persons from paragraph 1 of this article are subject to continual medical controls during all time of quarantine;
33.4 Ministry of Health by KIPH proposal makes a decision for putting persons into quarantine under paragraph 1 of this article;

33.5 Execution of decision for putting persons into quarantine under paragraph 1 of this article ensures the competent authority in the country level.

SAFETY MEASURES FOR POPULATION PROTECTION FROM THE INFECTIOUS DISEASES

Article 41
[No title]

41.1 In order to protect the country from cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases will be taken the foreseen measures by this Law and international sanitary conventions and other international acts.
41.2 In order to prohibit the entrance and spreading of cholera, plague, variola vera, viral hemorrhage, jaundice, SARS, birds flu, and other infectious diseases in the whole country, Ministry of Health with sub legal act will be determined the special emergency measures for protection from these diseases as following:
a) Prohibition of travel in that country where the epidemic of one of the abovementioned diseases is spread;
b) Prohibition of circulation in the infected regions or directly endangered;
c) Limitation of circulation prohibition for specific types of goods and products;
d) Obligatory participation of health institutions and other institutions and citizens in fighting against the disease and use facilities, equipments and transportation means in order to fight against the infectious disease;
41.3 For participation in measures application under sections a) to d) of this article, the health institutions and other organizations and citizens will receive an adequate compensation by competent authority.

Article 44
[No title]

In order to apply the prohibition control and fighting against the infectious diseases, the SIK competent authorities, apart the stated measures in articles from 41 to 43 of this Law, performs these tasks, too:
a) Persons being sick from a specific infectious diseases and bacillus suckle of these diseases (microbe –bearers) will prohibit exercising their work activities and duties where they can endanger the other persons' health;

b) Prohibit circulation of persons for whom is ascertained or suspected of being sick from specific infections diseases;
c) Prohibit persons meeting in schools, cinema, public premises and other public places to the epidemic danger passes;
d) Orders disinfection, disinsection and deratization with purpose of prohibition and fighting against the infectious diseases;
e) To order persons isolation who are sick from any specific infectious diseases and their treatment;
f) To order taking of other foreseen general or special technical-sanitary and hygienic measures.

Article 47
[No title]

47.1 Ministry of Health is competent for application of this Law and approving the foreseen dispositions in it.
47.2 In accordance with responsibilities from paragraph 1 of this article, Ministry of Health has the right and obligation:
a) To give the mandatory instructions to Kosovo competent administration authorities when this is for the whole country's interest and is necessary to have an uniform dispositions application.
b) If the Kosovo competent administration authority does not perform the assigned administrative work based on this Law authorization, whereas failure to perform the assigned work can cause the epidemic emergence or spreading of any infectious diseases and Ministry of Health through report notifies the Government.

Chapter VII - Punishable Dispositions

Article 53
[No title]

For sanitary administrative offences provided by this Law, Kosovo Sanitary Inspectorate imposes the following fines:
53.1 Natural person is fined from 1.000€ to 2.000€, where the juridical person with fine from 3.000€ to 8.000 €:
a) if does not conclude and present disease, death from contagious diseases, epidemics, secretion of causers of the specific diseases, transmitting the hepatitis viruses B and C, transmitting the HIV virus, transmitting the parasites of malaria, injury from mad animal or by the animal for which there is a doubt that it is mad; according to article 13 of this law.
b) if he/she does not make any immunization, chemoprophylaxis and chemoprophylaxis, in accordance with articles 28 to 32, of this law.
c) if he/she does not take foreseen measures for preventing and fighting the further spread of the infection or other more necessary

measures anti-epidemics and hygienic determined by the nature of disease.
d) if it does not set up measures, tasks and responsibilities for protection from contagious disease and it does not implement technical-sanitary respective measures, hygienic and other for protection against contagious disease.
53.2 The responsible person of juridical person is fined from 500€ to 1.500 €, for a violation mentioned in paragraph 1 of this article.

Law No. 05/l-031 on General Administrative Procedure, Official Gazette no. 20/21, 21 June 2016

PART III
ADMINISTRATIVE ACTIONS

CHAPTER I - ADMINISTRATIVE ACT

SECTION I - DEFINITIONS, FORM AND MANDATORY ELEMENTS OF AN ADMINISTRATIVE ACT

Article 44
[Administrative Act]

1. *An administrative act shall be any manifestation of will of a public organ, regulating unilaterally a concrete legal relationship under administrative law, intended to produce legal effects and which:*
   1.1. is addressed to one or several individually defined persons (hereinafter referred to as, respectively, "individual administrative act" and "collective administrative act"), or
   1.2. is directed to a group of persons, defined or definable on the basis of general characteristics (hereinafter referred to as "general administrative act"), or
   1.3. determines the status under administrative law of an object, or its use by the public (hereinafter referred to as "administrative act in rem").

Article 46
[The form of administrative act]

1. Except when provided otherwise by law, an administrative act may be issued in written, oral or in any other appropriate form, including signs or other technical means.
2. The written form shall also be fulfilled by an electronic document in accordance with the law regulating the electronic document.

3. On request, the public organ without delay shall confirm in written the content of the verbal act or the act approved in silence defined under Article 70 of this Law, without prejudice to the rules on the effectiveness of administrative acts. Paragraph 2. of this Article shall apply mutatis mutandis.
4. The confirmation referred to under paragraph 3. of this Article, although not an administrative act itself, shall consist of the statutory elements as provided by Article 47 of this Law.

Article 47
[Structure and statutory elements of the written administrative act]

1. A written administrative act shall consist of:
1.1. the introductory part, which indicates the name of the issuing public organ, legal basis, the name of the addressee, a brief note on the subject of the proceeding and date of issuance;
1.2. the decisional part (Decision), which indicates what was decided including the term, condition or obligation (if applicable) as well as the costs of the proceedings, if any. The decisional part may be divided into more points. The costs of proceedings are quantified under a separate point of the decisional part;
1.3. reasoning part (rationale);
1.4. the concluding part, indicating when the act enters into force, legal remedies, including the public organ or the court where the legal remedy may be lodged, its form, the deadline for lodging and the way such deadline is calculated(legal advice). In case the lodging of an administrative appeal, according to the law, does not suspend the enforcement of the administrative act, the concluding part shall also contain this information as well as the reference to legal grounds for such exception.
2. If the law does not provide otherwise, the written administrative act, shall also contain the signature or the written name and surname of the responsible official or the chair of the collegial body and the minutes-taker or in case if the latter is unable to sign, by any other member of the collegial organ.
3. The signature requirement regarding electronic documents, under paragraph 2. of this Article shall be considered as fulfilled by an electronic signature in accordance with the special law. The electronic signature shall be based on a qualified certificate in which the identity of the public organ is expressed.
4. The Government of the Republic of Kosovo may define by special decision another safe method that secures the authenticity and the integrity of the sent electronic document, and its particulars. An

electronic document secured according to a decision of the Government shall be deemed as signed.

Law No. 03/L-202 on Administrative Conflicts, Official Gazette No. 82, 21 October 2010

Article 27
[No title]

1. The indictment shall be submitted within thirty (30) days, from the day of delivering the final administrative act to the party.
2. This time-limit shall be also applied for the authorized body for submitting the indictment, if the administrative act has been delivered. If the administrative act has not been delivered, the indictment shall be delivered within sixty (60) days from the date of delivering the administrative act to the party, in favor of which the act has been issued.

Law No. 05/L-087 on Minor Offences

Article 3
Principle of legality

1. No person shall be convicted for a minor offence nor impose a minor offence sanction for an offence which was not defined as an offence by law or acts (municipal regulation) of the Municipal Assembly before the omission, and for which a minor offence sanction was not determined.
2. In minor offence procedure, no one can be punished more than once, for the same offence.
3. The definition of a minor offence should be accurately determined and interpretation by analogy is not allowed. In case of ambiguity, the definition of a minor offence is interpreted in the favour of the person subject to minor offence procedure.

Article 7
Prescription of minor offences

1. Minor offences and sanctions on minor offences can be prescribed by law and acts (municipal regulations) of the Municipal Assembly.
2. The municipal assembly may prescribe minor offences and sanctions on minor offences only on violations of municipal body acts which they issue within the scope of their jurisdiction.
3. The body authorized to prescribe minor offences and sanctions on minor offences may not delegate this authority to other bodies.

4. If not otherwise defined by law, the provisions of minor offences on natural persons are applied to respective persons under a legal entity, and to persons exercising an independent activity.

Article 167
Harmonization of provisions which are not in accordance with this law

Provisions on minor offences, which are not in accordance with this law, shall be brought into compliance within one (1) year from the day when this law enters into force.

Article 170
Cessation of existing applicable legislation validity

With the entry into force of this Law, the applicable law on minor offence shall cease to apply.

Regulation No. 05/2020 on the areas of administrative responsibility of the Office of the Prime Minister and Ministries, adopted at the 3rd meeting of the Government by Decision no. 01/03 of 19 February 2020

Article 4
[Government]

1. The Government shall exercise its executive power in accordance with Constitution and legislation in force.
2. In order to exercise its competences, the Government shall:
2.1. make decisions on the proposal of members of the Government and other institutions in accordance with the Constitution and the legislation in force;
2.2. issue legal acts or regulations, necessary for the implementation of laws;
2.3. discuss problems and make decisions on other issues that it considers important within its competencies;
2.4. decide on appointments and dismissals within its competencies, and
2.5. perform all duties and responsibilities set forth in the Constitution and legislation in force.

Article 8
[Minister]

1. In accordance with the constitution, the applicable legislation, policies and directives set by the Government or the Prime Minister, the Minister shall:
[…]
1.4. issue decisions and sub-legal acts and establish memorandums of understanding/cooperation within the area of administrative responsibility of the Ministry; and […]

APPENDIX 10
[Ministry of Health]

1. Ministry of Health (hereinafter: MoH) shall have the following responsibilities:

1. Prepares public policies, drafts legal acts, adopts sublegal acts and defines the mandatory standards in the field of health and social welfare, while respecting important international standards;

[…]

Admissibility of the Referral

83. In order to decide regarding the Applicants' Referral, the Court must first assess whether the admissibility requirements established in the Constitution and further specified in the Law and Rules of Procedure have been fulfilled.

84. In this regard, the Court first refers to the relevant constitutional and legal provisions under which the Assembly may appear as Applicant before the Court:

Constitution of the Republic of Kosovo

Article 113
[Jurisdiction and Authorized parties]

[…]

2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(2) The question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government.
[...]

Law on the Constitutional Court

CHAPTER III
Special Procedures

Procedure for cases defined under Article 113, paragraph 2, items 1 and 2 of the Constitution

Article 29
[Accuracy of the Referral]

1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.
2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.
3. A referral shall specify the objections put forward against the constitutionality of the contested act.

Article 30
[Deadlines]

A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

Rules of Procedure of the Constitutional Court

VII. Special Provisions on the Procedures under Article 113 of the Constitution

Rule 67
[Referral pursuant to Article 113.2 (1) and (2) of the Constitution
and Article 29 and 30 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.

85. In the following, the Court will assess: (i) whether the Referral has been submitted by an authorized party as defined under subparagraph (1) of paragraph 2 of Article 113 of the Constitution and paragraph 1 of Article 29 of the Law; (ii) the nature of the challenged acts, namely whether they qualify as *"government regulations",* as defined in the abovementioned paragraph; (iii) the specification of the Referral, as required by paragraphs 2 and 3 of Article 29 of the Law and paragraphs (2) and (3) of Rule 67 of the Rules of Procedure; and (iv) whether the Referral is filed within six (6) months after the entry into force of the challenged act, as defined in Article 30 of the Law and paragraph (4) of Rule 67 of the Rules of Procedure.

(i) As to the Authorized party

86. The Assembly, on the basis of Article 113.2 (1) of the Constitution, is authorized to refer before the Court the question of compatibility with the Constitution of (i) laws; (ii) of decrees of the President; (iii) decrees of the Prime Minister and (iv) regulations of the Government. Article 29 of the Law specifies that the Assembly is an authorized party before the Court, if the respective Referral has been submitted by one fourth (1/4) of the deputies of the Assembly. The same requirement is specified in paragraph 1 of Rule 67 of the Rules of Procedure. In the circumstances of the present case, it is one fourth (1/4) of the deputies of the Assembly, respectively thirty (30) deputies, who challenge the four (4) challenged Decisions of the Ministry of Health before the Court.

87. The Court recalls that, on 19 April 2020, based on its previous case law, it has addressed a request to the representative of the Applicants to clarify the absence of the signature of MP Gazmend Bytyqi, alongside his name and personal number in the documents submitted before it. On 19 April 2020, the Applicants' representative has

provided the clarification and submitted to the Court the signature of the respective deputy.

88. Consequently, the Court finds that the Referral before the Court is submitted by one fourth (1/4) of the deputies of the Assembly of the Republic, respectively thirty (30) deputies, who based on the above-mentioned articles of the Constitution, Law and the Rules of Procedure are authorized parties to refer to the Court, among other things, the question of compatibility with the Constitution, in the circumstances of the present case, of the "*Government regulations"*.

(ii) As to the challenged acts

89. The Applicants challenge before the Court the challenged Decisions issued by the Ministry of Health. The Court recalls that they claim before the Court that the challenged Decisions, based on the case law of the Court, qualify as "*regulations of the Government*". Parliamentary Group of VETËVENDOSJE! Movement opposes these claims. Relevant claims and justifications are presented in paragraphs 69-73 of this Judgment.

90. In the following, the Court must assess whether the challenged Decisions can be qualified as "*Government regulations*", as set out in Article 113.2 (1) of the Constitution.

91. In this respect, the Court emphasizes that pursuant to Article 113.2 (1) of the Constitution, the Assembly, namely one fourth (1/4) of its deputies, as explained above, in addition to the "*laws"* of the Assembly, *"decrees of the President" a*nd "*decrees of the Prime Minister"* are also authorized to raise before the Court the question of compatibility of "*Government regulations"* with the Constitution.

92. In this context, the Court recalls that as to the review of the constitutionality of "*decrees of the Prime Minister"* and *"Government regulations",* through its case law, has determined that beyond the terminology referred to in the Constitution it is the "*acts*" of the Prime Minister namely of the Government, which may be subject of review before the Court, in case their compatibility with the Constitution is raised before the Court by an authorized party, as established in the Constitution (See references regarding *"acts"* of the Prime Minister and the Government, in paragraphs 82, 83, 84 of the Judgment of the Court in case KO12/18 and paragraph 46 of the Judgment of the Court in case KO73/16).

93. More specifically, through the Judgments in cases KO73/16 and KO12/18, respectively, the Court has determined that it may conduct a constitutional review of other acts of the Government and the Prime Minister, in addition to "*regulations*" and "*decrees*", (i) if they raise "*important constitutional matters*" (see paragraphs 84 and 88 of Judgment KO12/18); and (ii) taking into account the legal effects produced by the acts of the Prime Minister and the Government, regardless of their formal name (see paragraph 87 of Judgment KO12/18).

94. The Court also recalls that when considering the constitutionality of Government Decision No. 04/20 of 20 December 2017, in the Court's case KO12/18, it had also addressed the Venice Commission Forum, by asking questions, among other things, which acts of governments may be challenged before the constitutional courts in their respective constitutional systems; and (ii) if the acts of the government which may be challenged before the constitutional courts are determined in a specific list, and/or the respective constitutions and laws provide flexibility in relation to the acts of the governments, the constitutionality of which may be challenged before the constitutional courts . (See paragraphs 18 and 22 of Judgment KO12/18). From the responses of the respective constitutional courts participating in the Venice Commission Forum, and also by taking into account the differences and specifics of the respective constitutions, it results that, in principle, their respective case laws determine that the respective constitutional courts assess the nature of the challenged act and not necessarily only their formal name. (See paragraphs 62-72 of Judgment KO12/18).

95. In this context, the Court recalls that (i) in case KO12/18, it has declared admissible the assessment of the constitutionality of a *"decision"* of the Prime Minister, despite the fact that it has not been named *"decree"*, given that in the Court's assessment the respective decision had raised *"important constitutional matters"* (see paragraphs 88 and 90 of Judgment KO12/18), whereas (ii) in case KO73/16 it has declared admissible the constitutional review of an *"Administrative Circular*", namely the Administrative Circular No. 01/2016 of 21 January 2016, issued by the Ministry of Public Administration, by taking into account its effect (see paragraphs 46, 56, and 58 of Judgment KO73/16).

96. This case law has been confirmed in the last case of the Court, namely the Judgment in case KO54/20, through which the Court, by declaring admissible the referral for constitutional review of Decision of the Prime Minister No. 01/15 of 23 March 2020, had stated that (i) in

determining whether a *"decree"* of the Prime Minister is challenged within the meaning of subparagraph 1 of paragraph 2 of Article 113 of the Constitution, *"focus should not be placed only on the name of an act but on its content and effects"*(see paragraph 161 of the Judgment KO54/20); and (ii) if the Court were to focus solely on the formal name of challenged acts, namely "*decree of the Prime Minister"* or even "*Government regulations"*, Government decision-making would be left out of constitutional control, based solely on the name which they have decided to assign to the relevant act. (See in this context, paragraphs 162-163 of the Judgment KO54/20).

97. The Court also recalls that in addition to the reference to the "*decree of the Prime Minister*" in subparagraph 1 of paragraph 2 of Article 113 of the Constitution, paragraphs 4 of Articles 92 and 93 [Competencies of the Government], respectively, refer to Government decision-making through *"decisions"*, *"legal acts'* and *"regulations"* necessary for the implementation of laws. The issuance of *"decrees"* in the sense of exercising the powers of the Prime Minister is defined only in subparagraph 2.1 of paragraph 2 of Article 6 of Regulation No. 50/2020. In this context, and as explained in Judgment KO54/20, if the Court would be limited to the constitutional review of the *"decrees of the Prime Minister"* and not his/her *"decisions"*, this would mean that the decision-making of a Prime Minister, would be left out of constitutional control and that the Court would not be able to review the constitutionality of any decision of the Prime Minister in any form. The same applies to *"Government regulations"*.

98. Consequently, the assessment of the constitutionality, of the acts of the Prime Minister and the Government, are subject to the constitutional review of the Court insofar as they are raised before the Court in the manner prescribed by the Constitution and Law, and based on the assessment of the Court, according to its case law relating to their *"effects"* and if they raise *"important constitutional matters"*.

99. In the circumstances of the present case, before the Court are challenged decisions of the Minister of Health. The Court recalls that pursuant to paragraph 1 of Article 92 of the Constitution, the Government is composed of the Prime Minister, the deputy prime minister(s) and ministers. The latter, based on paragraph 2 of the same article, exercise executive power in compliance with the Constitution and the law. In this context, the Court emphasizes that the decisions of the Ministers are subject to the assessment of the constitutionality before the Court insofar as they have been raised before the Court in the manner prescribed by the Constitution and the Law, and based on the Court's assessment relating to their effect and

if they raise "*important constitutional matters*". This case law was initially determined through the case of the Court KO73/16.

100. The Court also points out the fact that the challenged Decisions of the Ministry of Health were issued on the basis of Government Decision No. 01/24 of 8 April 2020, which authorized the Minister of Health, namely it has delegated the decision-making of the Government to this Minister of Health, to issue decisions in order to prevent and combat the spread of COVID-19 disease, in implementation of the provisions of the Law for Prevention and Fighting Against Infectious Diseases, with the sole "*intention of rationalizing the time in the decision-making process, in the function of prevention and fighting against the spread of the COVID-19 epidemic disease*".

101. Accordingly, and based on the clarifications given, including those related to its case law, the Court considers that the challenged Decisions of the Minister of Health fall within the scope of *"Government regulations"* because (i) they are acts which content has a direct effect on the fundamental rights and freedoms of the citizens of the Republic of Kosovo, specifically in respect of their freedom of movement guaranteed by Article 35 of the Constitution; and (ii) raise *"important constitutional matters"* which, as a consequence, are subject to the assessment of the constitutionality by the Court, given that, in the circumstances of the present case, they have been brought before it by an authorized party.

102. Therefore, on the basis of the foregoing, the Court also finds that the challenged Decisions qualify as *"Government regulations"*, and as such, are subject to the constitutional review by the Court.

(iii) As to the accuracy of the Referral and specification of the objections

103. The Court recalls that Article 29 of the Law and Rule 76 of the Rules of Procedure stipulate that (i) the referral filed in the context of Article 113.2 (1) of the Constitution must specify (i) whether the full content or certain parts of this act are considered to be contrary to the Constitution; and (ii) specify the objections put forward against the constitutionality of the challenged act.

104. The Applicants' Referral was submitted on 17 April 2020, it has determined that before the Court they challenge and request the imposition of the interim measures against the decisions of the Ministry of Health, as follows: (i) No. 238/IV/2020, of 14.04.2020; (ii) no.229/IV/2020, of 14.04.2020; (iii) no. 214 /IV/2020, of

12.04.2020; and (iv) no. 239/IV/2020, of 14.04.2020. However, the content of the Referral submitted by the Applicants has also referred to all other decisions, namely thirty eight (38) of them of the Minister of Health issued on 14 April 2020 (See in this regard, also paragraph 15 of this Judgment).

105. Based on paragraph 4 of Article 22 (Processing Referrals) of the Law and paragraphs (2) and (3) of Rule 33 (Registration of Referrals and Filing Deadlines) of the Rules of Procedure, on 19 April 2020, the Court requested the Applicants to clarify before the Court if they are challenging only (i) the four (4) aforementioned Decisions of the Ministry of Health; or (ii) they challenge all decisions of the Ministry of Health issued to all municipalities of Kosovo on 14 April 2020. The Applicants' representative did not respond to the Court within the time limit set by the latter. Further, on the same date, the Court notified all parties about the registration of the referral, as explained in the proceedings before the Court, it also notified them about the correspondence with the Applicants' representative regarding the request for the abovementioned clarification whether beyond the four (4) challenged Decisions, other decisions of the Ministry of Health issued on 14 April 2020 are being challenged, as well.

106. Taking into consideration the lack of response by the Applicants' representative within the deadline set by the Court, the latter finds that before it, the constitutionality of the four (4) above-mentioned decisions of the Ministry of Health is challenged.

107. In the letter submitted to the Court, following the Court's letter of 19 April 2020, sent to the deputies of the Assembly for their comments regarding the merits of the Referral, the Applicants' representative in the letter of 23 April 2020, stated that the latter are challenging before the Court, and seeking imposition of the interim measure and the assessment of merits only with respect to the four (4) challenged Decisions.

108. Further, and in the context of clarifying the Referral, the Court notes that based on the submission submitted to the Court on 23 April 2020, the Prime Minister, on behalf of the Government, through the letter, and which was presented in entirety in paragraph 28 of this Judgment, *inter alia*, claims that (i) *"the practice of the Constitutional Court of the Republic of Kosovo reveals the fact that the refusal to clarify, specify or supplement the referral filed to the Constitutional Court is considered as a reason to summarily reject the Referral, because the party has not met the procedural criteria for further review ";* (ii) *"for this reason, in all cases where the party has not*

clarified, specified or supplemented the referral, the Court has summarily rejected the referral pursuant to Rule 35 paragraph 5 and has not even notified the authority, the decision of which is being challenged. For us, the refusal to apply the rules set by the Constitutional Court itself in the circumstances of the concrete case, is a serious concern in respect of the professionalism and impartiality of the Court"; and (iii) *"to confirm our claim, please see the decisions of the Constitutional Court in cases No. KI72/19; No.KI89/18; No. KI121/18; No.KI74/18; No.KI04/18; No.KI89/ 19; No.KI130/17; No.KI48/17; No.KI109/16; No. KI71/16, No.KI94/15, in which the Court has summarily rejected, without notifying any public authority, the referrals which did not specify which act of the public authority is being challenged and thereupon did not respond to the Court for the supplementation of the Referral. We are aware that we are speaking about individual referrals, but Rule 35.5 is no exception even in the case of referrals addressed by the constitutional bodies".* Also the comments of the Parliamentary Group of the VETEVENDOSJE Movement!, claim before the Court, that the Applicants' referral must be summarily declared inadmissible pursuant to paragraph (5) of Rule 35 of the Rules of Procedure.

109. With regard to the claims of the Prime Minister that the Court is obliged to reject the Applicants' Referral based on Rule 35 (5) of the Rules of Procedure, states as follows: paragraph (5) of Rule 35 of the Rules of Procedure stipulates the possibility of the Court to summarily reject a referral if the referral is incomplete or not clearly stated, and despite requests by the Court to the party to supplement or clarify the referral, the latter did not do such a thing. Based on this rule, the Court summarily rejects all those referrals in which the challenged act of the public authority is not specified, and when this act has not been clarified before the Court, despite the Court's requests; and (ii) that the cases referred to by the Prime Minister in the above-mentioned submission addressed to the Court are all, without exception, cases in which the respective applicants have failed to specify before the Court **any** act of a public authority, and who have not done so, even after a specific requests by the Court. This is except for the case KI89/19, and which is in fact is a joint case, No. KI86/19, KI87/19, KI88/19, KI89/19, KI90/19 and KI91/19, and which, was not summarily rejected as claimed by the relevant submission, but it was declared inadmissible as manifestly ill-founded on constitutional basis by the Resolution on Inadmissibility of 18 February 2020.

110. The Court emphasizes that in the circumstances of the present case, this is not the case and that the cases mentioned by the Prime Minister differ from the circumstances of the present case, because the latter,

as explained above, before the Court have not challenged **any** act of a public authority. In contrast, the Applicants' referral filed with the Court on 18 April 2020, has accurately specified that before the Court they challenge the following Decisions (i) No. 238/IV/2020, of 14.04.2020; (ii) No. 229/IV/2020, of 14.04.2020; (iii) No. 214/IV/2020, of 12.04.2020; and (iv) No. 239/IV/2020, of 12.04.2020, and in relation to the latter, the imposition of the interim measure is sought.

111. However, as explained above, taking into account that in the content and reasoning of the Referral, the Applicants have also referred to thirty five (35) other Decisions of the Ministry of Health, of 14 April 2020, the Court has requested the Applicants to clarify whether they challenge before the Court (i) only the four (4) aforementioned Decisions of the Ministry of Health, or (ii) all the decisions issued on 14 April 2020 by the Ministry of Health with aim at preventing and fighting the pandemics. In the absence of an explanation by the Applicants within the time limit set by the Court, the Court found that the Applicants' referral is limited only to the request for constitutional review of four (4) aforementioned Decisions.

112. Having said that, the Court finds that the Applicants challenge before the Court four (4) Decisions of the Minister of Health, and consequently, the referral of Applicants (i) specifies the challenged act which they consider to be in contradiction with the Constitution; and (ii) specifies the objections put forward about the constitutionality of the challenged act, as set out in Article 29 of Law and Rule 76 of the Rules of Procedure.

(iv) As to the deadline

113. The Court recalls that Article 30 of the Law and Rule 76 of the Rules of Procedure stipulate that a referral submitted under Article 113.2 (1) of the Constitution, must be submitted within six (6) months from the day of entry into force of the challenged act.

114. The Court emphasizes that the challenged decisions of the Ministry of Health were issued on 12 and 14 April 2020, respectively, while they were challenged before the Court on 17 April 2020, and consequently, they have been submitted to the Court within the deadlines set forth in the provisions cited above.

(v) Conclusion regarding the admissibility of the Referral

115. The Court finds that the Applicants: (i) are an authorized party, who challenge before the Court; (ii) the acts which they are entitled to challenge; (iii) they have specified what acts they are challenging in their entirety; (iv) have submitted constitutional objections against the challenged acts; and, (v) have challenged the respective acts within the stipulated deadline.

116. Therefore, the Court declares the Referral admissible and in the following shall examine its merits.

Merits of the Referral

I. Introduction

117. The Court initially recalls that the Applicant, respectively one-fourth (1/4) of the Assembly, alleges that the challenged Decisions of the Ministry of Health are inconsistent with Articles 35 [Freedom of Movement] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

118. The Court recalls that before the Court are challenged (i) Decision of the Ministry of Health of 12 April 2020 for the declaration of "*quarantine zone"* for the municipality of Prizren; and (ii) only three (3) of the thirty-eight (38) Decisions of the Ministry of Health issued on 14 April 2020, for all Kosovo Municipalities. Applicants claim that the four (4) challenged Decisions: (i) limit the right of citizens to move in violation of Articles 35 and 55 of the Constitution, beyond the legal authorisations, namely those prescribed in Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases, because the relevant limitations on freedom of movement are not *"prescribed by law"*, do not pursue a *"legitimate aim"*, are not proportional because they are not limited to the necessary extent; and therefore neither are they *"necessary in a democratic society"*; and (ii) are contrary to the Court's Judgment in case KI54/20. On the other hand, the Parliamentary Group of VETËVENDOSJE! Movement opposes these claims. Whereas, the Ombudsperson, in essence, claims that the Judgment of the Court in the case KO54/20 (i) has been implemented by the Ministry of Health, and that the challenged Decisions are *"prescribed by law"*, but by leaving open the issue of their proportionality; and (ii) has not been implemented by the Assembly.

119. The Court in this regard notes that the constitutional issue included in this Judgment is the compliance with the Constitution of the challenged Decisions of the Ministry of Health, namely whether, upon

their issuance, the same have "*interfered*" with, namely, limited the right of movement guaranteed by Article 35 of the Constitution in violation of Article 55 of the Constitution and the Judgment KO54/20. In this context, in assessing the constitutionality of the challenged Decisions, the Court, based on Article 55 of the Constitution, its case law, including the Judgment KO54/20, and that of the ECtHR in the context of Article 2 of Protocol No. 4 of the ECHR, will assess whether *"interferences"*, and which are not disputable in the circumstances of the case, with the freedom of movement of citizens in the affected regions, namely the municipalities of Prizren, Dragash and Istog, respectively, (i) are *"prescribed by law"*, namely the Law on Prevention and Fighting against Infectious Diseases; (ii) pursue a *"legitimate purpose"*; and (iii) are *"necessary in a democratic society"*.

120. Before the assessment mentioned above, the Court recalls that the prior Decision of the Government regarding the limitations on fundamental rights and freedoms prescribed in the Constitution as a result of the COVID-19 pandemic, namely Decision [No. 01/15] of 23 March 2020, was declared contrary to the Constitution, namely Article 55 in conjunction with Articles 35, 36 and 43 in conjunction with Article 2 of Protocol No. 4, and Articles 8 and 11 of the ECHR.

121. In the abovementioned Judgment, the Court, insofar as it is relevant to the circumstances of this case, has clarified (i) the difference between Articles 56 [Fundamental Rights and Freedoms During a State of Emergency] and 55 of the Constitution, respectively *"derogation"* and *"limitation"* of fundamental rights and freedoms guaranteed by the Constitution (see paragraphs 184 to 188 of the Judgment in case KO54/20); (ii) the structure of Article 55 of the Constitution and the constitutional test which the latter includes regarding the assessment of the limitations on fundamental rights and freedoms guaranteed by the Constitution (see paragraphs 189 to 198 of the Judgment in case KO54/20) and the relation of this Article with Article 35 of the Constitution (see paragraph 201 of the Judgment in case KO54/20); (iii) the general principles of the case law of the ECtHR and of the Court regarding the assessment of *"prescribed by law"* of an *"interference"* with fundamental rights and freedoms (see paragraphs 208 to 221 of the Judgment in case KO54/20); and (iv) the content and authorizations that constitute, in particular Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases (see paragraph 227 to 273 of the Judgment in case KO54/20). The Court, throughout the assessment of the constitutionality of the challenged Decisions, shall refer to the abovementioned clarifications, as far as is necessary for the circumstances of the present case.

122. Having said that, the Court recalls that in the circumstances of the previous case, namely Judgment KO54/20, taking into account the finding of the Court that *"interferences"* with, respectively limitations of the respective rights and freedoms through the challenged Decision, were not *"prescribed by law"*, had stopped the constitutional analysis in the first part of the non-cumulative test included in Article 55 of the Constitution and the relevant case law of the ECtHR. In the circumstances of this case, as far as necessary and depending on the Court's assessments regarding *"prescribed by law"* of relevant *"interferences"*, the Court shall also elaborate the general principles of the ECtHR regarding *"legitimate purpose"* and *"necessity in a democratic society"*, including proportionality, applying the same in the circumstances of the present case.

123. Moreover, since the allegations of the Applicants in the circumstances of the present case are related only to Article 35 of the Constitution, the Court in elaborating, applying and assessing the *"interference"* with the right to freedom of movement through challenged Decisions, shall refer to the consolidated case law of the ECtHR regarding the interpretation of Article 2 of Protocol No. 4 of the ECHR, and which despite the fact that it has not yet been supplemented with cases related to limitations on freedom of movement as a result of COVID-19 pandemic, is sufficient in terms of general principles and the manner of their application regarding *"prescribed by law"*, *"legitimate purpose"*, *"proportionality"* and *"necessity in a democratic society"*.

124. Also, same as in case KO54/20, the Court emphasizes that in addition to Article 35 of the Constitution that has been raised by the Applicants in circumstances of this case, the possibility that in relation to the challenged Decisions, any other limitation on freedoms and fundamental rights guaranteed by the Constitution and the ECHR is applicable is not excluded, depending on how the challenged Decisions are implemented and depending on the legal consequences that persons (natural and legal) may or may not suffer as a result of their implementation. (See also paragraph 204 of the Judgment in case KO54/20).

125. As a result, and based on the abovementioned clarifications, the Court shall further assess (i) *"prescribed by law"* of *"interference",* through challenged Decisions, with the right of freedom of movement for the citizens of the municipalities of Prizren, Dragash, and Istog, respectively; and in case of an affirmative finding, it shall proceed with the assessment of (ii) *"legitimate aim"* pursued through respective

"interference"; and also in case of an affirmative finding, shall continue with the assessment of (iii) "*necessity in a democratic society"* of the same *"interference*".

II. Compliance of challenged Decisions with Articles 35 and 55 of the Constitution

126. The Court recalls that four (4) Decisions of the Ministry of Health are challenged before the Court. That of 12 April 2020, namely Decision [No. 214/IV/2020] on the declaration of the municipality of Prizren as a "*quarantine zone"*, and three others, those of 14 April 2020, namely Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] *"on preventing, fighting and eliminating the COVID-19 infectious disease in the territory of the Municipality"* of Prizren, Dragash and Istog, respectively.

127. Decision of 12 April 2020 for the declaration of the municipality of Prizren as a *"quarantine zone"*, stipulates that (i) the municipality of Prizren is declared a quarantine zone because *"residents of this municipality are suspected of having had direct contact with people infected with coronavirus COVID-19"*; (ii) declares the village of Skorobisht a hotbed of the spread of the Infection; (iii) prohibits entry to and exit from this Municipality; (iv) obliges all residents of Prizren to respect the measures according to the instructions of the NIPHK; and (v) prescribes its entry into force on the same date.

128. Three (3) other Decisions, namely those of 14 April 2020, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality"* of Prizren, Dragash and Istog, respectively, have identical content. This, with one exception, as explained above, of an additional point, namely point II, which is applicable only to Prizren. For simplicity of reading, in the following the Court will analyze the content of the Decisions [No. 238/IV/2020] and [No. 239/IV/2020] "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*", of Dragash and Istog, respectively, and will only specify where there are differences regarding the Decision [No. 229/IV/2020], "*on preventing, fighting and eliminating infectious disease COVID-19 of the Municipality"* of Prizren.

129. These Decisions, from 15 April 2020: (i) prohibit the movement of natural persons outside their houses/dwellings in the respective municipalities, as prescribed in point I; (ii) prohibit the movement of vehicles in the respective Municipalities, as prescribed in point II, namely III for Prizren; (iii) prescribe the conditions to be met for

natural persons during permitted movement, as prescribed in point III, namely IV for Prizren; (iv) prescribe the fines imposed in case of non-compliance with the measures prescribed in the relevant Decisions, as prescribed in point IV, namely V for Prizren; (v) prescribe the entry into force of the Decision and its validity until 4 May 2020, as prescribed in point V, namely VI for Prizren; (vi) reflect the possibility of its reconsideration by 30 April 2020, as prescribed in point VI, namely VII for Prizren; and (vii) provide the possibility for the Minister of Health, based on the analysis of the epidemiological situation, to change, supplement or repeal the prescribed measures, as prescribed in point VII, namely VI for Prizren.

130. Regarding the prohibition of movement of natural persons outside their houses/dwellings in the respective municipalities prescribed by point I of the challenged Decisions, the latter allow the movement of the same *"only for 1 and a half hour per day, according to prescribed weekly schedule based on the penultimate digit of their personal number"*, for the reasons prescribed in paragraphs a) and c), prohibiting accompanying during the exercise of this right in the manner prescribed in paragraph b) and prohibiting *"strictly"* leaving their houses/dwellings for any reason other than the above reasons, *"including in this prohibition social gatherings, family visits"*, as prescribed in paragraph k).

131. The aforementioned prohibitions also prescribe the respective exceptions regarding (i) the possibility of accompanying; (ii) the possibility of movement beyond the deadline of one and a half hour during the day; (iii) cases of domestic violence; (iv) persons over the age of 65; and (v) economic operators and relevant institutions.

132. Regarding the first category, the challenged Decisions prescribe the possibility of accompanying during the permitted schedule, for persons with disabilities, persons under 16 years of age, and pets, according to the conditions prescribed in sub-paragraphs 1, 2, and 3 of paragraph a). Regarding the second category, the challenged Decisions prescribe the possibility of movement (i) for the needs of medical treatment in a health institution, as prescribed in paragraph g); (ii) in cases where leaving the house/dwelling is necessary to care for one or more sick people, as prescribed in paragraph h); and (iii) in cases of death, only for close relatives of the deceased, as prescribed in paragraph j). Regarding the third category, the challenged Decisions prescribe the exception from the prohibition of movement in cases of victims of domestic violence, as prescribed in paragraph j). Regarding the fourth category, the challenged Decisions, although allow the freedom of movement of persons over the age of 65 during the

schedule prescribed by the challenged Decisions, nevertheless they recommend that such possibility be used only in urgent cases and when necessary, as prescribed in paragraph d). Finally, regarding the fifth category, the challenged Decisions also allow the movement of persons to perform the needs of economic operators or relevant institutions, in the cases and conditions prescribed by paragraphs e) and f).

133. Regarding the prohibition of vehicle movement in the respective municipalities as prescribed by point II, namely point III for Prizren, of the challenged Decisions, the latter prohibit the movement of all vehicles, however by defining the relevant exceptions regarding (i) economic operators and provided institutions, as prescribed in paragraph a); and (ii) performing of official duties, as prescribed in paragraph d) and f). Also, in terms of prohibition of the movement of vehicles, the challenged Decisions prescribe specific exceptions regarding (i) farmers and farm workers, as prescribed in paragraphs b) and c); and (ii) the media, persons with disabilities, cases in need of medical treatment, performance of essential needs, and attending funerals, as prescribed in paragraphs l), h), e), i), and j), respectively.

134. As noted above, the challenged Decisions prescribe (i) the time schedule for which the abovementioned prohibitions apply, namely until 4 May 2020; (ii) the mechanism for their review, no later than 30 April 2020, in consultation with the NIPHK, experts and other line ministries; and (iii) the possibility of the Ministry of Health that based on the analysis of the epidemiological situation and after prior consultations change, supplement or repeal the prescribed measures.

135. The Court also notes that, unlike the challenged Decisions concerning the municipalities of Dragash and Istog, the Decision [No. 229/IV/2020] on the Municipality of Prizren, contains an additional point, point II and through which, in the sense of prohibition of movement of vehicles, also from 15 April 2020, entries and exits to the Municipality of Prizren are prohibited, with the exception of (i) transport of goods and services to ensure the operation of the supply chain, as defined in point a); (ii) the relevant workers from the economic operators and who have been allowed to move, except in the areas declared to be the hotbed of the spread of the infection, as established in point b); (iii) the farmers and farm workers under the conditions set out in point c); performing official duties, as defined in point d); cases of movement permits, as defined in point e); and emergency health cases, as defined in point f).

136. The Court also notes that the challenged Decisions contain identical reasoning. This reasoning, beyond the factual description related to the (i) issuance of Government Decision No. 01/07 of 11 March 2020; (ii) issuance of Government Decision No. 01/15 of 23 March 2020; and (iii) the Judgment of the Court in Case KO54/20, justifies the *"interferences"* with the right of movement specified in the challenged Decisions, based on (i) paragraph 2 of Article 41 of the Law on Prevention and Fighting against Infectious Diseases; and (ii) the proposal of the NIPHK of 12 April 2020 which *"considers that the infection has spread to that municipality or the latter is considered directly endangered"*.

137. Based on the above clarifications regarding the content of the challenged Decisions, the Court will further examine whether the *"interference"* with the right to freedom of movement is *"prescribed by law"* initially regarding (i) Decisions, [No. 229/IV/2020], [No. 238/IV/2020], and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality"*, Prizren, Dragash and Istog, respectively, together, taking into account their identical content; and then (ii) Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, for the declaration of the municipality of Prizren *"quarantine zone"*, taking into account its difference with the three aforementioned Decisions.

1. Constitutional review of Decision [No. 229/IV/2020], Decision [No. 238/IV/2020], and Decision [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating COVID-19 infectious disease in the territory of the Municipality"* of Prizren, Dragash and Istog, respectively

(i) *Whether* the *"interference"* with the right to freedom of movement is *"prescribed by law"*

138. The Court first recalls that in Judgment KO54/20, it clarified the general principles deriving from the case law of the ECtHR and the Court, regarding the assessment of whether the "*interference"*, namely the limitation of a right, is *"prescribed by law*" (See paragraphs 208 to 211 of the Judgment in case KO54/20).

139. As clarified in Judgment KO54/20, the common denominator of the criteria necessary for the assessment of *"prescribed by law"*, based on the case law of the ECtHR, results in containing at least the following

elements: (i) *"interference"* with a fundamental right and freedom must have a legal basis; (ii) the relevant law must have the appropriate quality, respectively, and in principle, it must be formulated with sufficient precision to enable the citizens to regulate their conduct; the latter should be able, if need be, with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail; (iii) the accuracy and precision of the law are necessary, but may also result in *"excessive rigidity"*, therefore, it should also be able to adapt to changing circumstances, and it is up to the relevant institutions, the courts, respectively, to make its interpretation; and (iv) in matters affecting fundamental rights and freedoms it would be contrary to the rule of law that the legal discretion granted to the executive be expressed in terms of an unfettered power. Consequently, the *"law"* must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. (See, in this context, ECtHR cases, *Kudrevičius and others v. Lithuania,* application no. 37553/05, Judgment of 15 October 2015, paragraphs 108-110 – and the references cited therein; *Navalnyy v. Russia,* applications no. 29580 and 4 others, Judgment of 15 November 2018, paragraphs 115-119 and references cited therein; *Tommaso v. Italy*, application no. 43395/09, Judgment of 23 February 2017, paragraphs 106-109 and references cited therein; and *Khlyustov v. Russia*, Judgment of 11 October 2013, paragraph 68, 69 and 70 and references used therein).

140. Based on the abovementioned clarifications, and to assess whether the challenged Decisions meet the criterion of "*prescribed by law*", the Court must assess whether in the issuance of challenged Decisions, by which is "*interfered*" with the freedom of movement of the citizens of the affected municipalities, guaranteed by Article 35 of the Constitution, the Government is based on the legal authorizations given by law of the Assembly, namely the Law on Prevention and Fighting against Infectious Diseases.

141. The Court recalls that the challenged Decisions are issued on the following legal basis (see the section "Legal basis on which the challenged Decisions are issued" after paragraph 82 of this Judgment, which states the content of all subsequent articles; see also paragraphs 42-47 where the challenged Decisions and their content are cited by the Ministry of Health): (i) paragraph 2 of Article 145 [Continuity of International Agreements and Applicable Legislation] of the Constitution; (ii) Article 10 (Responsibility for the State Administration) and Article 11 (Ministry) of Law No. 6/L-113 on Organization and Functioning of State Administration and Independent Agencies; (iii) paragraph 1.11 of Article 12 (Measures and

Activities) and Article 89 (Responsibilities of the Ministry) of Law on Health; (iv) paragraph 1.4 of Article 8 (Minister) and paragraph 1 of Appendix 10 to Regulation No. 05/2020 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries; (v) Articles 3, 4, 33, 41, 44, 47 and 53 [no titles] of the Law on Prevention and Fighting against Infectious Diseases; (vi) Articles 44 (Administrative Act), 46 (The Form of Administrative Act) and 47 (Structure and Statutory Elements of the Written Administrative Act) of Law No. 05/L-031 on the General Administrative Procedure (hereinafter the Law on General Administrative Procedure); (vii) Article 27 [no title] of Law no. 03/L-202 on Administrative Conflicts; (viii) Government Decision No. 01/11 dated 15 March 2020; and (ix) Judgment KO54/20.

142. In this context, the Court notes that (i) paragraph 2 of Article 145 of the Constitution stipulates that the legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in compliance with it, until repealed, superseded or amended in accordance with this Constitution. The Court notes that the Law on Prevention and Fighting against Infectious Diseases entered into force on 15 May 2008, and consequently prior to the entry into force of the Constitution, however, it is not disputed that this law is in force and applicable in the circumstances of the present case; (ii) Articles 10 and 11 of the Law No. 6/L-113 on the Organization and Functioning of State Administration and Independent Agencies, determine, *inter alia*, issues related to the responsibility of a Minister before the Government and the Assembly, the scope of his activity and responsibility for the entire ministerial system within the field relevant to the responsibility, however, none of these provisions referred to are relevant to assess *"prescribed by law"* of the *"interference"* with the fundamental rights and freedoms guaranteed by the Constitution; (iii) in Judgment KO54/20, the Court has assessed the relevance of paragraph 1.11 of Article 12 and Article 89 of Law on Health, ascertaining that the same do not give the Government, in the circumstances of the present case, nor the Ministry of Health, the authorization for *"interference"* with the fundamental rights and freedoms guaranteed by the Constitution, as it is done by the challenged Decisions (see paragraphs 274-288 of the Judgment in case KO54/20); (iv) similarly, paragraphs 1.4 of Article 8 and paragraph 1 of Annex 10 to Regulation No. 05/2020 on the Administrative Responsibility Areas of the Office of the Prime Minister and the Ministries, prescribe the possibility of the relevant Minister to "*issue decisions and bylaws within the scope of administrative responsibility of the ministry*" and the competence of the Ministry of Health for, among others, preparation of public

policies, drafting of legal acts and approval of bylaws, but the same, do not contain the authorization for *"interference"* with fundamental rights and freedoms guaranteed by the Constitution, as it is done by the challenged Decisions; (v) Articles 3, 4, 33, 41, 44, 47 and 53 of the Law on Prevention and Fighting against Infectious Diseases are relevant to the assessment whether *"interferences"* with fundamental rights and freedoms through challenged Decisions of the Ministry of Health, are *"prescribed by law"*. The Court recalls that content of Articles 41, 44 and 47 of the Law on Prevention and Fighting against Infectious Diseases, was clarified in Judgment KO54/20 (see paragraphs 227-273 of the Judgment KO54/20), while Articles 3, 4 and 53 of this law will be analyzed below in the context of the assessment of *"prescribed by law"*, while Article 33 will be reviewed in the context of the constitutionality of the Decision of 12 April 2020 for the declaration of the municipality of Prizren *"quarantine zone"*; (vi) Articles 44, 46 and 47 of the Law on General Administrative Procedure and Article 27 of Law No. 03/L-202 on Administrative Conflicts, prescribe the types of administrative act, the form of its structure and the deadlines for the respective lawsuits, respectively, however, they do not contain the authorization for *"interference"* with fundamental rights and freedoms guaranteed by the Constitution, as it has been done through challenged Decisions. That said, the Court will consider Article 44 of the Law on General Administrative Procedure in conjunction with Article 45 of the Law for Prevention and Fighting against Infectious Diseases, in assessing *"prescribed by law"* of *"interference"* with fundamental rights and freedoms; while (vii) Decision of the Government no. 01/11 of 15 March 2020, delegates to the Ministry of Health the competence of decision-making regarding the prevention and fighting of pandemics, but is not relevant in assessing whether the Law on Prevention and Fighting against Infectious Diseases prescribes to the Ministry of Health the authorization of *"interference"* with the fundamental rights and freedoms established- in the Constitution. As explained in Judgment KO54/20, such authorization may be transferred to the executive power only through a law adopted by the Assembly.

143. Therefore, the Court considers that relevant to assess *"prescribed by law"* of *"interference"* with the freedom of movement guaranteed by Article 35 of the Constitution, through the challenged Decisions, are Articles 3, 4, 41, 44 and 45 of Law on Prevention and Fighting against Infectious Diseases. In the context of these articles, and Articles 35 and 55 of the Constitution, case law of the ECtHR and that of the Court, with particular emphasis on the Judgment of the Court KO54/20, the following Court will assess whether in the issuance of challenged Decisions, the Ministry of Health, has acted on the basis of

authorizations prescribed by Law on Prevention and Fighting against Infectious Diseases.

144. The Court recalls that in Judgment KO54/20, the Court, *inter alia*, and insofar as it relates to the circumstances of the present case, specified: (i) that the Ministry of Health, namely the Government, is authorized to issue decisions with an aim of preventing and fighting the pandemic, insofar as it is authorized by Law on Prevention and Fighting against Infectious Diseases and Law on Health (see paragraph 325 of Judgment KO54/20); (ii) the contents of Articles 41 and 44 of the Law on Prevention and Fighting against Infectious Diseases, respectively their scope and respective limitations, within which the Ministry of Health is authorized to act in accordance with that law (see paragraphs 227-273 of Judgment of KO54/20); and (iii) that Article 45 of the Law on Prevention and Fighting against Infectious Diseases specifies that all measures described in Articles 41 and 44 of this Law towards individuals and institutions, are ordered by a decision with administrative procedure. The Court had stated that this Article was relevant to show what procedures should be followed for the measures described in Articles 41 and 44 for individuals and institutions. (See paragraph 233 of Judgment KO54/20).

145. The Court also recalls that paragraph 2 of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, among other things, stipulates that in order to prevent *"entry"* and *"spreading"* of an infectious disease in *"the whole country"*, the Ministry of Health, may (i) prohibit **travel** in that country where the epidemic of any disease is spread; and (ii) prohibit **circulation** in *"infected or directly endangered regions*", as defined in paragraphs a) and b) of the abovementioned article. The Court clarified the content of this Article in Judgment KO54/20 (see paragraphs 237-253 of the same Judgment). Regarding paragraphs a) and b) of paragraph 2 of Article 41 of the abovementioned law, applicable even in the circumstances of the concrete case, the Court regarding (i) paragraph a) had clarified and reasoned, *inter alia*, that its purpose cannot be understood that it authorizes the Ministry of Health, namely the Government, to limit travel throughout the Republic of Kosovo and that its purpose is to prohibit travel *"in the place"* where the epidemic has spread, for example, to prohibit going or travelling to a certain village, city, place or geographical location where the epidemic has spread (see paragraphs 242, 243 and 247 of the Judgment KO54/20); while regarding (ii) paragraph b) it had clarified and reasoned, among other things, that its purpose is to prohibit movement in the "*infected regions*" and in the "*directly endangered regions"*, and referring specifically to the regional context, has excluded the possibility of

prohibition of movement throughout the territory of the Republic of Kosovo and to all its citizens (see paragraph 251-253 of the Judgment KO54/20).

146. Consequently, through Judgment KO54/20, the Court recognized the fact that items a) and b) of paragraph 2 of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, recognize the possibility of the Ministry of Health to prohibit (i) **travel** and (ii) **circulation** in *"the place where the epidemic is spread*", *"infected regions"* and *"directly endangered regions"*. These measures, based on Article 3 of the Law on Prevention and Fighting against Infectious Diseases, can be taken by the Ministry of Health on the proposal of NIPHK, and which based on Article 4 of the same Law, among other health institutions prescribed in this article, has the competence of *"protection against infectious diseases that endanger the whole country"*. Accordingly, the prescription of *"the place where the epidemic is spread*", *"infected regions"* and *"directly endangered regions"* is in the competence of the respective health institutions with the recommendation of which the Ministry of Health then acts.

147. Therefore, the Court emphasizes that (i) for the purposes of items a) and b) of paragraph 2 of Article 41 of the Law on Prevention and Fighting against Infectious Diseases and in line with the Judgment of the Court KO54/20, the municipalities of Prizren, Dragash and Istog, respectively, can qualify as *"places"* or *"regions"*; (ii) assessment whether the same qualify as *"the places where the epidemic is spread*", *"infected"* and *"directly endangered regions"* is in the competence of the health institutions defined through the Law on Prevention and Fighting against Infectious Diseases, on the basis of their health recommendations, the Ministry of Health acts; and (iii) the act referred to in paragraph 1 of Article 45 of the Law on Prevention and Fighting against Infectious Diseases, which prescribes the mechanism through which the procedure prescribed in paragraphs a) and b) of paragraph 2 of Article 41 of the above Law applies, read together with sub-paragraph 1.2 of paragraph 1 of Article 44 of the Law on General Administrative Procedure, do not make it impossible to take appropriate measures against *"individuals"* and *"institutions"* in the affected regions. More precisely, the use of the plural in relation to *"individuals"* and *"institutions"* in paragraph 1 of Article 45 of the Law on Prevention and Fighting against Infectious Diseases, read together *"places"* and *"regions"* referred to in paragraphs a) and b) of paragraph 2 of Article 41 of the same law, enables the issuance of an act which is directed to a *"group of persons, defined or definable on the basis of general characteristics*" for the purposes of subparagraph 1.2 of

paragraph 1 of Article 44 of the Law on General Administrative Procedure.

148. Recalling that the challenged Decisions of the Ministry of Health were issued with and upon the proposal of the NIPHK of 12 April 2020, which *"considers that the infection has spread to that municipality or the same is considered directly endangered",* and that, as clarified above, the undertaking of the measures prescribed in paragraphs (a) and (b) of paragraph 2 of Article 41 of the Law on Prevention and Fighting against Infectious Diseases is possible in these *"places"* and/or *"regions"*, the Court must find that *"interferences"*, respectively limitations of the freedom of movement of citizens in *"regions"* of Prizren, Dragash, and Istog, respectively, through challenged Decisions, are *"prescribed by law"*.

149. The Court emphasizes that for the purposes of this finding, it is not necessary to analyze Article 44 of the Law on Prevention and Fighting against Infectious Diseases, for which sufficient clarifications are given in the Judgment of the Court in case KO54/20 (See paragraphs 254 to 261 of the Judgment KO54/20). That said, the case is not the same under Article 53 of the Law on Prevention and Fighting against Infectious Diseases, on the basis of which, the administrative offenses applicable in case of non-implementation of the challenged Decisions have been specified. The Court must therefore assess whether point IV for the Municipalities of Dragash and Istog and point V for the Municipality of Prizren of the challenged Decisions are also based on law.

150. In this context, the Court recalls that item V of the enacting clause of the Decision [No. 229/IV/2020] for the municipality of Prizren and item IV of the enacting clause of Decisions [No. 238/IV/2020] and [No. 239/IV/2020], for the municipalities of Dragash and Istog, provide as follows:

> "***IV*. [V.]** *Failure to comply with the measures set out in this decision is considered, in accordance with the law, an administrative offense and punishable by a fine of 1,000 Euros to 2,000 Euros for natural persons and from 3,000 Euros to 8,000 Euros for legal persons, while the responsible person of the legal person shall be punished from 500 Euros to 1,500 Euros. In accordance with the law, fines are imposed by the competent Inspectorate*".

151. The Court recalls that the first three items (I, II and III) of the challenged Decisions regarding the municipalities of Dragash and

Istog, (i) prohibit "*movement of natural persons outside their houses/apartments*" in the respective municipalities, as provided in item I; (ii) prohibit "*movement of vehicles*" in respective municipalities, as established in item II; (iii) establish "*requirements to be met for natural persons during permitted movement*", as provided in item III. The Court also recalls that the abovementioned items of the challenged Decisions, comply with items I, III and IV of the challenged Decision regarding the municipality of Prizren, and which, differently, in its item II, also determines "*prohibition of entry into and exit from the Municipality of Prizren*". The three challenged Decisions determine the fines to be imposed in case of non-compliance with the measures set out in the relevant Decisions, referring to Article 53 of the Law for Prevention and Fighting against Infectious Diseases.

152. The Court initially states that this article defines as "*sanitary administrative offences*" the measures defined as such by the Law for Prevention and Fighting against Infectious Diseases, and for which, fines are imposed by the bodies of the Sanitary Inspectorate of Kosovo. These fines, based on this law, amount to 1,000 to 2,000 euro for natural persons, and from 3,000 to 8,000 euro for legal persons. The latter may be pronounced in case of certain requirements set in the same article, namely its items, a), b), c) and d). More specifically, the fine can be imposed for administrative offenses, (i) if does not conclude and present disease, death from contagious diseases, epidemics, secretion of causers of the specific diseases, transmitting the hepatitis viruses B and C, transmitting the HIV virus, transmitting the parasites of malaria, injury from mad animal or by the animal for which there is a doubt that it is mad, as established in item a) of Article 53 of the Law for Prevention and Fighting against Infectious Diseases, but in conjunction with its Article 13. The latter represents the obligation to report the infectious disease, specifically defined in its content in items a) to j); and (ii) if immunization, seroprophylaxis, and chemoprophylaxis are not performed, as defined in item b) of Article 53 of the Law for Prevention and Fighting against Infectious Diseases, but also in conjunction with its Articles 28 to 32. The latter determine the conditions of transport of sick persons or for whom there is the same suspicion, in order to become "*impossible to spread the infection*", and the obligation to protect with drugs for persons who are at risk of becoming infected with the diseases set out in this article.

153. Paragraphs c) and d) of Article 53 of the Law for Prevention and Fighting against Infectious Diseases, also establish "*sanitary administrative offences*" and the corresponding fines, for cases in which (i) no measures are taken to prevent and fight the further spread of the infection or other more necessary anti-epidemic and hygienic

measures conditioned by the nature of the disease, as defined in item c) of this Article; and (ii) the measures, duties and responsibilities for protection against infectious diseases are not determined and the relevant technical-sanitary, hygienic and other measures for protection against infectious diseases are not applied, as defined in item d) of the same article.

154. The Court notes that paragraph c) of the abovementioned article, and which is relevant in the circumstances of the present case, and contains greater discretion in relation to the other items above, refers to the "*measures*", namely the measures envisaged to prevent and fight the further spread of the infection or other more necessary anti-epidemic and hygienic measures conditioned by the nature of the disease.

155. That said, these "*measures*" for the prevention and fighting against infectious diseases, are defined (i) in Chapter III; and (ii) Articles 34 to 39 under the heading "*Measures for Prevention and Fighting the Infectious Diseases*" of the Law for Prevention and Fighting against Infectious Diseases. Chapter III, in its Article 8, determines general measures and special measures. The first are listed exactly in paragraph 2, while the second in paragraph 3 of this article. None of these measures is related to the measures defined as administrative offenses by challenged Decisions. The Court notes, item i) of paragraph 3 of Article 8 of the Law in question, and which, refers to other measures "*foreseen by this Law*". The latter, as noted above, are in fact set out in Articles 34, 35, 36, 37, 38 and 39 of the Law for Prevention and Fighting against Infectious Diseases, and which also accurately determine the measures which qualify as administrative offences, and which also do not contain any of the measures defined as administrative offenses by challenged Decisions.

156. In addition to Article 53 and on the basis of which items IV and V of the challenged Decisions are issued, the Court will also assess whether other articles of the Law for Prevention and Fighting against Infectious Diseases, namely those established in Chapter VII regarding Punishable Dispositions, foresee the administrative offences set forth through the challenged Decisions. In this regard, the Court notes that Article 54 of the aforementioned Law also prescribes fines for natural persons of 1.000 – 2.000 euro and for legal entities 3,000 to 8,000 euro, if the measures provided for in items a), b), c), d), and e) of its first paragraph are not applied or performed, and which do not reflect any of "*administrative offences*" stipulated by the challenged Decisions. The same applies to Articles 55 and 56 of the relevant Law, which provide for a fine of 250 to 1,000 euro for the natural person, if

the circumstances or situations provided in the items a), b), c), d), d), f), e), g) apply, while in the second case, from 500 to 1000 euro, for the natural person, if the circumstances or situations provided in items a) and b) apply. Any of these legal grounds also do not reflect any of the "*administrative offences*" defined by the challenged Decisions.

157. In addition, the Court also recalls that the Parliamentary Group of the VETËVENDOSJE! Movement states that based on item (m) of Article 31 of the Law on Sanitary Inspectorate, "*not applying, in full or partially, the measures and/or decisions of the Sanitary Inspectorate of Kosovo*", is a sanitary administrative offence and is imposed based on the decision/s issued by the Sanitary Inspectorate. However, Article 31 of this Law also accurately specifies the violations which constitute sanitary offenses, and none of "*administrative offences*" foreseen by the challenged Decisions, are part of this list described accurately in the abovementioned article of the Law on the Sanitary Inspectorate. Item m) of Article 31 of the Law on Sanitary Inspectorate refers to the non-implementation of decisions taken by the Sanitary Inspectorate of Kosovo, and which is not the case in the circumstances of the present case.

158. In fact, "*administrative offences*" established in the challenged Decisions, namely those established by (i) items I, II, III of the Decisions [No. 238/IV/2020] and [No. 239/IV/2020] "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*" of Dragash and Istog, namely and interrelated to "*prohibition of movement of natural persons outside their houses/apartments*"; "*movement of vehicles*"; and "*obligations of natural persons during permitted movement*"; and (ii) points I, II, III and IV of the Decision [No. 229/IV/2020] "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*" of Prizren, and interrelated to "*prohibition of movement of natural persons outside their houses/apartments*"; "*prohibition of entry-exits*", "*movement of vehicles*"; and "*obligations of natural persons during permitted movement*", in fact, derive from the content of paragraph 2 of Article 41 of the Law for Prevention and Fighting against Infectious Diseases, and which in items a) and b), the Ministry of Health is assigned the competence to (i) prohibit travel to the place where the epidemic of any of the infectious diseases has spread; or (ii) prohibit movement in infected or directly endangered regions, these measures which, based on the same article, are determined by the sub-legal acts of the Ministry of Health and are implemented following the procedure determined by Article 45 of the Law for Prevention and Fighting against Infectious Diseases.

159. In this context, the Court initially notes that such a sublegal act is not published in the Official Gazette of the Republic of Kosovo, despite the fact that based on Article 58 of the Law for Prevention and Fighting against Infectious Diseases, the Ministry of Health has been tasked with issuing sub-legal acts regarding measures, obligations and responsibilities for the implementation of protection and fighting infectious diseases, within six (6) months from the date of entry into force of this Law, date which dates back to 2008. Moreover, "*administrative offences*" determined through the challenged Decisions, are determined by the procedure defined in Article 45 of the abovementioned law, namely by an act of the Ministry of Health, and are not defined as administrative offenses in the Law for Prevention and Fighting against Infectious Diseases. More precisely, "*the administrative offences*" foreseen through the challenged Decisions, have been determined through a decision of the Ministry of Health.

160. In the context of the discretion of the Ministry of Health, to determine administrative offences and which are not accurately "*prescribed by law*", the Court initially recalls that the Assembly, in 2016, issued Law No. 05/L-087 on Minor Offences (hereinafter: Law on Minor Offences), and under (i) Article 170 (Cessation of existing applicable legislation validity) which establishes that with its entry into force based on Article 171 (Entry into force), this happened in "*January 2017*", "*the applicable law on minor offence shall cease to apply*"; and (ii) Article 167 (Harmonization of provisions which are not in accordance with this law) foresees that "*Provisions on minor offences, which are not in accordance with this law, shall be brought into compliance within one (1) year from the day when this law enters into force*". In this regard, the Court also states that the Law for Prevention and Fighting against Infectious Diseases, has never been supplemented/amended by the Assembly.

161. That said, there are also two articles in the Law on Minor Offenses, which are relevant in the assessment of being "*prescribed by law*" of items IV for the municipalities of Dragash and Istog, and item V for the municipality of Prizren, regarding "*administrative offences*". These are Articles 3 (Principle of Legality) and 7 (Prescription of minor offences) of the Law on Minor Offences. The former, namely Article 3, insofar as it is relevant to the circumstances of the present case, stipulates that (i) no person shall be convicted for a minor offence nor impose a minor offence sanction for an offence which was not defined as an offence by law or acts (municipal regulation) of the Municipal Assembly before the omission, and for which a minor offence sanction was not determined through its first paragraph; and (ii) the definition of a minor offence should be accurately determined and interpretation

by analogy is not allowed. Emphasizing that in case of ambiguity, the definition of a minor offence is interpreted in the favour of the person subject to minor offence procedure, through its second paragraph. Whereas the second, namely Article 7, as far as it is relevant to the circumstances of the present case, it also determines that (i) minor offences and sanctions on minor offences can be prescribed by law and acts (municipal regulations) of the Municipal Assembly, with the latter with the competence only violations of municipal body acts which they issue within the scope of their jurisdiction, as prescribed in its first and second paragraph; and (ii) the body authorized to prescribe minor offences and sanctions on minor offences, namely the Assembly of the Republic or the Municipal Assembly, may not delegate this authority to other bodies, as prescribed in its third paragraph.

162. In this regard, the Court notes that the "*administrative offences*" foreseen by the challenged Decisions are not prescribed by Articles 8, 34, 35, 36, 37, 38, 39, 53, 54, 55 and 56 of the Law for Prevention and Fighting against Infectious Diseases nor by Article 31 of the Law on the Sanitary Inspectorate. Secondly, it also notes that as long as items a) and b) of paragraph 2 of Article 41 of the Law for Prevention and Fighting against Infectious Diseases, refer to the possibility of taking appropriate and established measures by challenged Decisions, the same article stipulates that the same must first be specified by a sub-legal act and then determined by following the procedure set out in Article 45 of the same law. In this context, the Court emphasizes the following three issues: (i) that based on paragraph 1 of Article 3 of the Law on Minor Offenses, the offences must be accurately defined and interpretation by analogy is not permitted. The Court recalls that the minor offences set out in the challenged Decisions are not precisely defined in either the Law for Prevention and Fighting against Infectious Diseases or the Law on the Sanitary Inspectorate; (ii) that based on paragraph 3 of Article 7 of the Law on Minor Offenses, the authorized body to determine minor offenses and sanctions for minor offenses, which based on this law, is only the Assembly of the Republic and the Municipal Assembly, this authorization cannot be transferred to other bodies, including the Government; and (iii) that minor offenses and sanctions for minor offenses may be determined by law of the Assembly of the Republic and by acts of the Municipal Assembly, as stipulated by paragraph 1 of Article 7 of the Law on Minor Offenses, while also if this is not the case, no one can be punished for minor offence or imposed a sanction for the offense which before it was committed has not been defined as a minor offence by law or by acts of the Municipal Assembly based on, as defined in paragraph 1 of Article 3 of the same law.

163. In this regard, the Court finds that administrative offenses related to non-compliance with "*prohibition of movement of natural persons outside their houses/apartments*; "*prohibition of entry/exits*", "*movement of vehicles*"; and "*obligations of natural persons during permitted movement*", are not "*prescribed by law*", established by the challenged Law for Prevention and Fighting against Infectious Diseases, and furthermore, the latter are foreseen by the decisions of a ministry, namely the Ministry of Health, and not through a law of the Assembly of the Republic or even through an act of the Municipal Assembly.

164. The Court notes, as it did in Judgment KO54/20, that the Law for Prevention and Fighting against Infectious Diseases does not provide adequate authorizations to the Government to fight and prevent COVID-19 pandemic. Precisely for this reason, by Judgment KO54/20, set another date of entry into force of its Judgment, namely 13 April 2020, emphasizing that until this date, the relevant institutions of the Republic of Kosovo, in the first place the Assembly, must take the necessary measures to ensure that the necessary restrictions on fundamental rights and freedoms in order to protect public health are made in compliance with the Constitution and Judgment KO54/20. Such a thing, as explained in part III of this Judgment, did not happen.

165. That said, and despite the necessity that in the circumstances of the current pandemic, the Government (i) "*should be able to act quickly and efficiently*; and (ii) that such a thing, "*may call for adoption of simpler decision-making procedures and easing of some checks and balances*", as the Council of Europe itself states in its Information Document, however always stressing the necessity for oversight of the legislative power and judicial control, the Constitution, in its Articles 92 and 93, accurately stipulates that the Government enforces laws and other acts adopted by the Assembly of Kosovo and takes decisions and issues legal acts or regulations necessary for the application of laws, as also stipulates that the fundamental rights and freedoms may be restricted only by law of the Assembly, in its Article 55.

166. In this context, and based on the authorizations given to the Ministry of Health regarding the determination of administrative offenses through the Law for Prevention and Fighting against Infectious Diseases, the Court must find that in determining non-compliance with the measures provided through the challenged Decisions as "*administrative offences*", the Ministry of Health has exceeded the legal authorizations established in the Law for Prevention and Fighting against Infectious Diseases.

167. As a result, the Court finds that: (i) item V of the Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19"* for the municipality of Prizren; and (ii) item IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19"* in the municipalities of Dragash and Istog, where the *"administrative offences"* and the respective sanctions are determined, are not in compliance with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

168. As explained in the Judgment of the Court KO54/20, and in this Judgment, in case of non-fulfillment of the criterion of being "*prescribed by law*", further assessment of other requirements of the non-cumulative test, is not continued, namely "*legitimate aim*" and "*necessity in a democratic society*". Consequently, the Court will no longer proceed with the assessment of these two criteria regarding item IV of the Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19"* in the municipalities of Dragash and Istog; and item V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19"* for the municipality of Prizren, while the same analysis will continue with respect to (i) items I, II, III, V, VI and VII of the challenged Decisions for the municipality of Dragash and Istog, and (ii) items I, II, III, IV, VI, VII and VIII of the challenged Decisions for the Municipality of Prizren, because in this regard, the Court has already found as being "*prescribed by law*".

(ii) *Whether the "interference" with the right to freedom of movement pursues a "legitimate aim"*

169. The Court clarified the structure of Article 35 of the Constitution, namely freedom of movement, in Judgment KO54/20, insofar as it is relevant to the circumstances of both cases. The Court clarified that this article guarantees (i) the right to free movement in the Republic of Kosovo and the choice of residence for all citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo; (ii) the right of each person to leave the country; and (iii) the right of citizens of the Republic of Kosovo not to be deprived the right of entry into the Republic of Kosovo. Paragraph 2 of the same article stipulates that all restrictions regarding these guaranteed rights are, (i) "*prescribed by*

law"; (ii) are determined and are necessary for the implementation of a court decision; and (iii) are necessary to fulfill the obligation to protect the state. Paragraphs 4 and 5 of Article 35 of the Constitution are not relevant to the circumstances of the present case and therefore, as in Judgment KO54/20, the Court will not comment them. (See also paragraph 201 of the Judgment KO54/20).

170. This article, based on Articles 22 [Direct Applicability of International Agreements and Instruments] and 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court reads and interprets in relation to the equivalent article of the ECHR, namely Article 2 of Protocol No. 4 thereof. The latter also defines the rights and possibility of respective restrictions. Paragraphs 1 and 2 of it define the right to free movement within a state and the right to free choice of residence, for all those who are legally within the territory of the state concerned, and the right of every person to leave any place, including his own. However, in paragraphs 3 and 4, the same article defines the possibility of the respective restrictions, provided that the latter are "*prescribed by law*" and "*necessary in a democratic society*". The reasons on the basis of which these restrictions may be "*prescribed by law*" and "*necessary in a democratic society*", namely "*legitimate aims*" on the basis of which the relevant restrictions may be imposed, are also defined within the structure of this article, and include (i) national security or public security; (ii) maintaining public order; (iii) prevention of criminal offenses; (iv) protection of health or morals; or (v) protecting the rights and freedoms of others.

171. This structure of the respective articles, which is similar to other articles of the Constitution and the ECHR which, establish the rights and relevant restrictions (see, including but not limited to Articles 8 to 11 of the ECHR, and the respective articles of the Constitution), also coincides with the structure of Article 55 of the Constitution, which is widely explained in Judgment KO54/20 (see paragraphs 189-198) and the case law of the ECtHR regarding the assessment of the compatibility with the ECHR of limitations or respective rights and freedoms.

172. The case law of the ECtHR is consolidated regarding the assessment of whether an "*interference*", namely the limitation of the right, pursues a "*legitimate aim*". In this regard, the ECtHR focuses on the analysis of "*legitimate aims*" regarding which an "*interference*" may be permitted and which are specifically defined in paragraph 3 of Article 2 of Protocol No. 4 of the ECHR. For example, in a number of cases, the ECtHR considered this point of the test to be passed because the "*interferences*" in question were considered to have pursued a

"*legitimate aim*" regarding: (i) the interest of state security (see ECtHR cases *Berkovich and others v. Russia*, applications no. 5871 and 9 others, Judgment of 27 March 2018; and *Berkovich and others v. Russia* applications no. 5871 and 9 others, Judgment of 27 March 2018, paragraphs 84-85); (ii) public interest (see the ECtHR case, *Bessenyeli v. Hungary*, application no. 37509/06, Judgment of 21 October 2009, paragraph 22); (iii) protecting the interests of the child, respectively protecting the interests of others (see ECtHR case *Battista v. Italy*, application no. 43978/09, Judgment of 2 December 2014, paragraph 40); and (iv) protecting the interests and rights of others (see ECtHR case, *Mursaliyev and others v. Azerbaijan*, application no, 66650/13 and 10 others, Judgment of 13 December 2018).

173. In principle, the case law of the ECtHR, the burden of proof regarding the existence of a "*legitimate aim*" determines to the respective state, or more precisely the public authority which takes the "*interference*" in a protection of a "*legitimate aim*". Consequently, in the circumstances of the present case, the burden of proof relates to the existence of a "*legitimate aim*" in conjunction with the respective "*interference*", falls on the Ministry of Health, namely the Government. The Court recalls that neither the Prime Minister on behalf of the Government nor the Minister of Health on behalf of the Ministry of Health have responded to the Court's request for comments on the merits of the case. Therefore, they have not argued the "*legitimate aim*" pursued through "*interference*" with the right to movement through challenged Decisions.

174. Having said that, the case law of the ECtHR also recognizes cases in which, due to the specific circumstances of a case, it acknowledged the existence of a "*legitimate aim*", despite the lack of argumentation of the respective government. In line with this case law of the ECtHR, and taking into account the lack of consolidated case law regarding the limitations of the freedom of movement, as a result of the COVID-19 pandemic, the Court, in the circumstances of the present case, is ready to accept that in the "*interference*" with the fundamental rights and freedoms regarding the freedom of movement, the Ministry of Health pursued a "*legitimate aim",* namely that of protection of "*public health"*, established specifically in paragraph 3 of Article 2 of Protocol No. 4 of the ECHR.

175. Furthermore, and in support of this finding, the Court also refers to the Information Document SG/Inf(2020)11 of 7 April 2020 on Respecting Democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, of the Council of Europe, which, *inter*

alia, emphasizes that "*protection of health*" is one of the "*legitimate aims*" which enables the respective Governments to take restrictive measures in preventing and fighting the relevant pandemic, of course, only if the latter are "*prescribed by law*" and "*necessary in a democratic society*". (See, part 3.3 of the Information Document).

176. Also, despite the fact that the case law of the ECtHR in relation to cases that may result as a consequence of the restrictions taken by the respective states in order to prevent and combat COVID-19 is still missing, and the fact that the case law and the relevant Constitutional Court, at this stage, is few and under construction, a number of constitutional courts have already issued their first decisions regarding the constitutional review of restrictions during the COVID-19 pandemic, and have recognized the existence of a "*legitimate aim*" in terms of public health protection. Of course, this is only after they have ascertained that the measures, namely the restrictions taken, are "*prescribed by law*". (See in this context, the case of the Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits, AP-1217/20, paragraph 51. Despite the conclusion of existence of a "*legitimate aim*", this Decision found a violation of the rights of the respective applicants regarding freedom of movement, due to the lack of proportionality of the measures taken).

177. Consequently, the Court finds that in the circumstances of this case, the "*interference*", namely the restriction of fundamental rights and freedoms guaranteed by Article 35 of the Constitution, by challenged Decisions, has pursued a "*legitimate aim*" of the "*protection of public health*", as defined in paragraph 3 of Article 2 of Protocol No. 4 of the ECHR. This affirmative statement is followed by the need to analyze the remaining criterion, namely to assess whether the "*interference*" with the right to movement by the challenged Decisions is "*necessary in a democratic society*".

(iii) Whether the "interference" with the right to freedom of movement is "necessary in a democratic society"

178. The Court notes that in assessing whether the "*interference"* is *"necessary in a democratic society*", the ECtHR, initially states that an "*interference*", will be considered as "*necessary in a democratic society*" if it responds to a "*pressing social need*". In this context, the ECtHR balances the interests of the state concerned, in the context of the circumstances of the present case, the protection of public health, against the right of the Applicant, and, in particular, if (i) the "*interference*" is "*proportional*" with the "*legitimate aim*" it pursues; and (ii) reasons produced by state authorities to justify "*interferences*"

in questions are "*relevant and sufficient*". (See, among other, the ECTHR cases, *Khyustov v. Russia,* application no. 28975/05, Judgment of 11 July 2013, paragraph 84 and the references therein; *Nikiforenko v. Ukraine*, application no. 14613/03, Judgment of 18 February 2010, paragraph 56; and, *Kyprianou v. Cyprus*, application no. 73797/01, Judgment of 2005, paragraph 170-171).

179. In terms of assessing proportionality, the ECtHR found a violation of Article 2 of Protocol No. 4 of the ECHR, and found that the "*interferences"* with freedom of movement were not proportional to the "*legitimate aim*" pursued, when the latter, *inter alia*, were not subject to continuous review by the relevant public authority. For example, in case *A.E. v. Poland*, finding a violation of the right of the respective applicant regarding the freedom of movement guaranteed by Article 2 of Protocol No. 4 of the ECHR, the ECtHR, regarding the proportionality of the measures taken, among other things, emphasized that the state authorities are not allowed to take restrictive measures on the right to freedom of movement of persons *"without periodic review of the reasonableness of those measures*." (See, case of the ECtHR, *A.E. v. Poland*, No. 14480/04, Judgment of 31 March 2009, paragraphs 49 and 50 and the references used therein). Such a lack of periodic review of the restricting measures was considered by the ECtHR, to be against the obligation of states to apply the necessary care for the purpose of security that the applied "*interferences*" are reasonable throughout the time of application of the relevant restriction. Similarly, in case *Battista v. Italy*, the ECtHR stated that the measures of automatic nature, without limitations regarding their scope and duration, and which are not subject to periodic review, are inconsistent with the guarantees embodied in Article 2 of Protocol No. 4 of the ECHR. (See, the case of the ECtHR, *Battista v. Italy*, cited above, paragraph 47; see also some other cases, in which after passing the test regarding "*prescribed by law*" and "*legitimate aim*", it was concluded that the "*interferences*" were not "*necessary in a democratic society*" due to lack of proportionality of the "*interferences*" in question: *Milen Kostov v. Bulgaria,* application no. 40026/07, Judgment of 3 September 2013*; Mursaliyev and others v. Azerbaijan,* applications no. 66650/13 and 10 others, Judgment of 13 December 2018*; Sarkizov and others v. Bulgaria,* application no. 37981 and 3 others, Judgment of 17 April 2012*; Stamose v. Bulgaria,* application no. 19713/05, Judgment of 27 November 2012*;* and *Vlasov and Benyash v. Russia,* applications no. 51279/09; and 32098/13, Judgment of 20 September 2016).

180. Based on the explanations above, the Court further should assess whether, in the circumstances of the present case (i) the "*interference*"

with fundamental rights and freedoms regarding freedom of movement is proportional in relation to "*legitimate aim*" pursued, including whether they are of an automatic nature, without restrictions on their scope and duration, and if they are subject to periodic review; and (ii) in the "*interference*" with fundamental rights and freedoms regarding freedom of movement, the relevant public authorities, namely the Ministry of Health, presented "*relevant and sufficient*" reasons.

181. In this context, the Court initially states that the prevention and fighting of COVID-19 pandemics is necessarily a "*pressing social need*" in terms of assessing the "*need in a democratic society*". All states are facing the challenge of preventing and combating COVID-19 pandemics. Until 29 March 2020, 22 member states of the Council of Europe have declared a state of emergency at the national level, based on the relevant constitutional proceedings. As noted above, with the purpose of effectively addressing these challenges but also to preserve the system of protection of fundamental rights and freedoms, the Council of Europe has published the Information Document, in order to provide the relevant governments with a toolkit "*for dealing with the present unprecedented and massive scale sanitary crisis in a way that respects the fundamental values of democracy, rule of law and human rights*". This Information Document, among other things, and insofar as it is relevant to the circumstances of the present case, states that in the light of the threat from COVID-19, "*the regular functioning of society cannot be maintained, particularly in the light of the main protective measure required to combat the virus, namely confinement*", and that these measures "*will inevitably encroach on rights and freedoms which are an integral and necessary part of a democratic society governed by the rule of law*".

182. Furthermore, the Information Document of the Council of Europe also states that "*the major social, political and legal challenge facing our member states will be their ability to respond to this crisis effectively, whilst ensuring that the measures they take do not undermine our genuine long-term interest in safeguarding Europe's founding values of democracy, rule of law and human rights*". The need for prompt and effective action is recognized especially in the sense of the executive authorities, emphasizing, *inter alia*, that the latter (i) "*must be able to act quickly and efficiently*; and (ii) that such a thing, "*may require the adoption of simpler decision-making procedures, as well as the facilitation of certain checks and balances*", however, always emphasizing the importance of controlling the executive power by the legislative power. In this context, the Venice Commission has consistently reiterated that even in cases of declaration of emergency,

the rule of law must prevail. (See the Report of the Venice Commission for the Protection of Human Rights in Emergency Situations, adopted by the Venice Commission at 66th plenary session, on 17-18 March 2006; and also the Venice Commission Rule of Law Checklist (CDL-AD(2016)007), paragraph 51).

183. Although not regarding the challenges arising from the COVID-19 pandemic, but in the context of defining and clarifying the mechanisms regarding the protection of fundamental rights and freedoms at "*emergency times*", the case law of the ECtHR, but also the Venice Commission, emphasize that the ECHR should be interpreted as a "*living instrument*", implying that the criteria on the basis of which the balance between the interest of the state and individual right is assessed, and the weight attributed to these respective assessment criteria, may differ depending on the context. Consequently, the proportionality assessment should also be made based on the circumstances of the respective cases and the imposition of more severe restrictive measures in certain cases may be acceptable, however without ever limiting the essence of the guaranteed rights. (See, among others, the Opinion of the Venice Commission for the Protection of Human Rights in Emergency Situations, CDL-AD(2006)015), paragraph 8 and references used therein).

184. In this context, and in assessing the proportionality of the restrictions set out by the challenged Decisions in relation to the "*legitimate aim pursued*", the Court recalls that the latter prohibits the movement of people and movement of vehicles in the municipality of Prizren, Dragash and Istog, with the exception of a period of one and a half hour within a day, provided that one is not accompanied by anyone. Having said that, for the purpose of the assessment of the proportionality of the measures taken, the Court must analyze, with the exception of the general rule of restriction of freedom of movement, through three of the four challenged Decisions.

185. The Court recalls that by the challenged Decisions, freedom of movement and circulation has been made possible by the respective conditionings, regarding (i) cases of health emergencies; (ii) cases of performing essential needs beyond certain distances; (iii) cases of participation in burials; (iv) persons with disabilities; (v) victims of domestic violence, in accordance with the recommendations of the Information Document of the Council of Europe; (vi) circulation of necessary goods and services; (vii) the movement of relevant workers; (viii) farmers and farm workers; (ix) movements for needs of state institutions; and (x) media.

186. The challenged Decisions have also specifically addressed persons over the age of 65 and those under the age of 16. By the challenged Decisions, in fact, the Ministry of Health has not prohibited the movement of persons over the age of 65 during the allowed time, but has recommended that such a right not be exercised unless necessary. Whereas, regarding the persons under the age of 16, it has conditioned their movement on the condition of being accompanied by a member of the respective family community within the allowed time of the movement.

187. In the context of the abovementioned exceptions, the Court considers that (i) sufficient exceptions have been made in terms of restricting freedom of movement, thus preserving the essence of this right; and (ii) the relevant restrictions and exceptions reflect sufficient balance between the interest of the state on the one hand and the individual rights to freedom of movement of affected citizens by the challenged decisions on the other, in light of the unprecedented circumstances created by the COVID-19 pandemic, and as a result, (iii) the "*interference*" namely, the restriction of the right to freedom of movement of the citizens of the affected municipalities is proportional in relation to the pursuit of the "*legitimate aim*" of the protection of public health.

188. This finding also applies to persons under the age of 16, whose freedom of movement during the time allowed by the challenged Decisions, is conditioned by the escort of a member of the respective family. That is because, Article 50 [Rights of Children] of the Constitution, insofar as it is relevant in the circumstances of the present case, stipulates that all actions relating to children, taken either by public authorities or by private institutions, must be in the best interests of children, in its fourth paragraph. Taking this into account, and in particular, in the circumstances created by the COVID-19 pandemic, the Court, in principle, does not consider the obligation to accompany persons under the age of 16 to be disproportionate. Such an attitude is also in line with the Convention on the Rights of the Child, which under Article 22 of the Constitution applies directly to the Republic of Kosovo, and which, although it does not specifically define the right to freedom of movement, nevertheless, with regard to possible restrictions on children's rights, also defines the protection of public health as one of "*legitimate aim*" on the basis of which it may be "*interfered*" with their rights.

189. In support of the proportionality assessment of "*interferences*" with the freedom of movement by the challenged Decisions, the Court also emphasizes the fact that the latter, (i) determine the specified time

limit regarding the measures taken, namely until 4 May 2020; (ii) set deadlines within which they should be reconsidered, namely by 30 April 2020; and (iii) determine the possibility of continuous review, based on the analysis of the epidemiological situation. Therefore, the Court emphasizes that the challenged Decisions also contain the component of (i) "*periodic review of the reasonableness of those measures*", therefore (ii) are not measures of an automatic nature, without restrictions regarding their scope and duration, these criteria which, based on the case law of the ECtHR, in assessing an "*interference*" in its entirety, could result in a lack of proportionality.

190. The Court recalls that when assessing whether the "*interference*" with fundamental rights and freedoms is "*necessary in a democratic society*", it must also assess whether the reasons contained in the relevant decisions of the state authorities are "*relevant and sufficient*".

191. In this context, the Court recalls that the challenged Decisions, beyond the factual description relating to (i) the issuance of Government Decision No. 01/07 dated 11 March 2020; (ii) issuance of Government Decision No. 01/15 of 23 March 2020; and (iii) Judgment of the Constitutional Court in case KO54/20, justify the limitations specified in the challenged Decisions, on the basis of (i) Article 41.2 of the Law for Prevention and Fighting Against Infectious Diseases; and (ii) the proposal of the NIPHK dated 12 April 2020 which "*considers that the infection has spread to that municipality or that that municipality is considered directly endangered*".

192. In this context, the Court recalls (i) the Applicants' allegations that the Ministry of Health has treated three municipalities with different characteristics in the same manner, and has imposed the same measures in Dragash, Istog and Prizren, with no case, one case, and with more cases, respectively infected with COVID-19; and (ii) the fact that despite the request of the Court addressed to the Minister of Health, for comments in relation to the merits of the Referral and to submit to the Court the recommendations of the NIPHK which are not published on its official website, the Ministry of Health has failed to do so.

193. However, the Court emphasizes that, under the Law for Prevention and Fighting Against Infectious Diseases, it is not disputable that the NIPHK and other health institutions defined by this law have the competence and expertise to assess the situation with respect to infectious diseases, and to recommend that measures be taken in the *"place where the epidemic has spread"* and "*infected or directly endangered regions"* within the meaning of paragraph 2 of Article 41

of the Law for Prevention and Fighting Against Infectious Diseases. Moreover, despite the differences in cases infected in these municipalities, the Court cannot assess whether a region, although it may not be "*infected*", is also not "*directly endangered*" for the purposes of Article 41 of the Law for Prevention and Fighting Against Infectious Diseases. As stated in Judgment KO54/20, on the matters of public health, the Constitutional Court itself refers to and complies with the relevant health experts in the country or at the world level (see paragraphs 177 and 310 of Judgment KO54/20).

194. Therefore, and on the basis of the explanations above, the Court considers that the reasoning contained in the challenged decisions, namely the reference to the proposal of the NIPHK dated 12 April 2020 which "*considers that the infection has spread in that municipality or that that municipality is considered directly endangered"*, is *"sufficient and relevant"* in the circumstances of prevention and fighting against COVID-19 pandemic. In this context, the Court also points out the fact recognized by the Information Document of the Council of Europe that the need for prompt and effective action to prevent and fight against pandemic is specifically recognized to the executive authorities, by emphasizing that they *"should be able to act quickly and efficiently"* in this context.

195. Consequently, the Court considers that the *"interference"* with the freedom of movement through challenged Decisions is *"necessary in a democratic society"*, thus resulting in the fulfillment of the last condition set out in Article 55 of the Constitution and the case law of ECHR. This is because (i) it is not disputable that in the circumstances of the COVID-19 pandemic there is a *"pressing social need"*; (ii) the relevant *"interference"* is proportionate to the *"legitimate aim"* pursued, including the balance between the state's interest in protecting public health and the citizens' right of movement affected by challenged Decisions; and (iii) the reasons produced by the state authorities to justify the "*interference*" with the freedom of movement, in the circumstances of the fight against COVID-19 pandemics, are *"relevant and sufficient."*

196. Finally, the Court, in reviewing the constitutionality of the Decisions [No. 229/IV/2020], [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*"on preventing, fighting and eliminating infectious disease COVID-19*" in the municipalities of Prizren, Dragash and Istog, respectively, finds that they are in compliance with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. This finding, as clarified above, applies with exception of item

V of the Decision [No. 229/IV/2020] for the municipality of Prizren and item IV of the Decisions [No.238/IV/2020] and [No. 239/IV/2020] for the municipalities of Dragash and Istog, respectively, regarding "*administrative offences*", and which, according to the assessment and clarifications given by the Court, are not "*prescribed by law*", and consequently are contrary to Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

197. Having said that, in the following, the Court will proceed with the constitutional review of the Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health for the declaration of the municipality of Prizren as a "*quarantine zone*", starting from the assessment of whether in its issuance, the Ministry of Health is based on the authorizations defined in the Law for Prevention and Fighting against Infectious Diseases, namely "*prescribed by law*".

2. Constitutional review of Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health for the declaration of the Municipality of Prizren a *"quarantine zone"*

(i) Whether the "interference" with the right to freedom of movement is "prescribed by law"

198. As in the case of assessment of Decisions [No. 229/IV/2020], [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality"* of Prizren, Dragash and Istog, so that in the assessment of Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, for the declaration of the Municipality of Prizren "*quarantine zone*", the Court must first assess whether the latter meets the criterion of being "*prescribed by law*", namely, if in its issuance, through which it is has been "*interfered*" with the freedom of movement of the citizens of the municipality of Prizren guaranteed by Article 35 of the Constitution, the Ministry of Health was based on the legal authorizations defined by a law of the Assembly, namely the Law for Prevention and Fighting against Infectious Diseases.

199. The Court recalls that the challenged Decision holds that (i) the Municipality of Prizren is declared a quarantine zone because "*the residents of this Municipality are suspected to have had direct contact with persons infected with corona virus COVID 19*"; (ii) declares the village Skorobisht hotbed of transmission of the infection;

(iii) entry and exit in this Municipality is prohibited; (iv) obliges all residents of Prizren to comply with the measures in accordance with the instructions of the NIPHK; and (v) establishes the entry into force on the same date.

200. The Court also recalls that (i) the general principles of the case law of the Court and of the ECtHR regarding the principle of being "*prescribed by law*" have been clarified in Judgment KO54/20 (see 208-216 paragraphs thereof) and in paragraphs 138-139 of this Judgment; while (ii) all the provisions, namely the legal basis on which this Decision is based, have already been analyzed in paragraphs 141-142 of this Judgment.

201. The Court, however, notes that unlike the three Decisions of the Ministry of Health that were already assessed by the Court, and which were also based on Articles 44, 46 and 47 of the Law on General Administrative Procedure, the Decision on the declaration of the Municipality of Prizren "*quarantine zone*" was not referred on them. Whereas, as explained above, the only additional basis mentioned in this Decision is Article 33 of the Law for Prevention and Fighting against Infectious Diseases and as a result, the Court will focus precisely on this article, to conclude whether the quarantine of all citizens of the municipality of Prizren was "*prescribed by law*".

202. In this regard, the Court states that the quarantine was referred to four articles of the Law for Prevention and Fighting against Infectious Diseases, namely (i) Article 2, which defines the quarantine as "*the free movement limitation for healthy people who are exposed to dangerous causers of the infectious diseases*"; (ii) item c) of paragraph 3 of Article 8, defining quarantine as one of "*specific measures*" for the prevention of infectious diseases; (iii) its Article 33 , in which the conditions for placing natural persons in quarantine are determined; and (iv) item c of Article 49 thereof, and which determines the obligation of the Government to provide material means, to cover the costs of quarantine and sanitary control of persons in quarantine.

203. The Court emphasizes that in the circumstances of the present case, it is not disputed that there is an "*interference*" with the right to freedom of movement of the citizens of Prizren, and this finding is based on the very definition of quarantine, as defined in Article 2 of the Law for Prevention and Fighting against Infectious Diseases. While in assessing whether this "*interference*", namely limitation of the right of movement of the citizens of Prizren by the challenged decision is "*prescribed by law*", the Court must assess the content of Article 33 of the Law for Prevention and Fighting against Infectious Diseases.

204. The Court in this regard, emphasizes that Article 33 has a total of five paragraphs, and stipulates that (i) persons who are proved or suspected to have been in direct contacts with sick persons or suspects of being sick from plague, variola and viral hemorrhage fever will be put into quarantine; (ii) holding duration of persons in quarantine under paragraph 1 of this article depends on the maximum period of infectious disease incubation; (iii) persons from paragraph 1 of this article are subject to continual medical controls during all time of quarantine; (iv) Ministry of Health upon the NIPHK proposal makes a decision for putting persons into quarantine under paragraph 1 of this article; and (v) execution of decision for putting persons into quarantine under paragraph 1 of this article is ensured by the competent authority at the country level.

205. The Court notes that Article 33 of the Law for Prevention and Fighting against Infectious Diseases refers precisely to only "*persons*". This article is an integral part of Chapter III Measures for Prevention and Fighting the Infectious Diseases, and which in its entirety, also refers only to "*persons*", and never to, "*regions*" or "*places*". This is in contrast to Chapter IV regarding Safety Measures for Population Protection from the Infectious Diseases, and which in its Article 41, foresees the measure of "*prohibition of travel*" and "*prohibition of movement*" regarding the "*place where the epidemic is spread*", "*infected regions*" or/and "*directly endangered regions*".

206. In this regard, the Court notes that the Law for Prevention and Fighting against Infectious Diseases, exactly distinguishes between the use of the word "*person*" and "*place*" or "*region*" in terms of measures to prevent and combat infectious diseases, while prohibition of "*travel*" and "*movement*", uses precisely in the sense of "*place*" or "*region*" "*infected*" or "*endangered*". In this sense, in order to determine safety measures in the context of infectious diseases, for "*places*" and "*regions*", such as the whole Municipality of Prizren, has determined the measures specified in items a) and b) of paragraph 2 of Article 41 of the Law for Prevention and Fighting against Infectious Diseases, these measures which in the municipality of Prizren, have been imposed by the Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19"* and which, with the exception of item V, the Court has already declared compatible with the Constitution.

207. The Court also states that the use of the word "*person*" in the context of quarantine, reflects the legislator's intention to authorize the restriction of fundamental rights and freedoms for individually

defined natural persons, whose rights may consequently be restricted by an individual administrative act, and not for "*regions*" and "*places*" infected and endangered, the citizens' rights, which could be restricted through a general administrative act, because when the legislator had such a purpose, it has accurately established it, as is the case with paragraph 2 of Article 41 of the Law for Prevention and Fighting against Infectious Diseases.

208. Therefore, it is not disputable that Article 33 of the Law for Prevention and Fighting against Infectious Diseases refers to individually identifiable natural persons. That said, this law sets out other conditions on the basis of which the latter can be placed into quarantine. More precisely and based on paragraph 1 of Article 33 of the Law for Prevention and Fighting against Infectious Diseases, only two categories of natural persons may be subject to quarantine: (i) persons who are **confirmed** to have been in direct contact with sick or suspected persons with the disease; and (ii) persons **suspected** of having been in direct contact with sick or suspected persons with the disease.

209. Therefore, to place persons into quarantine, (i) "*the contact must be established*"; or (ii) "*suspicions of contact*" with sick persons or suspects of infectious disease should exist, as defined in paragraph 1 of Article 33 of the aforementioned law, and namely, it must be suspected that the same may also be carriers of the infectious disease. Consequently, the same persons are subject to quarantine, as long as there is a maximum incubation period of the respective disease, as defined in paragraph 2 of the same article. Furthermore, pursuant to paragraph 2 of Article 14 of the Law for Prevention and Fighting against Infectious Diseases, not only "*disease",* but also "*suspect of disease existence*" is ascertained by "*a doctor or another health employee, out of his/her duty performance in health institution, and is obliged to notify about this immediately the nearest health institution*".

210. In this regard, the conditioning of the "*confirmation*" or "*suspicion*" of contacts with sick or suspected persons for infectious diseases, for the quarantine of persons who are also consequently considered suspects as long as the incubation period of the respective disease lasts, reflect the purpose of the lawmaker that the cases of quarantine, as one of the special measures for the prevention of infectious diseases which is applied to "*healthy people*" and limits the freedom of movement, are applied exclusively, and in no way as a general measure which is imposed on all citizens of an entire "*region*". In fact, unlike special measures, the general and security measures are precisely

defined in paragraph 2 of Article 8 and Chapter IV of the Law for Prevention and Fighting against Infectious Diseases, which includes Article 41 of the Law in question, of which quarantine is not an integral part.

211. Furthermore, paragraph 3 of Article 33 of the abovementioned law, explicitly stipulates that the persons for whom quarantine has been ordered will be "*subject to continual medical controls during all time of quarantine.*" More precisely, Article 33 of the Law for Prevention and Fighting against Infectious Diseases, conditions the quarantine of persons by subjecting them to continuous medical examinations throughout the quarantine period. This condition also clearly reflects the legislator's intention to determine the special measure of quarantine, only for natural persons for whom it is "*confirmed*" or "*suspected*" that they have been in direct contact with sick or suspected persons of the disease, consequently to individually defined persons, and not to the citizens of an entire region. Moreover, the conditioning of continuous medical treatment and examination throughout the Law for Prevention and Fighting against Infectious Diseases, is determined only exceptionally, and that, only with respect to the persons for whom it is "*proved*" that they are sick or it is "*proved to be suspects*" for disease.

212. The quarantine of all citizens of Prizren does not meet any of these legal requirements because (i) does not apply to individually determined natural persons, but to all citizens of the municipality of Prizren; (ii) all of the latter, for the purposes of Article 33 of the Law for Prevention and Fighting against Infectious Diseases, it has not been "*confirmed*" nor can it be "*suspected*" that they have been in direct contact with sick or suspected persons with the disease; (iii) The relevant Decision does not set any time limit within which the duration of the quarantine will be reconsidered, contrary to paragraph 2 of Article 33 of the law in question, because it clearly specifies the time limit within which the quarantine is allowed and this is related to the maximum period of incubation of the respective disease; and (iv) the quarantined citizens of the municipality of Prizren have not been subjected to continuous medical examination which is an essential condition in case of quarantine, as stipulated in paragraph 3 of the abovementioned article.

213. Furthermore, and precisely for the purposes of continuous medical examination, in item c) of Article 49 of the Law for Prevention and Fighting against Infectious Diseases it is expressly provided that in the context of protecting the population from infectious diseases that endanger the whole country, the Government provides additional

means and materials: "*For cost recovery relating to quarantine and sanitary control of persons who were in contact with the sick persons or persons for whom is suspected to suffer from any of the infectious diseases.*" This provision, read together with Article 33 of the law in question, leads to the conclusion that the quarantine may be imposed by a decision of the Ministry of Health, following the recommendation of the NIPHK, only to individually determined natural persons, and not to all persons of a municipality or region or to a geographical area, a measure that is always conditioned on the application of the second and third paragraphs of this article, which are related to the duration of compulsory quarantine and medical examination.

214. The Court also notes that the challenged Decision, in addition to referring to the NIPHK recommendation, contains no single justification for placing citizens in an entire municipality in quarantine. It does not contain any justification, nor in terms of (i) confirmation or suspicion that these citizens in their entirety have been in direct contact with sick or suspicious persons of infectious diseases; (ii) the duration of their quarantine; (iii) the obligation to be subject continuous medical examinations throughout the quarantine period for the latter; nor (iv) coverage of quarantine costs for these persons and the respective sanitary control, as required through by 33 in conjunction with item c) of Article 49 of the Law for Prevention and Fighting against Infectious Diseases.

215. Furthermore, the Court also emphasizes that, pursuant to paragraph 5 of Article 33 of the Law for Prevention and Fighting against Infectious Diseases, the quarantine procedure, beyond the recommendation of the NIPHK, is conditional on the implementation of a decision. The reference in the latter should be read together with paragraph 1 of Article 45 of the Law for Prevention and Fighting against Infectious Diseases, and, which, is the only article in this law that refers to the procedure regarding the issuance of acts related to preventive measure and fighting infectious diseases. In this context, the Court notes that Article 33 of the Law for Prevention and Fighting against Infectious Diseases read together with Article 44 of the Law on General Administrative Procedure, enables the Ministry of Health to issue an individual administrative act, addressed to one or several individually determined persons, and not a general administrative act, as is the case in the circumstances of the present case. Having said that, the Court also notes that a structure and mandatory elements of the written act are set out in Article 47 of the Law on General Administrative Procedure, and which also includes the reasoning part of an act, the absence of which, based on Article 52 of the same law, also results in its unlawfulness.

216. Finally, it is also important to clarify that the challenged Decision regarding the declaration of the municipality of Prizren "*quarantine zone*", beyond the declaration of the village Skorobisht as a hotbed of the transmission of infection, has no other effect on the citizens of Prizren. This is because the latter does not specify any other obligation for them, except that it prohibits "*entries and exits*" in this municipality. The prohibition of "*entries and exits*" in the municipality of Prizren, includes issues related to circulation and movement, as defined in paragraph 2 of Article 41 of the Law for Prevention and Fighting against Infectious Diseases, while for the municipality of Prizren, the same measures are also determined by item II of the Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, *"on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*" of Prizren, and which the Court has already declared compatible with the Constitution, by leaving it in force.

217. Therefore, based on the abovementioned clarifications, the Court finds that in the issuance of the Decision on the declaration of the municipality of Prizren a "*quarantine zone*", and consequently, the quarantine of all citizens of a municipality, the Ministry of Health, has exceeded the authorizations established by the Law for Prevention and Fighting against Infectious Diseases, and consequently, "*the interference*" with the right to freedom of movement of citizens of the municipality of Prizren, is not "*prescribed by law*".

218. Taking into account that the "*interferences*" with the fundamental rights and freedoms of the respective citizens, are not "*prescribed by law*", based on the explanations given in Judgment KO54/20 and in this Judgment, the Court does not further assess whether the "*interferences*" provided by this challenged Decision, have also pursued a "*legitimate aim*" or whether they are "*necessary in a democratic society*".

219. Therefore, Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health does not meet the criteria of being "*prescribed by law*" and, as such, was rendered contrary to Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR.

(iv) Conclusion regarding the compatibility of the challenged Decisions with Articles 35 and 55 of the Constitution

220. The Court has assessed the compatibility of the challenged Decisions with Articles 35 and 55 of the Constitution, on the basis of the case law of the ECtHR relating to the freedom of movement defined by Article 2 of Protocol No. 4 of the ECHR, and found that:

(i) Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*" in the Municipality of Prizren (points I, II, III, IV, VI, VII and VIII); and Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*" in the Municipalities of Dragash and Istog (points I, II, III, V, VI and VII), respectively, **are in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. Consequently, all the specified points of the three abovementioned Decisions were declared constitutional by the Court.

(ii) The Court held, that in issuing the abovementioned Decisions, the Ministry of Health has acted in compliance with the authorizations prescribed by the Law for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens of the municipalities of Prizren, Dragash and Istog, through the abovementioned Decisions, were "*prescribed by law*". The Court also found that the latter, pursue a "le*gitimate aim*", namely the one of the protection of "*public health*", as foreseen in paragraph 3 of Article 2 of Protocol No. 4 of the ECHR; are proportional in relation to "*legitimate aim*" pursued; and are "*necessary in a democratic society*".

(iii) Item V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*" for the municipality of Prizren; and item IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*" for the municipalities of Dragash and Istog, respectively, through which the administrative minor offences and the respective sanctions are determined, **are not in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. The Court reasoned that in determining the non-compliance with the measures provided

for by the abovementioned Decisions as "*administrative minor offences*", the Ministry of Health exceeded the authorizations provided by Law for Prevention and Fighting against Infectious Diseases. The Court stated that based on Law on Minor Offences, the minor offenses and the respective sanctions must be determined only by law of the Assembly of the Republic or through acts of the Municipal Assemblies, and that this authorization may not be delegated to other bodies. Consequently, the administrative minor offenses determined through these three challenged Decisions, are not "*prescribed by law*" and consequently, were declared unconstitutional

(iv) Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, declaring the municipality of Prizren "*quarantine zone*", **is not in compliance** with Articles 35 and 55 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. The Court held, that in issuing this Decision, the Ministry of Health has exceeded the authorizations provided by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens, through the quarantine of all the citizens of the municipality of Prizren, are not "*prescribed by law*". The Court clarified that the "*quarantine*" according to Law for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry of Health, following the recommendation of the NIPHK, only for natural persons which are confirmed or suspected to have been in direct contact with the sick persons or suspected of infectious disease, always provided that also other requirements set forth through Article 33 and item c) of Article 49 of the Law in question are met.

221. The Court reiterates the findings of the Judgment KO54/20, that the Government pursuant to Articles 92 and 93 of the Constitution exercises executive power in compliance with the Constitution and the law. It implements the laws and other acts adopted by the Assembly, and takes decisions in accordance with the Constitution necessary for the implementation of the laws of the Assembly. In this context, the Government, as well as other law enforcement bodies or authorities, may take, apply and impose limitations measures only insofar as determined and allowed by the law of the Assembly. This interpretation is in full compliance with the system of checks and balances in terms of the separation of powers where the legislative power to create laws in the country belongs only to the Assembly; while the executive power to implement Assembly laws, belongs to the

Government. The judiciary in this triangle of power has its role to control, among other things, the constitutionality of the laws issued by the Assembly but also the constitutionality of the decisions of the Government whereby the Assembly laws are implemented. (See also paragraphs 293-295 of the Judgment KO54/20).

222. In the end, the Court also concludes that despite the fact that not only the Republic of Kosovo, but the entire world is facing the fight against COVID-19 pandemic, which inevitably prevents the *"normal functioning of society"*, as emphasized by the Council of Europe in the Information Document, the rule of law must prevail, and in this context, all institutions of the Republic are obliged to act in full compliance with the relevant constitutional and legal powers.

223. That being said and in the following, the Court will also address three remaining issues. The first concerns the (i) the implementation of the Court's Judgment in case KO54/20. The second is related to (ii) the submission of the Prime Minister addressed to the judges of the Court on 23 April 2020. Whereas, the third concerns (iii) the Applicants' request for an interim measure in respect of the challenged Decisions. Finally, the Court will present its conclusions and the operative part of this Judgment.

III. As to the implementation of the Court's Judgment in case KO54/20

224. In Judgment KO54/20, the Court reviewed the constitutionality of the Decision [No. 01/15] of the Government, of 23 March 2020, following the referral submitted by the President on 24 March 2020.

225. On 31 March 2020 the Court decided on case KO54/20 and found that the above-mentioned Decision of the Government was incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Association] of the Constitution and equivalent articles of the ECHR, respectively Articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), and 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

226. The Court also found that, under Article 55 of the Constitution, the limitation on fundamental rights and freedoms can be done *"only by law"* of the Assembly; and that Article 56 of the Constitution was not applicable in the circumstances of the case KO54/20. The full Judgment of the Court was published on 6 April 2020; whereas on 31

March 2020, the Court had already published the operative part of the Judgment and the conclusions of the Court.

227. The Court decided that the Judgment in case KO54/20 would enter into force on 13 April 2020. (See the operative part of the Judgment in question, cited above, as well as the Court's conclusions in that case, paragraphs 310-325). In the part where the rationale for the entry into force of the Judgment of the Court was elaborated on a date other than that of the announcement of the Judgment, the Court, among other things, also revealed the role and institutional responsibility of the Assembly in light of the need to deal with COVID-19 pandemic in the Republic of Kosovo, by emphasizing as follows: *"[...] The Court finds that until the date of the repeal of the challenged Decision, the responsible institutions of the Republic of Kosovo,* ***in the first place the Assembly, must take actions****, in accordance with the Constitution and this Judgment, which are considered as appropriate and adequate to continue preventing and fighting pandemics COVID-19 - which in itself constitutes a high interest of public health for all citizens and persons living in the Republic of Kosovo."*

228. Between 12 and 14 April 2020, the Ministry of Health issued a number of Decisions. On 17 April 2020, the case KO61/20 was submitted to the Court by the Applicants who challenged four (4) Decisions of the Minister of Health, issued in the course of the fight against the COVID-19 pandemic, the constitutional review of which was conducted through this Judgment. Among the key allegations of the Applicants was the fact that the Court's Judgment KO54/ 20 was not implemented and respected. Also the Ombudsperson held the same position.

229. As to what has happened since the entry into force of the Judgment of the Court and until now, at the level of the Assembly, the Court is uninformed. This is due to the fact that despite the specific request of the Court addressed to the Assembly on 20 April 2020 to notify the Court about the steps *"taken by the Assembly of the Republic of Kosovo following the publication of Judgment KO54/20 of 31 March 2020"*, the Court did not receive any response, document or information. Consequently, for the Court, the treatment by the Assembly of the Judgment KO54/20 since the moment of its publication remains unclear. What is publicly known on the basis of the updated information of the Official Gazette, is that the Assembly has not adopted any supplementation-amendments to existing laws addressing infectious diseases, nor has it adopted any new laws that

could take into account the findings of the Court in the Judgment KO54/20.

230. The Court, with respect to the non-submission of reply requested from the Assembly concerning the enforcement of the Judgment in case KO54/20, emphasizes that, under Article 26 [Cooperation with other Public Authorities] of the Law on the Constitutional Court, *"All courts and public authorities of the Republic of Kosovo are obliged to support the work of the Constitutional Court and to fully cooperate with the Constitutional Court upon request of the Constitutional Court."* Moreover, Rule 66 [Enforcement of decisions] of the Rules of Procedure provides that "*The decisions of the Court are binding [...] on the institutions of the Republic of Kosovo"* and that all natural and legal persons *"are obligated to respect and comply with the decisions of the Court."*

231. Moreover and finally, with respect to the enforcement of the Judgment KO54/20, the Court in particular emphasizes Article 116 [Legal Effect of Decisions] of the Constitution, on the basis of which, *"Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo."*

IV. In relation to the Prime Minister's submission addressed to the judges of the Court

232. In the proceedings before the Court, the latter has informed the public that during the review proceedings in the case KO61/20, it had received a submission from the Prime Minister, on behalf of the Government, addressed to the judges of the Court named as: "*Submission regarding the non-observance of the legal deadline and the Rules of Procedure of the Constitutional Court by the Constitutional Court in Case No. KO61/20"*.

233. About this submission and its content, as in the case of all other submissions, were notified all the judges of the Court as well as all interested parties in this case, namely: the Applicants; the President and the deputies of the Assembly; the President; the Ombudsperson; and the Minister of Health. The sender of this submission, namely the Prime Minister, was notified by the Court about its receipt and was informed that the Court will respond to the submission in accordance with the provisions of the Constitution, the Law and the Rules of Procedure.

234. The Court has published the content of the submission sent by the Prime Minister in paragraph 28 of this Judgment. It has also already

given its answer regarding the "*concern*" of the Government about "*violation of an essential importance in a constitutional judicial procedure*" in relation to Rule 35 (5) of the Rules of Procedure, in paragraphs 108-112 of the Judgment. In the following, the Court will also address the same "*concerns*" regarding Article 22.2 of the Law on the Constitutional Court.

235. The Court in the context of Article 22 of the Law on the Constitutional Court, initially states that it is correct that the provision mentioned by the Prime Minister, namely, paragraph 2 of Article 22 provides that: "*The Secretariat shall send copies of the referral to the opposing party and other party (ies) or participants in the procedure. The opposing party or participant has forty-five (45) days from the reception of the referral to submit to the Secretariat its reply to the referral together with justification and necessary supporting information and documents".*

236. However, the Court emphasizes and clarifies that the time limit set at forty-five (45) days from the abovementioned provision is only one of the applicable deadlines through which the Court exercises its function. The latter is the general deadline set out in paragraph 2 of Article 22 of part I of Chapter II of the Law on the Constitutional Court regarding the General procedural provisions. The same Law, in Chapter III, also defines Special Procedures. In the latter, it also sets deadlines of twenty-four (24) hours and up to sixty (60) days within which the Court is obliged to decide on a relevant referral. Precisely in order for the Court to adapt its decision-making to the nature, specifics and urgency of a case before it, including requests for interim measures, Rule 33 of the Rules of Procedure, and more precisely its paragraph 3, among other things, determines the competence of the Court, to order a shorter deadline in relation to the submission of the relevant documents in a given case, if in the assessment of the Court, a referral "*requires expedited handling*". This rule specifically defines the following: "*The Court may order a shorter deadline when a referral requires expedited handling*".

237. In this context, the Court notes that the general rule of the forty-five (45) day deadline referred to in Article 22 of the Law, is subject to the exceptions set out in this Law and the Rules of Procedure, and that based on the specifics of the case before it, and assessing whether "*a referral requires expedited handling*", the Court sets other deadlines and appropriate to the circumstances of the case before it

238. The Court considers that the requirements for assessing the compatibility of acts, in the circumstances of the present case, the

decisions of the Ministry of Health, with the fundamental rights and freedoms of its citizens and guaranteed by Chapter II of the Constitution, in the circumstances of COVID-19 pandemic, present "*a referral* which *requires expedited handling*", and that the necessity for such an approach is not disputed. The Court has acted in the same way in the previous case, namely the constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020, and which resulted in Judgment KO54/20 published on 6 April 2020, within 13 days of its registration. The Constitutional Courts of the region and beyond have acted with the same urgency. Such an approach is also required by the Council of Europe, in its Information Document published on 7 April 2020, on respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, which among other things, emphasizes the importance of quick decision-making by the courts, and especially the constitutional courts, in assessing the compatibility of the limitations of fundamental rights and freedoms with the relevant Constitutions. In fact, in the submission submitted to the Court, the Prime Minister himself states that "*expects the Court, similar to the institutions equivalent to it in Western countries, to show special care for the life and health of citizens"* despite the fact that the determination of "*expectations*" from the Court is not within the competence of the executive branch.

239. The Court also recalls that three (3) of the four (4) challenged Decisions before the Court are in force only until 4 May 2020. The Referral before the Court includes issues of the constitutional review of the restriction of fundamental rights and freedoms guaranteed by the Constitution in the circumstances of the COVID-19 pandemic. According to the Prime Minister, the Court should allow the latter and other parties to submit their comments within a period of forty-five (45) days, until 1 June 2020, namely twenty-eight (28) days after the expiration of the challenged Decisions.

240. In this respect, the Court emphasizes that neither party to the proceedings, nor the Government, has the authorisation to self-determine the legal time limits within which it must respond to the Court. It is only the latter that can set deadlines for the parties based on the Constitution, the Law and the Rules of Procedure. Moreover, as explained above, giving the parties forty-five (45) days to submit their documents, in the circumstances of the case before the Court, would result in the Court's complete negligence, by not treating a case of such constitutional importance with "*expedited handling*". This would be completely contrary to its constitutional mandate to interpret the Constitution in protection of fundamental human rights and freedoms and the values of the Republic.

241. In the end, and regarding the approach that the Prime Minister's submission addressed to the Court, on behalf of the Government, and which, among other things, expresses (i) "*its concerns about violations of essential provisions regarding the procedure and deadlines to be followed";* (ii) "*its concerns regarding the violation of legal provisions concerning the deadlines stipulated by the lawmaker*"; (iii) "*a serious concern regarding the professionalism and impartiality of the Court",* states that (iv) "*the Court has avoided the procedure which it should have followed in case no. KO61/20"*; (v) "*two legal violations of essential importance in the constitutional court proceedings"*; states that (vi) "*putting pressure on the Government by unlawful notifications is unacceptable"*; and finally announces that (vii) "*the Government will carefully review the legal violations so far and, depending on their legal qualification, will take the necessary actions based on the legislation in force"*. The Court chooses only to strongly emphasize that the Government's approach to the Court reflected in this submission, is unacceptable and contrary to the fundamental values of the Constitution of the Republic.

242. In this context, the Court reiterates that it is an independent body in protection of the Constitution and is the final interpreter of the Constitution. The Court also recalls that the Constitution attributes to it full independence in the performance of its responsibilities. Moreover, it is a constitutional obligation of the Government and all institutions of the Republic to respect and not interfere with this independence. The Court also reminds the Government that the Constitution does not attribute to it any competence regarding the decision-making of the judiciary. Respecting the fundamental constitutional values, regarding the separation of powers, independence of the judiciary, independence and authority of the Constitutional Court and protection of the rule of law, is a constitutional obligation of all branches of government of the Republic of Kosovo.

V. In relation to the request for interim measures

243. The Court recalls that through the Referral submitted on 17 April 2020, the Applicants requested the imposition of interim measure whereby the implementation of the challenged Decisions of the Minister of Health would be suspended pending the decision of the case on merits by the Court.

244. On 20 April 2020, the Court had given the opportunity to the Government, the Assembly, with request that the same opportunity be

provided to all deputies, the President and the Ombudsperson, who, by 21 April 2020, at 16:00hrs were to provide their comments on the Applicants' request for an interim measure. The Court received comments within the said deadline only from the Government. The latter objected the Applicants' request for imposition of interim measure, claiming that none of the requirements for imposition of the interim measures provided by the Law and the Rules of Procedure have been met. (See paragraphs 60-67 of this Judgment which reflect the Applicants' request for interim measure; and the comments submitted to the Court by the Government in respect of the request for interim measure).

245. Given that the Court, by this Judgment, has already decided on the merits of the case in its entirety, the request for an interim measure remains without subject of review.

VI. Conclusions

246. On 31 March 2020, the Court decided on case KO54/20, rendering a Judgment whereby it declared Decision No. 01/15 of the Government invalid, holding that the latter was in contradiction with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] of the Constitution and the equivalent articles of the ECHR, namely articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), and 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

247. In the abovementioned Judgment, the Court emphasized that (i) the Government may only implement a law of the Assembly that limits a fundamental right and freedom, and only to the extent that the Assembly has authorized it through the respective law; and that (ii) the Ministry of Health, namely the Government, is authorized to issue decisions aimed at preventing and fighting the pandemics, only to the extent it is authorized through the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health. The Court also stated that these two laws do not authorize the Ministry of Health, namely the Government, to limit the rights and freedoms guaranteed by the Constitution at the level of the entire Republic of Kosovo and for all the citizens of the Republic of Kosovo without exception.

248. Following Judgment KO54/20, on 14 April 2020, through thirty-eight (38) decisions on "*preventing, fighting and eliminating the infectious*

disease COVID-19", the Ministry of Health imposed limitations in all municipalities of Kosovo and for all citizens of the Republic of Kosovo. The Court in the present case, namely KO61/20, is not conducting a constitutional review of all thirty-eight (38) abovementioned Decisions, because the Applicants have not challenged all of them.

249. Only three (3) of them have been challenged before the Court, Decisions [No. 229/IV/2020]; [No. 238/IV/2020]; and [No. 239/IV/2020] of 14 April 2020, for the municipalities of Prizren, Dragash and Istog, respectively. The Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health declaring the Municipality of Prizren "*quarantine zone*", has also been challenged before the Court.

250. Therefore, the constitutional question entailed in this Judgment, KO61/20, is the compatibility with articles 35 and 55 of the Constitution of the four (4) challenged Decisions of the Ministry of Health. The Court, in assessing their constitutionality, based on article 55 of the Constitution, the case-law of the Court, including the Judgment of the Court KO54/20, and the case-law of the ECtHR pertaining to Article 2 of Protocol No. 4 of the ECHR, has reviewed whether the "*interferences*", namely the limitations on the freedom of movement of the citizens in the municipalities of Prizren, Dragash and Istog, respectively (i) are "*prescribed by law*", namely by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases; (ii) pursue a "*legitimate aim*"; and (iii) are "*necessary in a democratic society*".

251. Based on the examinations and assessments of the documents submitted to the Court and its case-law, the Court, unanimously, decided to declare Referral KO61/20 admissible for review on the merits, taking into account that all admissibility criteria established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure, have been met.

252. The Court decided that the Decisions "*on preventing, fighting and eliminating the infectious disease COVID-19*" in the municipalities of Prizren, Dragash and Istog, respectively, are in compliance with the Constitution, with the exception of the respective points of the enacting clauses which determine "*the administrative minor offences*", whereas it declared unconstitutional the Decision declaring the Prizren municipality a "*quarantine zone*".

253. More precisely, the Court, unanimously, decided that: (i) Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating the infectious disease COVID-*

19" in the municipality of Prizren (points I, II, III, IV, VI, VII and VIII); and (ii) Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating the infectious disease COVID-19*" in the municipalities of Dragash and Istog (points I, II, III, V, VI and VII), respectively, **are in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. Consequently, all the specified points of the three abovementioned Decisions, were declared constitutional by the Court.

254. The Court held, that in issuing the abovementioned Decisions, the Ministry of Health, has acted in compliance with the authorizations prescribed by the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens of the municipalities of Prizren, Dragash and Istog, through the abovementioned Decisions, were "*prescribed by law*". The Court also found that the latter, pursue a "le*gitimate aim*", namely the one of the protection of "*public health*", as foreseen in paragraph 3 of Article 2 of Protocol No. 4 of the ECHR; are proportional in relation to "*legitimate aim*" pursued; and are "*necessary in a democratic society*".

255. However, the Court, by majority, decided that: (i) item V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating the infectious disease COVID-19*" for the municipality of Prizren; and (ii) item IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating the infectious disease COVID-19*" for the municipalities of Dragash and Istog, respectively, through which "*the administrative minor offences"* and the respective sanctions are determined, **are not in compliance** with Article 55 of the Constitution in conjunction with Article 35 of the Constitution and Article 2 of Protocol No. 4 of the ECHR. The Court reasoned that in determining the non-compliance with the measures provided for by the abovementioned Decisions as "*administrative minor offences*", the Ministry of Health exceeded the authorizations provided by Law No. 02/L-109 or Prevention and Fighting against Infectious Diseases. The Court stated that based on Law No. 05/L-087 on Minor Offences, the minor offenses and the respective sanctions must be determined only by law of the Assembly of the Republic or through acts of a municipal assembly, and that this authorization may not be delegated to other bodies. Consequently, the administrative minor offenses determined through these three challenged Decisions, are not "*prescribed by law*" and consequently, are declared unconstitutional.

256. The Court, on the other hand, decided, by majority, that Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, declaring the Municipality of Prizren "*quarantine zone*", **is not in compliance** with Articles 35 and 55 of the Constitution and Article 2 of Protocol no. 4 of the ECHR. The Court held by issuing this Decision, the Ministry of Health has exceeded the authorizations provided by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens, through the quarantine of the all citizens of the municipality of Prizren, are not "*prescribed by law*". The Court clarified that the "*quarantine*" according to Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry of Health, following the recommendation by the NIPHK, only for natural persons which are confirmed or suspected to have been in direct contact with the sick persons or suspected of infectious disease. Therefore, the Decision declaring entire municipality of Prizren a "*quarantine zone*", was declared unconstitutional.

257. Pertaining to the request for interim measure, the Court held that following the decision of the judges to decide the merits of the case in their entirety, and to render this Judgment, the latter remained without a subject of review.

258. The Court also recalled that by Judgment KO54/20, it had set another date for the entry into force of its Judgment, namely 13 April 2020, emphasizing that until that date, the relevant institutions of the Republic of Kosovo, in the first place, the Assembly, must take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to preserve the public health, are made in accordance with the Constitution and Judgment KO54/20.

259. In addition, the Court emphasizes that despite the specific request addressed to the Assembly requesting information "*regarding all the steps taken by the Assembly of the Republic of Kosovo after the publication of Judgment KO54/20 of 31 March 2020*", the Court did not receive a response from the Assembly. In this regard, the Court initially emphasized the fact that it is a legal obligation of all public authorities "*to support the work of the Constitutional Court and to cooperate with the Constitutional Court upon request of the Constitutional Court*". Furthermore, the Court emphasized that based on Judgment KO54/20, the Assembly was obliged, either through supplementing and amending existing applicable legislation or

through the adoption of a new law, to determine the most appropriate mechanisms and the corresponding authorizations, for the competent authorities, including the Ministry of Health, namely the Government, to take the appropriate and necessary measures designed to fight and prevent COVID-19 pandemics, in compliance with the Constitution and Judgment KO54/20. In this regard, the Court also emphasized Article 116 [Legal Effect of Decisions] of the Constitution, based on which, the decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.

260. In Judgment KO61/20, the Court also addressed the submission of 23 April 2020 of the Prime Minister, submitted to the Court on behalf of the Government, entitled "*submission regarding non-compliance with the legal deadlines and the Rules of Procedure of the Constitutional Court by the Constitutional Court in case No. KO61/20*", through which the Government expressed its "*concerns*" pertaining to "*violation of essential provisions regarding the procedure and deadlines to be followed*" by the Court, while also emphasizing that the "*Government will carefully review the legal violations so far and, depending on their legal qualifications, will take the necessary actions based on the legislation in force*".

261. The Court has shared this submission, same as other submissions, with all the interested parties in this case. The submission has also been published in its entirety together with Judgment KO61/20, which also contains the necessary clarifications pertaining to this submission. Nevertheless, the Court strongly emphasizes that the Government's approach towards the Constitutional Court reflected through this submission, is unacceptable and contrary to the fundamental values of the Constitution of the Republic.

262. The Court reiterates that it is an independent body established to protect the Constitution and it is the final interpreter of the Constitution. The Court recalls that the Constitution attributes to it full independence in the performance of its responsibilities. Furthermore, it is a constitutional obligation of the Government and all institutions of the Republic, not to interfere with this independence. The Court also reminds the Government that the Constitution does not attribute to it any competence regarding the decision-making of the judicial power. Respecting the basic constitutional values, pertaining to the separation of powers, the independence of the justice system, the independence and authority of the Constitutional Court and the protection of the rule of law, is a constitutional obligation of all branches of government of the Republic of Kosovo.

263. Finally, the Court emphasizes the fact that regardless of the situation created with pandemic COVID-19, and which has affected the entire world, the rule of law, must prevail. This is also emphasized by the Council of Europe in the Information Document SG/Inf(2020)11 of 7 April 2020 on Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, but also in the Opinions of the Venice Commission, including the one on Protection of Human Rights in Emergency Situations and the Rule of Law Checklist. All institutions of the Republic are obliged to act in full compliance with the respective constitutional and legal competences and in compliance with the Judgments of the Court.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 113.2 (1) and 116 of the Constitution, Article 20 of the Law on the Constitutional Court and Rule 59 (2) of the Rules of Procedure, on 1 May 2020,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating the infectious disease COVID-19*" in the territory of the municipality of Prizren (points I, II, III, IV, VI, VII and VIII), **is in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

III. TO HOLD, unanimously, that Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*" in the municipalities of Dragash and Istog (points I, II, III, V, VI and VII), respectively, **are in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

IV. TO HOLD, by majority, that point V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating the infectious disease COVID-19*" in the municipality of Prizren and point IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19*", in the Municipalities of Dragash and Istog, pertaining to the administrative minor offences, **are not in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

V. TO HOLD, by majority, that Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health declaring the Municipality of Prizren

a "*quarantine zone*", **is not in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR;

VI. TO DECLARE, invalid, in accordance with Article 116.3 of the Constitution, point V of Decision [No. 229/IV/2020] and point IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020], referred to in item IV of this enacting clause, from the date of entry into force of this Judgment;

VII. TO DECLARE, invalid, in accordance with Article 116.3 of the Constitution, Decision [No. 214/IV/2020] referred to in item V of this enacting clause, from the date of entry into force of this Judgment;

VIII. TO NOTIFY this Judgment to the Parties;

IX. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law; and

X. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

DISSENTING OPINION IN JUDGMENT KO 61/20 OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Bekim Sejdiu, Judge

Expressing initially my respect for the opinion of the majority of judges in this case, I must express my disagreement with the finding of the Constitutional Court that Decision No. 214/IV/2020 of the Ministry of Health, of 12 April 2020, for the declaration of the Municipality of Prizren *"a quarantine area"*, **is not in compliance** with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution, in conjunction with Article 35 [Freedom of Movement] of the Constitution and Article 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

My disagreement with this finding of the Constitutional Court (hereinafter: the Court) is based on two basic arguments: first, I have not agreed that the Court has not reviewed the Decision of the Ministry of Health, in the light of the positive obligations of the state, in relation to the right to life. Secondly, I do not agree with the approach followed by the Court in interpreting that Decision, in the light of the relevant articles of the Law for Prevention and Fighting against Infectious Diseases.

1. With respect to the non-addressing by the Court of the positive obligations of the state in relation to the right to life, in the circumstances of COVID-19 Pandemic

- The Court avoided addressing Referral KO 61/20, from the prism of the positive obligations of the state versus the right to life (Article 25 of the Constitution and 2 of the ECHR). I am of the opinion that the main issue that should have been addressed by the Court in this case, has to do with the balance between the positive obligation of the state to protect the right to life, endangered by the COVID-19 pandemic, as opposed to the negative obligation not to infringe the freedom of movement (Article 35) and, potentially, some other rights (such as freedom of gathering or the right to privacy).

- Within this normative background, the Court had to start from the basic premise that the challenged decisions (namely the four decisions of the Ministry of Health) are related to the obligation of the state to take measures to protect the health of citizens endangered in situation of serious global pandemic, which has affected the life and health of the population of the Republic of Kosovo.

- In my interpretation, the Judgment of the Court in case KO 54/20, of 23 March 2020 (declaring Decision No. 01/15 of the Government of the Republic of Kosovo unconstitutional), had rightly pointed out that the need to take measures to protect the health of citizens from pandemic is not challenged. However, the decision of the Government that limited human rights at the national level had no legal support. However, always according to my interpretation, in that Judgment (KO54/20) the Court referred to Law for Prevention and Fighting against Infectious Diseases, as the main legal framework for this situation, as well as the Ministry of Health, as the main government department that the Law in question vested with authorizations for its implementation (in the pandemic situation COVID-19).

- I consider it highly important to emphasize that the highest institutional authorities in the field of human rights, at European level and beyond, have pointed out that the situation of COVID-19 pandemic had profound effects on guaranteeing the human rights. This situation has shown the fragile balance between the positive obligations of states to take proactive actions to protect the right to life, as opposed to the negative obligation to self-restraint, namely not to interfere with freedom of movement and other relative rights.

- It should be noted that, in this regard, the President of the European Court of Human Rights (hereinafter: the ECtHR), Linos-Alexandre Sicilianos, stated that: "effectively responding of states to the threat to life and personal integrity caused by COVID-19 pandemic is part of the positive obligations of states to protect the right to life".[1]

- It is well known that the case law of the ECtHR, as well as the practice of the member states of the Council of Europe, attributes to the right to life (Article 2 of the ECHR), the status of one of the most fundamental rights, in the hierarchy of human rights. As such, there can be no derogation from this right, never in peace circumstances, including emergent situations. Such a prohibition was made by the Constitution of the Republic of Kosovo, namely Article 56, which stipulates that, I cite: "*derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances*".

[1] *Speech by the President of the ECtHR, Linos-Alexandre Sicilianos, of 11 April 2020, available at: https://www.youtube.com/watch?v=HE8IZSqz8Uw*#

- The ECtHR has several decisions regarding the positive obligations of states to protect the right to life, in the event of various natural disasters (see, for example, ECtHR decisions in cases: *Budayeva and others v. Russia; Oneryidiz v. Turkey*). This interpretation of the ECHR faithfully reflects its unwavering stance that Article 2 of the ECHR obliges states to protect the right to life of persons under their jurisdiction. (*LCB v. United Kingdom,* paragraph 38). This also means positive obligations, which, in practical terms, include in particular the obligation to take preventive measures, *vis-a-vis* threats to life and the right to life.

- This essential fact is also outlined in the comments and statements of the Institution of the Ombudsperson, as well as the international institutions mentioned in this Judgment of the Constitutional Court. Thus, the Information Document *SG/Inf(2020)11, 7 April 2020,* of the Council of Europe for Member States, reiterates that, I cite: *"The executive authorities should be able to act quickly and efficiently. That may call for adoption of simpler decision-making procedures and easing of some checks and balances. This may also involve, to the extent permitted by the constitution, bypassing the standard division of competences between local, regional and central authorities [...].Parliaments, however, must keep the power to control executive actions in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified, or by intervening on an ad hoc basis to modify or annul the decisions of the executive".*[2]

- As it can be seen from the guidelines and declarations made by the Council of Europe and the relevant human rights institutions, the approach to be taken by the courts in these circumstances is to avoid rigid interpretations of the relevant legal provisions, to enable states/governments to act effectively to protect public health.

- This does not in any way mean deviation from the constitutional norm, which is guaranteed by emphasizing the supervisory/controlling role that the legislative and judicial authorities should exercise, even in such an emergency situation.

2. With respect to the erroneous interpretation by the Court of Decision of the Ministry of Health for the Declaration of the Municipality of Prizren as "a quarantine area"

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[2]Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, Council of Europe, Information Document SG/Inf(2020)11, 7 April 2020.

- In the doctrinal discourse of the constitutional judiciary, as well as in judicial jurisprudence, some techniques of interpretation of constitutional texts and legal texts are known (originality, textualism, intentional interpretation, pragmatic interpretation, etc.).

- In the present case, the Court, in an attempt to follow a textual interpretation of the Decision in question of the Ministry of Health, against the relevant legal provisions for the declaration of "quarantine areas", has made a rigid and contradictory interpretation.

- Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health for the declaration of the Municipality of Prizren *"a quarantine area",* has his contents:

  "I. The Municipality of Prizren is declared a quarantine zone, as the residents of this Municipality are suspected to have had direct contact with persons infected with corona virus COVID 19; II. The village Skorobisht in the Municipality of Prizren is declared Hotbed of Transmission of the Infection; III Entry into and exit from the Municipality of Prizren is prohibited; IV. All residents of Prizren are obliged [to] comply with the measures in accordance with the instructions of the National Institute of Public Health of Kosovo (NIPHK); V. The decision shall enter into force on the day of signing and it is valid until another decision".
- Article 33 of the Law for Prevention and Fighting against Infectious Diseases establishes that:

  "(i) persons who are proved or suspected to have been in direct contacts with sick persons or suspect of being sick from plague, variola and viral hemorrhage fever will be put into quarantine; (ii) Holding duration of persons in quarantine under paragraph 1 of this article depends on the maximum period of infectious disease incubation; (iii) Persons from paragraph 1 of this article are subject to continual medical controls during all time of quarantine; (iv) Ministry of Health by KIPH proposal makes a decision for putting persons into quarantine under paragraph 1 of this article; and (v) Execution of decision for putting persons into quarantine under paragraph 1 of this article ensures the competent authority in the country level".
- In light of these provisions, the Court by a majority of votes found that with the issuance of the Decision on the declaration of the Municipality of Prizren "*a quarantine area*", the Minister of Health has exceeded the authorizations defined by the Law for Prevention

and Fighting against Infectious Diseases and, consequently, the "*interference*" with the right to freedom of movement of citizens of the Municipality of Prizren is not "*prescribed by law*". Therefore, the Court concluded that the decision in question violated Articles 35 and 55 of the Constitution.

- The Court by a majority of votes accepted the argument that: "quarantine" of all citizens of Prizren does not meet the legal requirements because, I cite: *" (i) does not apply to individually determined natural persons, but to all citizens of the municipality of Prizren; (ii) all of the latter, for the purposes of Article 33 of the Law for Prevention and Fighting against Infectious Diseases, neither has it been 'proven' nor can it be 'suspected' that they have been in direct contact with sick or suspected persons with the disease.; (iii) The relevant decision does not specify any time limit within which the duration of the quarantine will be reconsidered, contrary to paragraph 2 of Article 33 of the law in question, because the latter clearly defines the term within which the guarantee is allowed and this is related to the maximum incubation period of the respective disease; and (iv) the quarantined citizens of the municipality of Prizren have not been subjected to continuous medical examinations which is an essential condition in the event of quarantine, as defined in paragraph 3 of the abovementiond article*".

- According to the Court's interpretation the "*quarantine*", according to Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry/Minister of Health, following the recommendation of the NIPHK, only for natural persons for whom it is confirmed or suspected that they have been in direct contact with sick persons or suspected of infectious diseases.

- The interpretation above of the Court, taking as reference point exclusively and only the term "quarantine", which is mentioned twice in the Decision (in the title and in paragraph I), and not the content and effects of that Decision, led to the erroneous conclusion that Article 33 of the Law for Prevention and Fighting against Infectious Diseases is the only legal framework to ascertain whether or not the Decision in question has legal support.

- I consider that such an interpretation is non-contextual, does not make an integral connection of all the provisions of the Decision in question of the Ministry of Health and, above all, does not take into account the content and effect of the Decision, but its naming.

- This is due to the fact that paragraphs III and IV of the Decision in question determine the manner of its implementation, but also the effect and the meaning that has the term "quarantine" of the Municipality of Prizren has for the purpose of this Decision. In this context, paragraph III clarifies that the effect of the declaration of Prizren as a quarantine area is "prohibition of entries and exits from the Municipality of Prizren". While paragraph IV outlines the other effect of the declaration of Prizren as a quarantine area, defining the other obligation of the residents of Prizren to respect the measures according to the instructions of the NIPHK.

- Thus, if the Court were to make an integrated interpretation of all the paragraphs of the Decision, it would conclude that, despite the erroneous designation (use of the term "quarantine"), in fact its only real effect does NOT have to do at all with "a quarantine" of persons, in certain physical facilities or spaces, as defined by law. In essence, the only effect of the Decision is to restrict the freedom of movement from and to the Municipality of Prizren.

- In this regard, the Decision of the Ministry of Health for the declaration of the Municipality of Prizren as "*a quarantine area*", is complementary to other restrictive measures taken by the Minister of Health, by the Decision "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality*" of Prizren– This decision was not declared unconstitutional by the Court. The Court even explicitly states in the Judgment, I cite: "*The challenged Decision regarding the declaration of the Municipality of Prizren 'a quarantine area', beyond the declaration of the village of Skorobisht a hotbed of the transmission of Infection, there is no other effect for the citizens of Prizren. This is because it does not specify any other obligations for them, except that it prohibits 'entry and exit' in this municipality*".

- Such an interpretation of the Constitutional Court leads to an illogical situation, in the legal sense, where the Ministry of Health could keep in force the same decision that the Constitutional Court declares as unconstitutional, with the same content, but only by changing its name, namely only by removing the term "quarantine" from its text.

- I consider that the Constitutional Court, by its decisions, should avoid the creation of such situations where terminological improvisation camouflages the content and normative effect of acts of public institutions.

- Following a terminological interpretation of the Decision of the Ministry of Health [No. 214/IV/2020], the Court has also come into conflict with its already consolidated approach to the interpretation of constitutional and legal norms. The court already has a consistent practice, especially with regard to the interpretation of the acts provided for in Article 113.2 (1) of the Constitution (see Court decisions in cases KO73/16; KO12/18; and KO54/20). In these decisions, the Court has emphasized that "the acts are not qualified by name but by their constitutional effect".

- The Court has also followed this approach for declaring the Referral of the Applicants in this case admissible (KO 61/20), where it emphasized that, I cite: *"In this context, the Court recalls that as to the constitutional review of "decrees of the Prime Minister" and "Government regulations", through its case law, has determined that beyond the terminology referred to in the Constitution it is the "acts" of the Prime Minister respectively of the Government, which may be subject of review before the Court, in case their compatibility with the Constitution is raised before the Court by an authorized party determined by the Constitution [...] Consequently, the assessment of the constitutionality, of the acts of the Prime Minister and the Government, are subject to the constitutional review of the Court insofar as they are raised before the Court in the manner prescribed by the Constitution and Law, and based on the assessment of the Court, according to its case law relating to their "effects" and if the latter raise "important constitutional matters"*.

- In the light of the interpretations of the ECtHR and other authoritative instances in the field of judicial protection of human rights, the courts should not follow a rigid approach in terms of interpretations of legal norms. This is in order for the decisions of the courts not to become an obstacle for the realization of the positive obligations of the state to protect the right to life and a number of other rights related to pandemic situations.

- In this regard, as the Court itself has emphasized in Judgment KO54/20, the common denominator of the required criteria for assessment of "*prescribed by law*" of an act of the Government, based on the case law of the ECtHR, turns out to contain at least the following elements: (i) "*the interference*" with a fundamental right and freedom should have legal basis; (ii) the relevant law, must have the right quality, namely, and in principle, must be formulated with sufficient precision to enable citizens to regulate their conduct; the latter must be able -if need be with appropriate advice - to foresee, to

a degree that is reasonable in the circumstances, the consequences which a given action may entail; (iii) accuracy and precision of the law is required, but can also result in "*excessive rigidity*". Therefore, the latter must also be able to adapt to changing circumstances, and it is up to the relevant institutions, namely the courts, to interpret it.

- Such a position, regarding the need for the courts to have an elastic approach to interpretations of legal texts, the ECtHR has emphasized in some cases. Thus, in the case *Olivieira v. the Netherlands* (where the freedom of movement was restricted to a person by an act of local authorities), the Court of Strasbourg noted that, according to its consistent case law, a measure of executive power restricting human rights must be based on law, have a legitimate aim, be proportionate and necessary in a democratic society. As for the requirement of being "based on law", the ECtHR accepted the argument that a "law", in that case, could also be considered the Municipality Act. Furthermore, the ECtHR stated that situations that impose the need for the local authority to issue orders relating to public safety are so diverse that it is impossible to provide [exactly] by law. (see paragraph 54 of the ECtHR decision, in case *Olivieira v. the Netherlands*). The ECtHR reiterated such a position also in case *Leyla Sahin v. Turkey*. In its decision, the ECtHR underlined that, "*as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one* (see paragraph 88 of the ECtHR decision in case *Leyla Sahin v. Turkey*).

With respect to the effect of the Judgment of the Court

- Finally, I want to emphasize that I agree with the findings of the Court both on the admissibility of the Referral as well as on the finding that the decisions *"on preventing, fighting and eliminating infectious disease*" in the Municipality of Prizren, Dragash and Istog, are in compliance with the Constitution, with the exception of the relevant points of the enacting clause of those decisions which determine administrative minor offenses. However, I think that in both of these points, the Judgment of the Court lacks sufficient and clear reasoning, in order to avoid any idleness regarding the practical effects of this Judgment.

- As a result of the ambiguity caused by the Applicants themselves, the Court found that the Applicants challenged only four decisions, out of 38 decisions taken by the Ministry of Health, at the same time and, more

or less, with the same content. I consider that the Judgment of the Court, which includes only 4 of the total of 38 decisions, has produced a paradoxical situation, in the legal sense. This is because, even after the Court found that some of the measures of the Ministry of Health are unconstitutional, they are repealed only in 3 of the 38 municipalities of Kosovo (unless they are repealed by the Ministry/Minister of Health himself). Thus, a citizen of Kosovo residing in any of the other cities, except Prizren, Dragash and Istog, may continue to be subject to the same measures of the Ministry of Health, which the Constitutional Court has declared unconstitutional.

- Furthermore, I am of the opinion that, taking into account the background of this case, the Court should have addressed in more depth the finding that the enacting clause of the decisions in question of the Ministry of Health relating to the imposition of an administrative minor offense are contrary to the Constitution. I think that the Court should have clarified the interaction, in relation to this case, between the Law on Minor Offenses, the Law for Prevention and Fighting against Infectious Diseases and the Criminal Code (Article 250 of which sanctions "failure to act in accordance with health provisions during the epidemic"). The repeal by the Court of the relevant points of the enacting clause of the decisions of the Ministry of Health, which determine the administrative minor offences, in fact takes from those decisions of the Ministry of Health the binding attributes, giving them a recommendatory nature.

- I consider that the Constitutional Courts, in any case, but especially in such situations where the lives and health of citizens are endangered, must carefully analyze the effects of their decisions. Those decisions, in any situation and as far as possible, must be reasoned but also reasonable.

Bekim Sejdiu

Judge

DECISION ON INTERIM MEASURE

in

Case No. KO72/20

Applicant

Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020

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 is submitted by: Rexhep Selimi, Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Hajrullah Çeku, Saranda Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëresha Kryeziu Hyseni, Labinotë Demi Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani, Salih Zyba (hereinafter: the Applicants), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

Challenged act

2. The Applicants challenge Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020 (hereinafter: the Decree) by

which Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for the Prime Minister to form the Government of the Republic of Kosovo.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged act, which according to the Applicant's allegations is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

4. The Applicants request the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure *"on the Decree in order to prevent unrecoverable damage to the party and the institution"*.

5. The Applicants also request the holding of the public hearing.

Legal basis

6. The Referral is based on Article 113, paragraph 2, sub-paragraph 1 [Jurisdiction and Authorized Parties] of the Constitution, Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rules 32 [Filing of Referrals and Replies] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo, No. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 30 April 2020, about 17:00 hrs, the Applicants submitted the Referral to the Court.

8. On the same date, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Radomir Laban (members).

9. On the same date, the Court, through electronic mail, notified the Applicants about the registration of the Referral.

10. On the same date, the Court notified the President of the Republic of Kosovo about the registration of the Referral (hereinafter: the President); the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the Acting Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); as well as the Ombudsperson.

11. The Court notified all interested parties mentioned above that their comments: (i) regarding the request for the imposition of an interim measure, if any, taking into account the urgency of the case, to present them to the Court, by 1 May 2020, at 12:00 hrs; while (ii) the comments regarding the merits of the Referral, if any, to submit to the Court no later than 8 May 2020, at 16:00 hrs.

12. On 1 May 2020, before 12:00 hrs, the Court received a letter from the Head of the Parliamentary Group of the Serbian List, the deputy Slavko Simić, requesting the Court to provide additional deadline to submit comments on interim measure because they received Referral KO72/20 only in Albanian.

13. On the same date, the Court responded to the deputy Slavko Simić by notifying him that the Referral KO72/20 was received in the Court only in the Albanian language and that the Court sent it for urgent translation immediately after its receipt. The Court sent the full copy of the Referral in Serbian to the deputies in question. The Court also approved their request for an extension of the deadline for submitting comments for an interim measure until 16:00 hrs on 1 May 2020.

14. On 1 May 2020, within the set deadline, the Court received comments regarding the interim measure from the following parties: the President, the President of the Assembly, the Prime Minister, the Parliamentary Group of the Democratic League of Kosovo, the deputy Arban Abrashi and the deputy Shkëmb Manaj.

15. On 1 May 2020, the Judge Rapporteur recommended to the Court the approval of the interim measure. On the same date, the Court, by majority of votes, decided to approve the interim measure until 29 May 2020, namely to suspend the further implementation of the challenged Decree of the President.

Summary of facts

16. On 6 October 2019, the early parliamentary elections were held.

17. On 27 November 2019, the CEC certified the election results for the Assembly, based on the following list of the election results:

    a. VETËVENDOSJE! Movement, 29 deputies;
    b. Democratic League of Kosovo, 28 deputies;
    c. Democratic Party of Kosovo, 24 deputies;
    d. AAK-PSD Coalition 100% Kosovo, 13 deputies;
    e. Srpska Lista, 10 deputies;
    f. Social Democratic Initiative – Alliance Kosova e Re, Justice Party, 6 deputies;
    g. "Vakat" Coalition, 2 deputies;
    h. Kosova Demokratik Tyrk Partisi, 2 deputies;
    i. Egyptian Liberal Party, 1 deputy;
    j. Nova Demokratska Stranka, 1 deputy;
    k. Ashkali Party for Integration, 1 deputy;
    l. New Democratic Initiative of Kosovo, 1 deputy;
    m. Jedinstvena Goranska Partija, 1 deputy;
    n. Kosovo United Roma Party, 1 deputy.

18. On 26 December 2019, the Assembly was constituted.

19. On 20 January 2020, the President issued the Decree by which Mr. Albin Kurti was proposed to the Assembly as a candidate for Prime Minister to form the Government.

20. On 3 February 2020, the Assembly elected the Government with Prime Minister Mr. Albin Kurti.

21. On 20 March 2020, a number of deputies of the Assembly submitted to the Presidency of the Assembly the no-confidence motion against the Government.

22. On 25 March 2020, the Assembly approved the no-confidence motion against the Government.

23. After this date, the Court notes that there have been exchanges of communications over the appointment of a mandate holder for the formation of the Government. [*Clarification of the Court:* all communications and exchanges of the letters in question shall be reflected in the final decision of the Court].

24. On 30 April 2020, the President rendered the challenged Decree which contains three points, as follows:

> "*1. Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo.*
>
> *2. The candidate under item I of this Decree, no later than fifteen (15) days after the appointment, submits the composition of the Government to the Assembly of the Republic of Kosovo and requests the approval by the Assembly.*
>
> *3. The Decree enters into force on the date of signing".*

25. The abovementioned Decree of the President is stated to have been issued based on:

(i) paragraphs (4) and (18) of Article 84 [Competencies of the President] of the Constitution and Article 95 [Election of the Government] of the Constitution;
(ii) Article 6 of Law No. 03/L-094 on the President of the Republic of Kosovo;
(iii) Judgment of the Constitutional Court in case KO103/14 of 1 July 2014; and
(iv) in the course of the proposal of the Democratic League of Kosovo, accepted by the Office of the President on 30 April 2020.

Applicant's allegations

26. The Applicants allege that the challenged Decree of the President is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution. The Applicants oppose the challenged Decree in entirety. [*Clarification of the Court:* all allegations of the Applicants regarding the admissibility of the Referral and its merits will be presented in detail in the final decision of the Court. In this Decision on Interim Measure, the Court has focused only on the request for an interim measure].

Regarding the request for imposition of interim measure

27. Regarding the interim measure, the Applicants state that *"the interim measure [...] is in the public interest, because an action of the Assembly based on the unconstitutional decree of the President [...] would cause irreparable damage to the party, because: a) The Government to be voted on the basis of this decree would take decisions that affect the public interest which would then be declared null if the decree itself is unconstitutional; b) The Government should use public resources/budget, the use which would be unlawful; c) The Government could take actions and measures that affect the constitutional rights of citizens, due to pandemics; d) If with the scenario that the Government is voted based on this decree no. 24/2020 and after one or two or three months, for example, the election of the Government is declared unconstitutional, from that moment that government must stop every activity. In that situation, no Government would be in office, and Kosovo could not stay without the caretaker Government until new elections, so it is necessary that prior to the vote of the Government, the compliance with the Constitution of that procedure is known"* further emphasizing possible economic and international implications, as well as harming the public interest.

28. To support their arguments, they also refer to the case of the Court KO119/14 where the Court issued an interim measure to suspend the decision to elect the President of the Assembly, arguing that in the case of the election of the Government, the risk of damage and public interest is even bigger.

29. Therefore, the Applicants consider that the Referral has met the criteria set by the constitutional and legal provisions which have been materialized through the decisions of the Court that their Referral be considered admissible *prima facie* and the Court to impose interim measures.

30. Therefore, taking into account the arguments presented in the content of this Referral and pursuant to Article 27 paragraph 1 of the Law on the Constitutional Court, the Applicants request the Constitutional Court to decide on the imposition of an interim measure on the suspension of the legal effect of the challenged Decree in order to prevent irreparable damage to the party and the institution, as well as to protect the public interest.

Comments received regarding the interim measure

31. Within the deadline given by the Court, namely until 1 May 2020 at 12:00 hrs, the comments regarding the Applicants' request for the imposition of an interim measure regarding the challenged act, have been submitted by: the President, the President of the Assembly, the Prime Minister, the Parliamentary Group of the Democratic League of Kosovo, the deputy Arban Abrashi and deputy Shkëmb Manaj. The Court will present in a summarized manner their positions in the following.

32. The President, in his comments regarding the Referral justifies, among other things, that the Applicants' Referral regarding the imposition of the interim measure does not meet the legal requirements for the imposition of the interim measure, namely the Applicants have not indicated that the case is *prima facie* admissible, have not proved that with the implementation of the challenged act will suffer irreparable damage and if the imposition of the interim measure would be in the public interest. The President presented his position that the Applicants' Referral does not provide arguments proving that the challenged Decree is not in compliance with the Constitution. He also emphasized that the formation of *"a government that has the legitimacy to take important decisions about governing the country [...] would be in the public interest*". This is, according to him, by taking the measures that must be taken urgently regarding pandemics COVID-19, but also taking into account the fact that in the field of international relations *"only a Government with legitimacy from the Assembly, may represent the interests of the Republic of Kosovo inside the country and abroad [...]."* Therefore, the President requests that the request for an interim measure be rejected.

33. In her comments regarding the request for an interim measure, the President of the Assembly reasons, *inter alia*, that an interim measure is necessary given the complexity of the constitutional procedure for forming the government and the uncertainties over this procedure. She further justifies the imposition of an interim measure because only in this way it will be guaranteed that the Assembly of Kosovo, as the highest institution in our political system, will not take decisions that may result unconstitutional, and consequently would seriously damage the public trust and the very integrity of this institution.

34. In his response regarding the request for an interim measure, the Prime Minister stated that the Government considers that the Court should approve the interim measure after the legal criteria have been met, among other things, as the Applicants have proved that the case is *prima facie* inadmissible, and also have proved that the imposition of the interim measure is in the public interest and serves the administration of justice, namely the administration of the case without time pressure. The Prime Minister further adds that the interim measures have always been imposed by the Court in case the main positions of state institutions have been challenged before it.

35. The Parliamentary Group of the Democratic League of Kosovo in their response emphasize that the legal requirements for the imposition of the interim measure have not been met. They especially emphasize the fact that it is not necessary to impose an interim measure because according to the Court's practice, even if the challenged act was declared unconstitutional, then the Court could decide that the effect of the decision would be for the future and it would not have a retroactive effect, and therefore, no irreparable damage would be caused.

36. The deputy Arban Abrashi in his response to the request for an interim measure requests the Court to reject the request for an interim measure and to open the way for the establishment of a legitimate Government and with the support of the representatives of the sovereign, so that the new Government be able to perform the functions and expectations that the country's economy has in these days of urgency and need. According to him, any postponement of the deadline and at the same time the establishment of the new Government with full constitutional capacities increases the economic damage, causes serious economic consequences and even irreparable damage to the economy and Kosovar society.

37. The deputy Shkëmb Manaj, regarding the request of the Applicants for the imposition of the interim measure, states that taking into account the fact that the granting of the interim measure is necessary to avoid irreparable risks or damage, or if the granting of these measures is in the public interest, in the present case, not that these legal criteria for imposing the interim measure are not met, but on the contrary, imposing the interim measure would cause irreparable damage and would be in full contradiction with the public interest, because, among other things, the dismissed Government does not have the capacity to take legal initiatives and as a result, cannot manage the state of emergency in the country due to COVID-19 pandemic. Therefore, he

requests the Court to reject the request for the imposition of an interim measure.

Assessment of the request for interim measure

38. In order to assess the request for interim measure, the Court first examines whether the Referral has fulfilled the relevant requirements, established in the Constitution and further specified in the Law and the Rules of Procedure.

39. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides that "*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties*".

40. In addition, the Court refers to Article 113.2 (1) of the Constitution, which states that:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> > *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;"*

41. In this regard, the Court also refers to Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law which stipulate that:

> *Article 29*
> *Accuracy of the Referral*
>
> *1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, […].*
>
> *2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.*

3. A referral shall specify the objections put forward against the constitutionality of the contested act.

Article 30
Deadlines

A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

42. The Court also refers to Rule 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure, which establishes:

"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.

(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.

(3) The referral shall specify the objections put forward against the constitutionality of the contested act.

(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act".

43. The Court also refers to paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, which provides:

"[…]

2. While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action or law would result in unrecoverable damages".

[…]"

44. The Court also refers to Article 27 [Interim Measures] of the Law, which provides:

> *"1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
>
> *2. The duration of the interim measures shall be reasonable and proportionate".*

45. Finally, the Court recalls Rule 57, paragraphs (4) and (6) of the Rules of Procedure, which specify:

> *Rule 57 (4) of the Rules of Procedure*
>
> *[...] Before the Review Panel may recommend that the request for interim measures be granted, it must find that:*
>
> *(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;*
>
> *(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and*
>
> *(c) the interim measures are in the public interest*
> *[...]*
>
> *Rule 57 (6) of the Rules of Procedure*
>
> *"[...] If the request for interim measures has made this necessary showing either in whole or in part, the Court shall grant the request, stating the facts and the legal reasons supporting the decision and the time during which the interim measures will be effective. No decision granting interim measures may be taken unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court [...]".*

46. In light of the abovementioned normative framework, in order to impose an interim measure, it is required that the submitting party first shows the *prima facie* case on the merits of the Referral.

47. Regarding this criterion, the Court considers that the Applicants have managed to show *prima facie* case before the Court through the allegations filed in the Referral and their reasoning.

48. In addition to the first procedural criterion, elaborated above, the Law and the Rules of Procedure provide for two other bases on which the interim measure can be imposed. The first basis concerns the requirement that the party seeking the interim measure be able to prove that the interim measure is necessary *"to avoid unrecoverable risks or damage"*. While the second basis has to do with argumentation, namely the finding that the interim measure is in *"public interest"*.

49. In this regard, the Court considers that the Applicants' Referral raises a number of issues at the constitutional level regarding the democratic functioning of the constitutional institutions of the Republic of Kosovo and the separation of powers. Such issues, without imposing an interim measure, have the potential to cause irreparable damage in terms of the constitutional order of the Republic of Kosovo and the functioning of key institutions in the Republic of Kosovo - within the meaning of Article 116, paragraph 2 of the Constitution, Article 27, paragraph 1 of the Law and Rule 57, paragraph (4) item (b) of the Rules of Procedure. The Court, therefore, finds that the Applicants have proved that the approval of the request for an interim measure is necessary to avoid irreparable risks or damage.

50. Furthermore, the Court considers that the constitutional issues filed in this Referral regarding the observance and implementation of constitutional provisions governing the democratic functioning of institutions established by the Constitution and the separation of powers are of such importance and nature that they inevitably make the suspension of implementation of the challenged Decree, an issue of public interest. Therefore, the Court considers that there are substantial reasons of the public interest nature within the meaning of Article 27 of the Law and Rule 57, paragraph 4, item (c), of the Rules of Procedure, justifying the adoption of the interim measure concerning the challenged Decree. In this regard, the Court finds that the approval of the request for an interim measure is of public interest to the Republic of Kosovo and its citizens and necessary for the protection of the public interest.

51. Therefore, the Court, without any prejudice to the admissibility or merits of the Referral, concludes that the Applicants' request for

interim measure regarding the challenged Decree of the President must be approved in accordance with the reasoning of this Decision.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 1 May 2020, by majority of votes

DECIDES

I. TO APPROVE interim measure in duration until 29 May 2020, from the date of issuance of this Decision;

II. TO IMMEDIATELY SUSPEND the implementation of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020, in the duration established in item I of this enacting clause;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and

V. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KO72/20, Applicant: Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo, Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020

KO72/20, Judgment adopted on 28 may 2020

Key words: Institutional referral, motion no-confidence, appoint the candidate for formation of the Government, dissolution of the Assembly, division of powers

The Referral was submitted by thirty (30) deputies of the Assembly of the Republic of Kosovo based on Article 113, paragraph 2, subparagraph 1, of the Constitution. The subject matter of the Referral was the constitutional review of the challenged Decree, which according to the Applicant's allegations was not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution.

Under the heading **VIII – CONCLUSIONS** – of this Judgment (see paragraphs 546-580), the Court summarized the essence of the case and stated the following:

In the assessment of the Decree [no. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, through which "*Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo*", the Court decided: (i) unanimously that the request of the Applicants is admissible; (ii) unanimously that the contested Decree of the President is in compliance with paragraph 2 of Article 82 [Dissolution of the Assembly] of the Constitution; whilst therefore declaring that the successful vote of a motion of no confidence by the Assembly against a Government does not result in the mandatory dissolution of the Assembly and thereby permits the election of a new Government in compliance with Article 95 [Election of the Government] of the Constitution; (iii) by majority that the contested Decree is in compliance with paragraph (14) of Article 84 [Competencies of the President] in conjunction with paragraph 4 of Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo; (iv) unanimously to repeal the interim measure which was set through the Decision of 1 May 2020; and (v) unanimously to reject the request for a public hearing.

The Court recalls that the constitutional matter involved in this Judgment is the compliance with the Constitution of the disputed Decree of the President of the Republic, through which Mr. Avdullah Hoti was proposed to the Assembly of Kosovo as a candidate for Prime Minister. In assessing the constitutionality of the aforementioned Decree, and based on the Applicants' allegations as well as the arguments and objections of other interested parties, the Court initially assessed whether after a successful vote of no confidence by the vote of two thirds (2/3) of all Deputies of the Assembly on 25 March 2020, the President of the Republic, was obliged to dissolve the Assembly of the Republic and to announce early elections, based on paragraph 2 of Article 82 of the Constitution. Further, the Court clarified the procedure to be followed for the formation of a new Government, after a successful vote of no confidence in the Assembly and also gave its assessment, as to whether, in the circumstances of the concrete case, the procedure followed for the nomination of the candidate for Prime Minister pertaining to the formation of a new Government, resulted in a Decree that is constitutionally compliant.

In order to interpret the constitutional articles related to the circumstances of the concrete case, respectively Articles 82, 95 and 100 of the Constitution, the Court also took into account: (i) the constitutional principles on the role of the Assembly and the President; (ii) its case law, including Judgment KO103/14 and all cases cited by the parties to the proceedings; (iii) the relevant Opinions of the Venice Commission; (iv) the Comparative Analysis of the Constitutions, including those referred to by the Applicants; (v) responses received from the Constitutional/Supreme Courts, part of the Venice Commission Forum; and (vi) the preparatory documents for the drafting of the Constitution.

The Court initially recalled that the Constitution consists of a unique entirety of constitutional principles and values on the basis of which the Republic of Kosovo has been built and must function. The norms provided by the Constitution must be read in conjunction with each other, because that is the only manner through which their exact meaning derives. Constitutional norms cannot be taken out of context and interpreted mechanically and in isolation from the rest of the Constitution. This is due to the fact that the Constitution has an internal cohesion, according to which each part is connected to the other. The structure of the constitutional norms related to the establishment of state institutions that stems from the people's vote must be interpreted in such a way that they enable and not block the establishment and the effective exercise of the respective functions. Any ambiguity of norms must be interpreted in the spirit of the Constitution and its values. No constitutional norm can be interpreted in such a way as to block the effective establishment and functioning of the legislative and executive branches of

government, nor the way in which they balance each other in terms of the separation of powers.

In addition, the Court also notes that every state power and holder of public functions without any exception, is under the obligation to undertake the respective public duties in service of the implementation of the values and principles based on which the Republic of Kosovo was built to function. The rights and obligations deriving from the Constitution must not be exercised in service of establishment and effective functioning of State Institutions.

Further and with regard to the constitutional provisions pertaining to the dissolution of the Assembly, the Court emphasized that the Constitution provides an obligation to dissolve the Assembly only in the circumstances of paragraph 1 of Article 82 of the Constitution, and the possibility to dissolve the Assembly in the circumstances of paragraph 2 of Article 82 of the Constitution, following a successful vote of a motion of no-confidence. More precisely, the Assembly is mandatorily dissolved only in three cases: (i) if the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister; (ii) if two thirds (2/3) of all deputies of the Assembly vote in favor of the dissolution of the Assembly; and (iii) if, within sixty (60) days from the date of the beginning of the President's election procedure, the latter is not elected. Whereas, in case of a successful vote of no confidence against Government, the President has the possibility but not the obligation to dissolve the Assembly.

The President's possibility to dissolve the Assembly cannot be exercised independently or contrary to the will of the Assembly, but it must be exercised in coordination and depends on the will of the necessary majority of the representatives of the people represented in the Assembly. The use of the verb "*may*" in the context of paragraph 2 of Article 82 of the Constitution, only reflects the possibility of the President to dissolve the Assembly, based on consultations with the political parties represented in the Assembly. Such a determination pertaining to the presidential competencies related to the verb "*may*" ["*mund*"/"*može*"] in the context of the dissolution of the Assembly, is also confirmed through the Opinions of the Venice Commission, referred to in this Judgment.

The Court emphasized that the Assembly is the only institution in the Republic of Kosovo that is directly elected by the people for a four (4) year term. Apart from the Constitution, the representatives of the people are not bound by any other power or obligatory mandate. Neither does the President who is elected by the Assembly have the power to dissolve the Assembly in contradiction with its will; nor can the exercise of the competence of the Assembly to express a vote of no confidence against a Government which was

elected by Assembly itself, can result into the end of the mandate of the Assembly itself. The Assembly cannot be conditioned to self-dissolution if it chooses to express no confidence against a Government it has elected, because a motion of no confidence as a mechanism of constitutional control of the Government by the Assembly as a representative organ of the people, would not have any meaning. Such an approach is contrary to the constitutional principle of parliamentary control of the Government enshrined in paragraph 4 of Article 4, paragraph 8 of Article 65 and Article 97 of the Constitution and the basic democratic principles.

The high threshold of the vote required to dissolve the Assembly by the deputies themselves, reflects the weight and importance that the Constitution has set for this purpose. In addition to the highest threshold provided for the amendment of the Constitution, which requires the approval of two thirds (2/3) of all deputies of the Assembly, including two thirds (2/3) of all deputies of the Assembly holding guaranteed seats guaranteed for representatives of communities that are not in the majority in the Republic of Kosovo, the Constitution sets the next highest possible threshold for the dissolution of the Assembly, namely the vote of two thirds (2/3) of all its deputies, which equals, *inter alia*, to the necessary vote for the delegation of state sovereignty, as defined in Article 20 of the Constitution. In contrast, for a successful motion of no-confidence against the Government, the Constitution has set a lower threshold of the required vote, namely sixty-one (61) deputies.

If the President could dissolve the Assembly on its own motion following a no-confidence motion, then the President would have the power which equals to the two-thirds (2/3) of the votes of the representatives of the people and which would result in an arbitrary reduction of the necessary will of two thirds (2/3) of the deputies for the dissolution of the Assembly, into only sixty one (61) votes, required for a motion of no confidence. Such a power, Presidents, based also on the Opinions of the Venice Commission, do not even have in the majority states with presidential regulation.

In fact, the Analysis of other Constitutions reflected in this Judgment, including those Constitutions used in the arguments of the Applicants, the relevant Opinions of the Venice Commission and the responses of the Venice Commission Forum, reflects that no Constitution requires the mandatory dissolution of the Assembly only due to the fact that a motion of no-confidence has been successfully voted. On the contrary, the successful vote of a motion of no-confidence results in three situations: (i) the automatic election of a new Prime Minister, in cases where the Constitutions provide for a "*constructive motion*"; (ii) an additional possibility for the election of a Prime Minister; and (iii) the return of the process to the President, to start and follow the procedures for the election of the Government, for the number

of possibilities for prescribed in the Constitution. In all these countries, only when all the constitutional possibilities for the election of a new Government have been exhausted, the Assembly is dissolved and early elections are announced.

The competence of the President to dissolve the Assembly as set forth in paragraph 2 of Article 82 of the Constitution, is applied correctly, only when following a successful motion of no confidence voted by at least sixty-one (61) deputies: (i) there is sufficient majority of deputies to form a new Government, and at the same time (ii) there is no majority of two-thirds (2/3) of the deputies, necessary to self-dissolve. This competence, on one hand, represents an additional possibility to form the Government within the existing legislature and avoid elections; while on the other hand, it represents a possibility to enable the unblocking of situations in which there is neither will nor a necessary majority to form a new Government by the Assembly within the same legislature.

To this day, Article 82 of the Constitution has always been applied in this same way. More precisely: (i) the third and fifth legislatures were dissolved by the President in the third year of their term, in 2010 and 2017, respectively, when in the Assembly there was no will or necessary majority to form a new Government; whereas, (ii) the fourth and sixth legislatures, in 2014 and 2019, respectively, were self-dissolved with two-thirds (2/3) of the votes of all deputies and this dissolution was only decreed by the respective Presidents.

The circumstances of the present case are clearly different from those of previous legislatures. In this case, (i) a no-confidence motion was passed by the votes of two-thirds (2/3) of all people's representatives and the same, do not need the President's help to self-dissolve; and (ii) the majority of political parties and coalitions represented in the Assembly, respectively the majority of the people's elected representatives, have declared their will in favor of the establishment of a new Government, after expressing no confidence against the caretaker/dismissed Government. The dissolution of the Assembly by the President against the will of the people's representatives would be arbitrary and clearly unconstitutional. On the contrary, the President was obliged to initiate proceedings which would provide for the opportunity to establish a new Government based on the provisions of Article 95 of the Constitution.

The manner of electing the Government in the Constitution of Kosovo is determined through Article 95. The procedure to be followed for the election of a Government is clarified in the Judgment of the Court in case KO103/14. The Court adheres to the principles set out in that Judgment. The latter clarified that for the establishment of a Government, the Constitution defines two possibilities. The first right to establish the Government belongs to the

"*political party or coalition that has won the necessary majority in the Assembly to establish the Government*", respectively the political party or the coalition having won the elections. The President has no discretion regarding the right of this political party or coalition to nominate a candidate for Prime Minister and only mandates the same. In case of failure of the election of this Government in the Assembly, or rejection of this mandate by the winning political party or the coalition, the right to establish the Government passes to the political party or coalition represented in the Assembly, which at the discretion of the President is more likely to establish the Government and avoid elections. Whilst, the failure of these two possibilities, results in the obligation of the President to announce the elections, as defined in the Constitution.

Article 95 of the Constitution defines the procedure for electing a Government during an election cycle. The same, defines two options for electing a Government, after the elections and after the resignation of the Prime Minister/Government. The Court has clarified that the effect of the resignation of a Prime Minister results in the resignation of a Government, just as the effect of the successful vote of a no-confidence motion on the "*Government as a whole*", results in the resignation of the same. Such a stand is also consistent with the Comparative Analysis, the cited Opinions of the Venice Commission and the contribution submitted to the Court by members of the Venice Commission Forum, according to which, after a successful motion of no-confidence, the Prime Minister/Government are resigned, and the respective constitutional article pertaining the election of the Government is activated, except for those cases that have provided for the "*constructive motion*", or have provided only one more possibility for the election of the Prime Minister/Government, after the relevant motion.

Therefore, all cases of resignation of the Prime Minister, or when the post becomes vacant for other reasons, result in the fall of the Government, including when the resignation of the Government is the result of a successful motion of no confidence, provided that after this motion there is no dissolution of the Assembly, based on the principles explained above, paragraph 5 of Article 95 of the Constitution is activated, obliging the President to mandate the new candidate for Prime Minister. The political party or coalition that has the first right to nominate the candidate for Prime Minister and establish the Government, is again the winning political party or coalition. For the establishment of this Government, the procedure defined through paragraphs 2 and 3 of Article 95 of the Constitution must be followed, while the failure to obtain the necessary votes in the Assembly or the rejection of this mandate, results into passing the right to establish the Government to a political party or a coalition that may have the necessary majority to establish the Government, as provided in paragraph 4 of Article 95 of the Constitution and in accordance with the principles set out in

Judgment KO103/14. The Court clarifies that through Judgment KO103/14, it has never determined that the winning political party or coalition has the exclusive and sole right to nominate the candidate for Prime Minister and to establish the Government.

The Court also notes that the competence of the Assembly to elect and express no confidence against the Government is set out in paragraph 8 of Article 65 of the Constitution and is implemented through Articles 95 and 100 of the Constitution, on the Election of the Government and the Motion of No Confidence, respectively. The latter is one of the most essential mechanisms for exercising parliamentary control over the Government and, consequently, for balancing the powers among the branches of government. The democratic legitimacy of a government elected by an Assembly stems from the confidence that the representatives of the people vest with it when electing it. This confidence ceases at the moment when the majority of all deputies of the Assembly have voted against it. As a result, it loses the confidence of the representatives of the people, and consequently the constitutional authority to exercise the relevant competences.

The Court reiterates that in the circumstances of the concrete case, on 25 March 2020, a motion of no-confidence was voted for by two-thirds (2/3) of the votes of all deputies of the Assembly, against the Government led by the winning political party in the elections of 6 October 2019. The same political party, unlike most of the Constitutions analyzed and reflected in the Judgment, after a successful vote on the motion of no confidence, based on the Constitution of Kosovo, still has the first right to propose a candidate for Prime Minister. Such a proposal has not been made by this political party even after (4) four requests by the President, starting from 2 April 2020 to 22 April 2020. The respective political party, namely VETËVENDDOSJE! Movement, in essence, claims that: (i) after a motion of no confidence, the President is obliged to dissolve the Assembly and announce early elections; and that (ii) there is no constitutional deadline for proposing of the candidate for Prime Minister, therefore, it is at the full and indefinite discretion of the winning political party to nominate the candidate for Prime Minister and that "*only when the political, administrative and technical conditions have been met*." Consequently, another matter relevant for this Judgment is: (i) the deadline within which the candidate for Prime Minister must be proposed; and (ii) if the lack of proposal of this candidate by the political party that has the first right to nominate, reflects the refusal to accept the mandate for the Prime Minister.

Regarding the deadline within which the proposal for the candidate for Prime Minister should be made, the Court has emphasized that this matter must be analyzed in terms of: (i) the system of constitutional deadlines that the Constitution has set for the purposes of forming the Government; and (ii) the

nature of the "*consultation*" between the President and the political party or coalition with the right to nominate a candidate for Prime Minister, including mutual responsibilities and obligations between them, for the purpose of nominating the candidate for Prime Minister.

First, the Court noted that the nomination of a candidate for Prime Minister by the President results into the running of two types of parallel constitutional deadlines: (i) that of the dissolution of the Assembly if the election of the Government is not made within sixty (60) days of taking the mandate; and (ii) those set out in Article 95 of the Constitution, which relate to the two possibilities for the formation of the Government, respectively the fifteen (15) day period within which the candidate for Prime Minister presents the composition of the Government and requires approval by the Assembly; (iii) the ten (10) day deadline within which the President nominates another candidate for Prime Minister, in case the first candidate for Prime Minister fails to secure the necessary votes in the Assembly or refuses the respective mandate; and (iv) referring to the "*same procedure*", the fifteen (15) day deadline, within which the other candidate for Prime Minister, presents the composition of the Government and requests its approval by the Assembly. These precise deadlines reflect the purpose and importance that the Constitution has assigned to the need for speedy establishment of the Government, setting the deadline of fifteen (15) days for the candidate for Prime Minister, to negotiate and reach the agreements to secure the necessary votes of deputies of the Assembly for the proposed Government; and also the sixty (60) day deadline for the formation of a Government, and the corresponding consequence of the dissolution of the representatives of the people, if this deadline is not met.

Secondly, the Court recalled that in Judgment KO103/14, it distinguished between the nature of "*consultation*" between the President and the political party or coalition with the right to nominate the first and second candidate for Prime Minister. In the first case, the President has no discretion and it is clear which is the political party or coalition that proposes the candidate for Prime Minister, consequently this "*consultation*" entails a completely formal and technical process between the President and the winning party or coalition, pertaining to the the proposal of the candidate for Prime Minister and the appointment of the same. By contrast, in the second case, the President has the discretion and it is not clear at the outset which is the political party or coalition with the right to propose the candidate for Prime Minister, therefore, this process of "*consultation*" is more complex and entails the obligation of the President to consult with all the political parties and coalitions represented in the Assembly and his/her assessment, as to who has the highest probability to form the Government in order to avoid elections. In exercising this discretion, the Constitution has set a deadline of ten (10) days for the President.

Therefore, in the context of: (i) the undisputed importance of the effective functioning of a Government as one of the three branches of government; (ii) the system of precise and short deadlines set out in the Constitution regarding the formation of a Government; (iii) the completely clear, technical and formal nature of the "*consultation*" between the President and the winning political party or coalition for the purposes of nominating the first candidate for Prime Minister; and (iv) the constitutional limit of ten (10) days for the purposes of nominating the second candidate for Prime Minister through a much more complex "*consultation*" process, the Court notes that the non-specification of deadlines by the Constitution pertaining to the proposal of the first candidate for Prime Minister from the winning political party or coalition, does not entail the right and the discretion of the latter not to act for an unlimited duration of time.

In this respect, the Court notes that a time limit for proposing the candidate for the Prime Minister is not specified in the Constitution not only with respect to the political party or coalition with the first right to propose a candidate, but it also does not specify a deadline within which the President is obliged to decree the proposed candidate, or to submit the same to the Assembly. The Court notes that the designation of the candidate for the Prime Minister, neither involve only the obligation of the President to decree the candidate, nor only the right of the winning political party to propose a candidate; but it also includes the duty of the latter to propose or refuse to propose the candidate for Prime Minister. More precisely, the designation of the candidate for Prime Minister involves the mutual obligation for the cooperation between the President and the winning political party in this process. Moreover and whilst having in mind the technical and formal nature of the "*consultation*" for the purpose of designating the first candidate for Prime Minister, a step that puts into motion the process Government formation and corresponding constitutional deadlines, it is clear and self-understanding that this "*consultation*" must be concluded as soon as possible and that it involves the requirement for a swift cooperation dynamic.

On the contrary, all of the above-mentioned constitutional norms regarding the deadlines and the purposes that they entail regarding the formation of the Government, would be without any meaningful effect and completely unnecessary. The election of the Government would remain hostage to the "*unlimited deadlines*" and at the full discretion of a winning political party or coalition or at the full discretion of the President. The former, would hold the formation of the Government pending, relying to the full and indefinite discretion to propose a candidate for Prime Minister, while the President would also refer to the full and indefinite discretion to decree the same. This "*full and unlimited discretion in terms of time*", in the meantime, is related to the election of the Government, a competence which pertains to another

branch of government, respectively the Assembly. Such an approach and interpretation would be arbitrary and clearly contrary to the structure of constitutional norms, its purpose and spirit, but also contrary to the basic principles of a parliamentary democracy. In this regard, the Court also emphasizes that, despite the allegations of the applicants regarding the delay of the procedures for establishing institutions after the elections, emphasizing the situation of 2014 in respect to the prolongation of the process for the establishment of the Assembly, the Court has never, including in the Judgment KO119/14, addressed the issue of deadlines related to the constitution of the Assembly, as the same were not the subject matter of the case before the Court.

Regarding the lack of a proposal of candidate for the Prime Minister by the winning political party in the elections, the Court, in this Judgment, has analyzed the exchange of letters between the Chairman of the winning political party, at the same time the caretaker Prime Minister, and the President. These letters reflect two characteristics: (i) the President's request for the nomination of a candidate for Prime Minister on the one hand; and (ii) the lack of a proposal and the request for the dissolution of the Assembly and the announcement of early elections by VETËVENDOSJE! Movement, on the other hand.

The Court, in this Judgment, has emphasized that: (i) for the purposes of "*consultation*" to nominate the candidate for Prime Minister between the President and the winning political party or coalition, only the nomination of the candidate for Prime Minister and the respective decreeing by the President is relevant; and (ii) this "*consultation*" process cannot include issues related to the dissolution of the Assembly or the announcement of early elections, because none of these issues is within exclusive competence of either the President or the winning party or Caretaker/resigned Government. This because it is clear that: (i) the cases of compulsory dissolution of the Assembly are precisely defined in the Constitution; (ii) the possibility of the Assembly to be dissolved by the President, as has already been clarified, is not a competence exercised by the President without coordination with all political parties and coalitions represented in the Assembly, and not only with the one that has won the elections; and (iii) the Government has no constitutional competence either with regard to the dissolution of the Assembly or the announcement of elections. On the contrary, in relation to these two issues, the role of political parties or coalitions represented in a Government is equivalent only to the power they have through their representation in the Assembly. The will of the majority of the Assembly in the circumstances of the current case, has clearly made it impossible for the President to dissolve the Assembly and announce early elections.

The Court notes that in the circumstances of the present case, the political party that has led the Government against which a motion of no confidence has been voted, has not made a proposal for a new candidate for Prime Minister for the purpose of forming a new Government. However, the Applicants claim that they have never explicitly refused to accept this mandate.

Regarding the possibility of refusing to accept the mandate, the Court recalls that in Judgment KO103/14, it found that "*it is not excluded that the party or coalition in question will refuse to accept the mandate*". Despite the fact that it was not an issue before the Court in 2014, the Court had foreseen the possibility of refusal, precisely for the purpose of making it impossible to block the formation of the Government in the future. This Judgment did not specify the manner in which the refusal of the respective mandate can be made. Therefore, the claim of the applicants that "*the Court has stated that the President may bypass the winner of the election only if the latter expressly waives his right but under no other circumstances*" is incorrect. This is so because also the authorization of the winning political party or coalition to refuse the mandate only explicitly, namely the possibility to not propose a name for the candidate for Prime Minister, and at the same time, to hold this right by not refusing explicitly, would vest the winning political party or coalition with the undisputable right to block the process of nominating a candidate for Prime Minister by the President.

Such a possibility would make it impossible for the President to exercise his competence to appoint a candidate for Prime Minister, thus making it also impossible for the Assembly to exercise its competence for the election of Government. On the contrary, as it has already been clarified, the appointment of a candidate for Prime Minister requires immediate interaction in fulfilling the mutual obligations and responsibilities between the President and the winning political party or coalition. Therefore, the refusal in fact means the lack of action in order to fulfill this obligation, namely the lack of concrete action towards and through proposing the candidate for Prime Minister by the winning political party or coalition. The Constitution and its spirit foresees that this right and, at the same time, obligation, for both, the winning party and the President, cannot be abused by any of them and must be exercised in a good faith and in the function of forming of the Government.

From the exchange of official letters between the President and the winning political party in the present case, not only that there is no proposal of a candidate for Prime Minister, but even a single indication of the intention to propose a candidate for the Prime Minister, is reflected. They rather only contain the request to dissolve the Assembly and call early elections. These demands exclude the possibility of proposing a candidate for Prime Minister.

In circumstances where a no-confidence motion with two-thirds (2/3) of the representatives of the people is successfully voted and the possibility to form a new Government exists, if the claims about (i) the unlimited time and the full discretion of the winning political party, and (ii) the right to only expressly refuse the candidate for Prime Minister, were to be held, combined with the sole demand for the dissolution of the Assembly and the announcement of early elections, the formation of a Government would be blocked indefinitely, keeping in office a Government that has lost the confidence of the representatives of the people. This is not the spirit of the Constitution of the Republic of Kosovo.

The President, through balancing his obligation to guarantee the constitutional functioning of the institutions defined by the Constitution, as set forth in paragraph 2 of Article 84 of the Constitution, including in this context, the right of the Assembly to elect a Government, as defined in paragraph 8 of Article 65 of the Constitution, on the one hand; and on the other hand, given that the winning political party has not undertaken any single action towards proposing the candidate for Prime Minister despite the President's requests, but has continued to request the dissolution of the Assembly and the announcement of early elections, despite the fact that the majority of political parties or coalitions represented in the Assembly have already declared themselves against this possibility, whereby making it impossible for the President to exercise the competence set out in paragraph 2 of Article 82 of the Constitution, has rightly ascertained the constitutional possibilities to nominate a candidate for Prime Minister by the winning political party have been exhausted. As a result, the President initiated the procedures for the appointment of the new candidate for Prime Minister, in consultation with and after the proposal of the political party, which based on the relevant consultations, resulted to have the highest probability to form the Government and in order for the elections to be avoided. The opposite would make impossible the exercise of the essential powers of the Assembly of the Republic to elect the Government of the Republic of Kosovo.

The right to nominate a candidate for Prime Minister is a responsibility and a privilege. The proposal of this name represents the highest point of success of a political party or coalition for and within an election cycle. The first right to nominate a candidate for Prime Minister is guaranteed to the winning political party or coalition, through the Constitution. The exercise of this right is not vested with the authorization to block the formation of a Government within an election cycle. Such an attitude would submit the most important state institutions to the sole will of the winning political party or coalition.

Finally, the Court concludes that the democratic functioning of institutions is the primary responsibility of every person who is vested with public authority. All actions taken by persons vested with public power or authorizations must be in accordance with the Constitution and its spirit and contribute to the orderly conduct and coordination of affairs of public interest for the state of the Republic of Kosovo, so that the latter would develop and implement the values and principles on which it has been built and aspires through its Preamble.

JUDGMENT

in

Case No. KO72/20

Applicant

Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020

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

Applicants

1. The Referral is submitted by: Rexhep Selimi, Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Hajrullah Çeku, Saranda Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëresha Kryeziu Hyseni, Labinotë Demi Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani, Salih Zyba (hereinafter: the Applicants or the Applicants deputies), all deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly).

Challenged act

2. The Applicants challenge Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020 (hereinafter: the challenged Decree) by which Mr. Avdullah Hoti, was proposed to the Assembly

of the Republic of Kosovo as a candidate for the Prime Minister to form the Government of the Republic of Kosovo (hereinafter: the Government).

Subject matter

3. The subject matter of the Referral was the constitutional review of the challenged Decree, which according to the Applicant's allegations is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

4. The Applicants requested the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure *"on the Decree in order to prevent unrecoverable damage to the party and the institution"*.

5. The Applicants also requested the holding of the public hearing.

Legal basis

6. The Referral is based on Article 113, paragraph 2, sub-paragraph 1 [Jurisdiction and Authorized Parties] of the Constitution, Article 29 [Accuracy of the Referral] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rules 32 [Filing of Referrals and Replies] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure No. 01/2018 of the Constitutional Court of the Republic of Kosovo, (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 30 April 2020, about 17:00 hrs, the Applicants submitted the Referral to the Court.

8. On the same date, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Gresa Caka-Nimani and Radomir Laban (members).

9. On the same date, the Court, through electronic mail, notified the Applicants about the registration of the Referral.

10. On the same date, the Court notified the President of the Republic of Kosovo (hereinafter: the President) about the registration of the Referral; the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all deputies of the Assembly; the caretaker Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); as well as the Ombudsperson.

11. The Court notified all interested parties mentioned above that their comments: (i) regarding the request for the imposition of an interim measure, if any, to present them to the Court, by 1 May 2020, at 12:00 hrs; whereas (ii) the comments regarding the merits of the Referral, if any, to submit to the Court no later than 8 May 2020, at 16:00 hrs.

12. On 1 May 2020, before 12:00 hrs, the Court received a letter from the Head of the Parliamentary Group of the Serbian List, the deputy Slavko Simić, requesting the Court to provide additional deadline to submit comments on interim measure because they received Referral KO72/20 only in Albanian.

13. On the same date, the Court responded to the deputy Slavko Simić by notifying him that the Referral KO72/20 was received in the Court only in the Albanian language and that the Court sent it for urgent translation immediately after its receipt. The Court sent the full copy of the Referral in Serbian to the deputies in question, and approved the request for an extension of the deadline for submitting comments for an interim measure until 16:00 hrs on 1 May 2020.

14. On 1 May 2020, within the set deadline, the Court received comments regarding the interim measure from the following parties: the President, the President of the Assembly, the Prime Minister, the Parliamentary Group of the Democratic League of Kosovo (hereinafter: the LDK), the deputy Arban Abrashi and the deputy Shkëmb Manaj.

15. On 1 May 2020, the Judge Rapporteur recommended to the Court the approval of the interim measure. On the same date, the Court, by majority of votes, decided to approve the interim measure until 29 May 2020, namely to suspend the further implementation of the challenged Decree of the President.

16. On 6 May, 2020, the Court received from A.M. a request to allow him to present *Amicus Curiae* regarding the case KO72/20.

17. On 7 May 2020, the Judge Rapporteur in accordance with Rule 55 [Amicus Curiae], after consulting with the Review Panel, assessed that the request of A.M. to present *Amicus Curiae* must be rejected. The Court notified A.M. about the rejection of his request.

18. On 8 May 2020, within the prescribed time limit, the Court received comments regarding the merits of the Referral from the following parties: the President; the President of the Assembly; the Prime Minister; the Deputy President of the Assembly, Ms. Arbërie Nagavci; the Ombudsperson; the Parliamentary Group of the LDK; deputies of the Assembly, Behxhet Pacolli and Mirlindë Sopi-Krasniqi from the Alliance New Kosovo (hereinafter: the AKR), supported by the deputies Endrit Shala, Haxhi Shala and Albulena Balaj-Halimaj from Social Democratic NISMA (hereinafter: NISMA); and the deputy Arban Abrashi.

19. On 11 May 2020, the Court submitted the following questions to the Venice Commission Forum:

"1. After the motion of no confidence in the Government, is there a constitutional/legal possibility that allows the formation of the new Government within the same legislature?
2. Is there a constitutional/legal obligation to dissolve the Assembly after the no-confidence motion against the Government?
3. Do you have case law on this issue?"

20. Between 11 and 21 May 2020, the Court received answers to questions posed through the Venice Commission Forum by the constitutional/supreme courts of the following states: England, Brazil, Liechtenstein, Austria, Slovakia, Sweden, Czech Republic, Croatia, Germany, Bulgaria, North Macedonia, Moldavia and South Africa. (See summaries of thirteen (13) responses received in paragraphs 291-306 of this Judgment).

21. On 12 May 2020, the Court notified the Applicants; the President; the President of the Assembly; the Prime Minister; as well as the Ombudsperson regarding the comments received on 8 May 2020.

22. The Court also requested the President of the Assembly to take all necessary steps in her jurisdiction to inform the Court about *"Travaux Preparatoires"* or "*Preparatory Documents"* of the Constitution and, if the same exist, to submit them to the Court within an urgent time limit and no later than 13 May 2020.

23. On 13 May 2020, the Court received from the President of the Assembly the letter in which the latter informed the Court that *"Travaux Preparatoires"* of the Constitution are not found in the Assembly but in the State Agency of Archives of Kosovo (hereinafter: the Archive of Kosovo). Therefore, the President of the Assembly notified the Court that she had addressed an official request to the Archive of Kosovo and based on their response they were informed that due to the large volume of documents, *"it is impossible to photocopy the material before 15 May* [2020]" and as soon as they receive the copy of *"Travaux Preparatoires"* from the Kosovo Archive, they will forward it immediately to the Court.

24. On the same date, 13 May 2020, the Court responded to the letter of the President of the Assembly, in which case it emphasized: *"Taking into account the urgency of the case that the Court is dealing with as well as the large declared volume of files of "Travaux Preparatoires", please take all steps at your disposal to ensure that the Court has access to certified copies as authentic and original documents of "Travaux Preparatoires" as soon as possible and no later than within the deadline proposed by you, 15 May 2020."* The Court also noted in the letter that: *"In accordance with the Constitution of the Republic of Kosovo and Law No. 04/L-088 on State Archives, please submit to the Court the full copy of the archival material together with the document certifying the authenticity of that archival material".*

25. On 14 May 2020, the Court received through the Assembly a certified copy of the Preparatory Documents for drafting the Constitution.

26. On 18 May 2020, the Court accepted from the President of the Assembly the letter by which the latter presented some issues regarding the Preparatory Documents for the drafting of the Constitution, which the Court received on 14 May 2020, and which the Assembly had obtained from the Archives of Kosovo. In her letter, the President of the Assembly stated:

> *"The Assembly of the Republic of Kosovo is not the author of the submitted documents and they have never been dealt with in a regular procedure in the Assembly;*
> *The Assembly of Kosovo has never possessed these documents, until 14 May 2020, when a copy was given to it by the State Archives Agency;*
> *These documents have never been published in the Official Gazette or in other official sources;*
> *The Assembly cannot certify the authenticity of these documents, or whether there has ever been any interference with them;*

The Assembly cannot verify who possessed these documents before they were sent to the Kosovo Archives, as well as whether there has been any interference with them during these years;
The Assembly bears no responsibility for the authenticity of the documents submitted, as it has acted only as a facilitator of communication between the Constitutional Court and the State Agency of Archives of Kosovo".

27. On the same date, 18 May 2020, regarding the letter received by the President of the Assembly on the Preparatory Documents for drafting the Constitution, the Court notified the President of the Assembly as follows:

"Honorable President of the Assembly,

Thank you for your cooperation and of the State Agency of Archives of Kosovo for submitting the certified copy of the preparatory documents for drafting of the Constitution of the Republic of Kosovo. On this occasion, we invite you to find attached to a CD - electronic version in PDF a copy of all the preparatory documentation for the drafting of the Constitution submitted to the Court by the Assembly on 14 May 2020. We confirm that this is the entire material that has been forwarded to the Court in an official manner by the Assembly and as such has been recorded, evidenced and archived in the Court.

We respectfully recall that the Constitutional Court cannot speculate on the authenticity of this material nor engage in such discussions. This material was submitted as a public document in an official way to the Court and it was submitted as a certified copy of the original material found in the State Archives of the Republic of Kosovo. Consequently, the Court will deal with these documents in accordance with international practices and standards for their treatment".

28. Through this letter addressed to the President of the Assembly, the Court also clarified the entire process of how to obtain the certified copy of the Preparatory Documents for drafting the Constitution in the Court and which is reflected above, including the fact that on 20 June 2014, the Court during the review of case KO103/14 (see, the Applicant, *the President of the Republic of Kosovo*, Judgment of 30 June 2014 - hereinafter: Judgment KO103/14, requested the Assembly to submit to the Court a copy of *"Travaux Preparatoires"* but was notified by the Secretary General of the Assembly that *"they did not have Travaux Preparatoires"*. The Court also clarified that on 8 May 2020, the Ombudsperson submitted a letter to the Court stating that

there were no comments on case KO72/20, but it has information that "*the files of the preparatory works for the drafting of the Constitution are in the State Agency of Archives of Kosovo*".

29. On 28 May 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

30. On the same date, on 28 May 2020, the Court decided: (i) unanimously that the Applicants' Referral is admissible; (ii) unanimously that the challenged Decree of the President is in compliance with paragraph 2 of Article 82 [Dissolution of the Assembly] of the Constitution, thereby finding that the successful vote of a no-confidence motion by the Assembly against the Government does not result in mandatory dissolution of the Assembly and enables the formation of a new Government in accordance with Article 95 [Election of the Government] of the Constitution; (iii) by a majority that the challenged Decree of the President is in accordance with paragraph (14) of Article 84 [Competencies of the President] of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution; (iv) unanimously to repeal the interim measure established by the Decision of 1 May 2020; and (v) unanimously reject the request for a hearing. The main conclusions of the Court were published on the same date.

31. On 1 June 2020, the Court published full Judgment in case KO72/20.

Summary of facts

32. On 6 October 2019, the early elections for the Assembly were held.

33. On 27 November 2019, the CEC certified the election results for the Assembly, based on the following list of the election results:

(i) VETËVENDOSJE! Movement (hereinafter: the LVV), 29 deputies;
(ii) Democratic League of Kosovo, 28 deputies;
(iii) Democratic Party of Kosovo, 24 deputies;
(iv) AAK-PSD Coalition 100% Kosovo, 13 deputies;
(v) Srpska Lista, 10 deputies;
(vi) Social Democratic Initiative – Alliance Kosova e Re, Justice Party, 6 deputies;
(vii) "Vakat" Coalition, 2 deputies;
(viii) Kosova Demokratik Tyrk Partisi, 2 deputies;
(ix) Egyptian Liberal Party, 1 deputy;

(x) Nova Demokratska Stranka, 1 deputy;
(xi) Ashkali Party for Integration, 1 deputy;
(xii) New Democratic Initiative of Kosovo, 1 deputy;
(xiii) Jedinstvena Goranska Partija, 1 deputy;
(xiv) Kosovo United Roma Party, 1 deputy.

34. On 26 December 2019, the Assembly was constituted.

35. On 20 January 2020, the LVV proposed its candidate for Prime Minister to the President.

36. On 20 January 2020, on the same date, the President issued the Decree by which Mr. Albin Kurti was proposed to the Assembly as a candidate for Prime Minister to form the Government.

37. On 3 February 2020, the Assembly elected the Government with Prime Minister Mr. Albin Kurti.

38. On 20 March 2020, a number of deputies of the Assembly submitted to the Presidency of the Assembly the No-Confidence Motion against the Government.

39. On 25 March 2020, the Assembly [Decision No. 07-V-013] approved the No-confidence Motion in the Government. The voted motion contained, among other things, the following reasoning:

"[...]
we call on the deputies of the Assembly of the Republic of Kosovo to vote for this motion through a vote of no confidence. By this action, the Assembly creates the possibility of forming a stability government with a limited duration, which would address the immediate challenges facing the country, both in the position of foreign policy and in the dynamics created within the country".

40. On 30 March 2020, the President sent special letters to the presidents of all political entities represented in the Assembly, which had the following content *"Following the no-confidence motion against the Government [...] it will take the steps set out in the Constitution. [...] In this regard, I invite you to attend the consultative meeting to discuss further steps*".

41. On 1 April 2020, the President had separate consultative meetings with the presidents of all political entities represented in the Assembly.

42. On 1 April 2020, Mr. Albin Kurti, in his capacity as Prime Minister, by the letter [Ref: 108/2020], expressed readiness to meet with the President, following the motion of no confidence in the Government. In his letter to the President, he also stressed that *"The Constitution, as well as your previous practice in 2017, makes it clear that, after the successful motion of no confidence, the only way forward is to dissolve the Assembly. [...], in accordance with Article 82.2 of the Constitution, and the announcement of the early elections"*. He added that "*the only issue I will discuss with you is when will be the most appropriate time for the dissolution of the Assembly, taking into account in particular the state of emergency of public health that the Republic of Kosovo is currently facing",*

43. On 1 April 2020, Mr. Albin Kurti, in his capacity as Prime Minister, by the letter [Ref.1 09/2020] stressed among other things as follows: *"[...] Regarding your notification that you are carrying out "consultations" with the leaders of other political parties [...] I would like to emphasize my position that such consultations have no basis in any provision of the Constitution. [...]. I would also like to reiterate my readiness to stay in touch with our fight against the COVID-19 virus, as well as your duty to dissolve the Assembly [...] after the motion of no confidence. While, for any other issue outside these two topics, I reiterate my position expressed in today's meeting, that the inter-institutional communication between the Office of the President and the Office of the Prime Minister, continue in written form"*.

44. On 2 April 2020, the President addressed a letter [No. Prot. 353] to Mr. Albin Kurti, in the capacity of President of the LVV with the following content: *"[...] Yesterday's meeting with you (01.04.2020), after the motion of no confidence in the Government [...], was a consultative meeting with the President of the Vetëvendosje Movement - the leader of the first party according to the final results of the Early Elections for the Assembly of the Republic. Kosovo, held on 6 October 2019. So, it was a meeting of a formal, legal and procedural nature, for consultation to assess whether it is in the interest of the political party that you represent the formation of the new Government or the dissolution of the Assembly [...]"*

45. On the same date, on 2 April 2020, the President through the letter [No. Prot. 354] notified Mr. Albin Kurti, in the capacity of the latter as President of the LVV, that after the motion of no confidence of the Government, in accordance with *"Article 95 of the Constitution [...], will take the necessary steps to appoint the candidate for Prime Minister for the formation of the Government"*. The President further emphasized: *"Taking into account Article 95 of the Constitution, the*

Decision of the Constitutional Court KO103/14, of 1 July 2014, and the Decision of the Central Election Commission for the certification of the final election results [...] held on 6 October 2019 (CEC Protocol No. 1845-2029, 27.11.20 19), Vetëvendosje Movement is the political entity that has won the majority in the Assembly to form the Government and has the right to propose a new candidate, to form the Government. Please, on behalf of the Vetëvendosje Movement, propose the new candidate, who I will mandate for the formation of the Government of the Republic of Kosovo".

46. On 10 April 2020, the President by the letter [No. Prot. 354/1] addressed Mr. Albin Kurti, in the capacity of the latter as the President of the LVV:

"Honorable Mr. Kurti,

I am waiting for your response to the request I forwarded to you on 2 April 2020 (Ref 354, 02.04.2020), to nominate the candidate for Prime Minister and form the Government [...] after the no-confidence motion in the Government [...]

I remind you that [the LVV] [...] is the political entity that has won the majority in the Assembly to form the Government and has the right to propose a new candidate to form the Government.

As you know, after the motion of no confidence in the Government on 25.03.2020, I held consultative meetings with all political parties represented in the Assembly to assess whether it is in the interest of political parties to form a new Government or to dissolve the Assembly. Most political parties have stated they are in favor of forming a new Government.

[...]

Once again, I must remind you that my constitutional mandate obliges me to guarantee the democratic functioning of the institutions of the Republic of Kosovo, including ensuring the appointment of a new candidate for Prime Minister to form the Government. [...]. As President of the Republic of Kosovo, I will take this action, following all the constitutional steps for the citizens of the Republic of Kosovo to have their new Government as soon as possible.

Please, on behalf of [the LVV], propose a new candidate for Prime Minister, whom I will nominate for the formation of the Government [...]".

47. On 13 April 2020, Mr. Albin Kurti, in his capacity as Prime Minister by the letter [Ref: 120/2020] addressed the President, emphasizing, among other things,

"[...] let me express my deep regret after your last letter, in which you openly state your intention to bypass your constitutional duty to dissolve the Assembly and call new elections, after the end of the battle against COVID-19

In your letter dated 10.04.2020, you emphasize that you held consultative meetings with the representatives of all political parties represented in the Assembly in order to assess the interest of political parties in relation to the new elections or the formation of the new Government. Let me remind you that it is not in the competence of the President of the Republic of Kosovo to assess the interests of political parties, but to protect the state interest. Furthermore, the Constitutional Court in paragraph 84 of its Judgment in case KO 103/14 expressly found that "The Court reiterates that the President of the Republic can only consult with the political party or coalition that has won the majority in the Assembly be it absolute or relative". Therefore, by holding such consultative meetings, You have acted contrary to the Constitution of the Republic of Kosovo, because the judgments of the Constitutional Court are legal acts through which the constitutionality is realized and are considered a source of the Constitutional Law. To be even clearer, as you know, before the meeting and after the meeting with you, You were officially informed by me that the meetings with you are taking place in the capacity of the caretaker Prime Minister and I was accompanied by my two external advisors, who are not members of [the LVV]. I was in a meeting where the topic of discussion was the state of health emergency and the issue of announcing the elections after the motion of no confidence.

Also let me remind you that after the successful motion of no confidence [...] the president is not given space to play the role of a political actor trying to impose his will on political life. To the President of the Republic of Kosovo, as a constitutional authority, a motion of no confidence gives him the right to fulfill only one action determined by the Constitution. Thus, the dissolution of the Assembly in accordance with Article 82.2 of the Constitution [...]"

That this is the only procedure provided by the Constitution [...] it has never been questioned even in the current constitutional practice. It has been a notorious fact that there have never been consultative

meetings with the political party that has won the majority in the Assembly. That the Presidency has always considered necessary the immediate announcement of the elections, in addition to being confirmed by the fact that in 2010 and 2017 the Assembly was dissolved and the elections were announced on the same day when the no-confidence motion was voted, it is also confirmed by the interview of Acting President Mr. Jakup Krasniqi [of 2 February 2010]. [...].

[...] that the elections are the only option after a successful motion of no confidence, it was also emphasized by You in 2010, in the extraordinary meeting of the Assembly of Kosovo dated 02.11.2010, when you asked for votes in favor of the no-confidence motion [...]

Therefore, in the spirit of this factual and legal situation, I believe that it is now clear to You that it is not the duty of the President to impose letters by requesting the names of candidates for Prime Minister. Especially, not in a period of health emergency. But let me emphasize that this letter is not a refusal to give you a name of the candidate for Prime Minister. It is a reminder of the framework of your powers and constitutional obligations that fall on the institution of the President [...], after a successful motion of no confidence, because it is not at your discretion to impose unconstitutional scenarios".

48. On 15 April 2020, the President by letter [Prot. No. 370/1] addressed Mr. Albin Kurti, in the capacity of the latter as the President of LVV, emphasizing:

"On 13.04.2020 (Ref.: 120/2020) I have received a letter from you, in which you have referred to the letters I have sent to you as the President of the Vetevendosje Movement. In this letter you have not proposed the candidate for Prime Minister, but you have neither refused such a thing. Considering the requests I forwarded to you on 2 April 2020. (Ref. 354, 02.04.2020) and on 10 April 2020 (Ref. 354/1, 10.04.2020), I remind you again that I am waiting for your answer to propose the candidate for Prime Minister to form the Government of the Republic of Kosovo, after the motion of no confidence in the Government (Decision of the Assembly of the Republic of Kosovo Nr. 07-V- 013, of 25.03.2020).

I remind you that my constitutional mandate obliges me to guarantee the democratic functioning of the institutions of the Republic of Kosovo, including ensuring the appointment of a candidate for Prime Minister to form the Government of the Republic

of Kosovo. The citizens of the Republic of Kosovo and the political parties represented in the Assembly of the Republic of Kosovo, rightly expect the functioning of the new Government, as well as expect the President to appoint a candidate for Prime Minister for the formation of the Government.

Taking into account item 87 of the Judgment of the Constitutional Court in case no. KO103/14, the Constitutional Court "notes that it is not excluded that the party or coalition concerned will refuse to receive the mandate", then you should keep in mind that if you do not propose the candidate for Prime Minister, then your actions may reflect hesitation in taking the mandate, respectively the refusal of taking the mandate.
Finally, I urge you again to make the proposal for the candidate for Prime Minister without wasting time and in accordance with Article 95 of the Constitution and the Judgment of the Constitutional Court in case No. KO 103/14. I assure you that within a reasonable period of time, in accordance with the urgency to give the country a new Government with legitimacy by the Assembly [...], I will propose the candidate for Prime Minister to form the Government."

49. On 17 April 2020, Mr. Albin Kurti in his capacity of the Prime Minister, by the letter [Ref. 122/2020] addressed the President, emphasizing:

"Honorable President,

No, we do not hesitate to answer you.

No, we do not reject your request.

But I am obliged to repeat what I asked in my last letter, for which I have not received an answer. I have explicitly stated: It is clear that the current situation does not allow holding elections, and this is something we are not seeking to do now, before the conditions are created after the passage of pandemics. But what I am not clear about is the double standard that you and the political parties are trying to impose in an unconstitutional way, after this motion of no confidence which does not differ formally and materially from previous practices. Maybe you can explain that to us?

I have sought clarification on this, and I am still awaiting your response.

Also, please specify the legal basis on which you are acting, because Article 95 to which you refer has six paragraphs which regulate,

different issues from each other, and the non-verbal reference in Article 95 is not justifiable at this time.

I look forward to your clarification, in the hope that you will use the same standard you expect from me. After your answer, I may have a clearer reason behind this insistence on dealing with secondary and tertiary issues, at a time when we all need to unite in the fight against the common enemy - COVID-19".

50. On the same date, the President by letter [Prot. No. 370/3] addressed Mr. Albin Kurti, in the capacity of the latter as President of the LVV, emphasizing*:*

"Dear Mr. Kurti,

On 17.04.2020 (Ref, 122/2020), I have also received a letter from you, where you have referred to the letters that I have sent to you in the capacity of the President of the Vetëvendosje Movement, despite the requests sent on 2 April 2020 (Ref. 354), on 10 April 2020 (Ref, 354/1) and on 15 April 2020 (Ref. 370/1), also in your letter sent on 17 April 2020 (Ref. 122/2020), you have not proposed a candidate for Prime Minister, but you have stated that you are not refusing to propose a candidate for Prime Minister. Let me emphasize that your non-refusal means that you send the name of the candidate for Prime Minister. But you have not yet done so, despite the fact that I have sent you three requests for this purpose.

Therefore, once again, in accordance with Article 95 of the Constitution and the Judgment of the Constitutional Court in case No. KO103/14, I ask you to send the name of the candidate for Prime Minister without wasting time".

51. On 22 April 2020, Mr. Albin Kurti in his capacity as Prime Minister, by letter [Ref. 135/2020] addressed to the President emphasizing:

"Honorable President,

Despite the fact that in no case we have rejected either the request or the proposal of the candidate for Prime Minister, today, on 22.04.2020, I have received a letter from you, by which you ascertain out of your constitutional competencies as President, that I have not exercised the right to the proposal of the new candidate to form the Government.

The Constitution of the Republic does not provide for such a competence of the President to assess or ascertain the use or non-use of the right to propose a candidate for Prime Minister. In addition, the Constitution and Judgment No. 103/14 have not even set a deadline for such a thing. What the Constitution provides in this case is the appointment of the candidate for Prime Minister only after the proposal by the party or coalition that has won the absolute or relative majority, as defined in item 84 of the Judgment of the Constitutional Court.

Therefore, based on the role and function as President, you have neither the right nor the constitutional authorization to ascertain that we have rejected the nomination of the candidate for Prime Minister when we have not done so; you do not have the mandate and competence to determine beyond the Constitution how and what the Government will be, as you have done these days in public statements; and, we regret to say that you have not yet responded to us on the basis of which point of Article 95 you are acting and addressing us".

52. On 22 April 2020, the President by letter [Prot. No. 380] addressed again Mr. Albin Kurti, in the capacity of the latter as the President of the LVV emphasizing that:

"Dear Mr. Kurti,

Despite the requests I sent to you on 2 April 2020 (Ref. 354), on 10 April 2020 (Ref. 354/1), on 15 April 2020 (Ref. 370/1) and on 17 April 2020 (Ref: 370/3), you have not proposed that candidate for Prime Minister.

I regret to conclude that with your actions you have not exercised your right to propose a new candidate to form the Government, in accordance with the Decision of the Central Election Commission [...] for the Assembly [...].

I have to remind you that in accordance with the constitutional mandate of the President of the Republic of Kosovo, it is my responsibility to maintain the stability of the country and to guarantee the democratic functioning of the country's institutions.

Therefore, in accordance with Article 95 of the Constitution and the Judgment of the Constitutional Court in case no. KO 103/14 I will hold joint consultations with all leaders of parliamentary political entities about further steps".

53. On the same date, on 22 April 2020, the President sent separate letters to the presidents of all political entities represented in the Assembly inviting them to participate *"in the joint consultative meeting with the leaders of the parliamentary parties to discuss the next steps in order to give the Government a full legitimacy"*.

54. On the same date, thus on 22 April, 2020, a meeting was held with the presidents of all political entities represented in the Assembly, starting at 16:30. The President sought the opinion of political entities as to whether they were in favor of the early elections or the formation of a new government. Most political parties stated they were in favor of forming a new Government. Whereas, the representative of LVV referred to and read the letter [Ref. 135/2020] of 22 April 2020, which Mr. Albin Kurti had sent to the President, cited widely above in paragraph 51. At the meeting, the President also presented the prevailing criteria for the formation of the new Government, as the criterion that the proposal for the candidate for Prime Minister be derived from the political party or coalition which will be more likely to form the Government, and to receive the necessary votes in the Assembly to maintain the stability of the country, as well as for the Government to adhere to the following principles: the principle of constitutionality; the principle of equal treatment; the principle of political stability, the principles regarding dialogue and foreign policy, the principle of transparency, the principle of integrity, the principle of availability, and the principle of merits (hereinafter: Prevailing Criteria).

55. On the same date, the President by letter [Prot. No. 382/1] addressed Mr. Isa Mustafa, in the capacity of the latter as President of the LDK, with this content:

"Dear Mr. Mustafa,

In accordance with my constitutional mandate and in compliance with the Judgment of the Constitutional Court in case no. KO103/14,

in order to avoid early elections, to maintain the stability of the country and in accordance with the urgency to give the country a new Government with legitimacy by the Assembly of the Republic of Kosovo,

after consulting with all parliamentary political parties and agreeing with their absolute majority to form a new Government,

after not sending the candidate to form the Government by Vetëvendosje Movement, as a political entity that has won the relative majority in the early elections for the Assembly of the Republic of Kosovo on 6 October 2019, despite the requests sent on 2 April 2020 (Ref. 354), on 10 April 2020 (Ref. 354/1), on 15 April 2020 (Refl 370/1), on 17 April 2020 (Ref. 370/3), and on 22 April 2020 (Ref. 380),

in accordance with the Prevailing Criteria for the formation of the new Government, please propose the potential candidate for Prime Minister for the formation of the Government of the Republic of Kosovo, who should ensure that he will have the right number of votes in the Assembly of Kosovo and pledge that he will establish a stable and inclusive Government. [...]"

56. On 29 April 2020, the President by the letter [Prot. No. 382/2] again addressed the President of the LDK, Mr. Isa Mustafa, asking him again, without wasting time, to propose the potential candidate for the formation of the Government, who must ensure that he will have the right number of votes in the Assembly and pledge to create a stable and inclusive Government.

57. On the same date, on 29 April 2020, the President of LDK, Mr. Isa Mustafa, by the letter [Prot. No. 408], addressed the President, emphasizing that they are:

"about to conclude the agreements with potential partners of the ruling coalition, in line with prevailing criteria. These days we have had many intensive meetings, dealing with the governing program and the sharing of governing responsibilities.

We are working intensively, and we hope that in the very near future we will create a parliamentary majority and propose a candidate for Prime Minister of Kosovo".

58. On 30 April 2020, the President of LDK, Mr. Isa Mustafa, by the letter [Prot. No. 409], addressed the President with this content:

"Honorable President Thaçi,

In accordance with the Prevailing Criteria for the formation of the new Government, presented by you at the meeting of 22 April 2020, after public consultation with all leaders of political parties represented in the Assembly, and comprehensive consultations with entities AAK, NISMA Social Democrats, AKR and other entities

representing the non-majority community in the Assembly of Kosovo, in order to avoid early elections, maintaining the stability of the country and in accordance with the urgency to give the country a new Government with legitimacy by the Assembly of the Republic of Kosovo, we propose to the President of the Republic of Kosovo, Mr. Avdullah Hoti, as candidate for Prime Minister to form the Government of the Republic of Kosovo".

59. On the same date, on 30 April 2020, the President issued the challenged Decree which contains three points, as follows:

> "*1. Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo.*
>
> *4. The candidate under item I of this Decree, no later than fifteen (15) days after the appointment, submits the composition of the Government to the Assembly of the Republic of Kosovo and requests the approval by the Assembly.*
>
> *5.The Decree enters into force on the date of signing".*

60. The abovementioned Decree of the President is stated to have been issued based on:

(v) paragraphs (4) and (14) of Article 84 [Competencies of the President] of the Constitution and Article 95 [Election of the Government] of the Constitution;
(vi) Article 6 of Law No. 03/L-094 on the President of the Republic of Kosovo;
(vii) Judgment of the Constitutional Court in case KO103/14 Applicant the President of the Republic of Kosovo, Judgment of 1 July 2014 ; and
(viii) in the course of the proposal of the LDK, accepted by the Office of the President on 30 April 2020.

61. On 30 April 2020 a number of the deputies of the Assembly submitted to the Presidency of the Assembly a request for convening an extraordinary session to vote on the composition of the Government.

Applicants' allegations

62. The Applicants allege that the challenged Decree of the President is not in compliance with paragraph 1 of Article 4 [Form of Government

and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution.

63. With regard to the admissibility of the Referral, the Applicants state that all formal-constitutional, legal and sub-legal criteria have been met for the Referral to be considered admissible for review of merits.

64. Regarding the merits of the referral, the Applicants allege that through the challenged Decree, the President violated the constitutional provisions as: (i) after the successful motion of no confidence, the President had a constitutional obligation to announce early elections for the Assembly and not to mandate a candidate for Prime Minister; and (ii) during the procedure that resulted in the issuance of the Decree on the appointment of the candidate for Prime Minister for the formation of the Government, the President acted in contradiction with the procedures foreseen in the Constitution and in the Judgment of the Court KO103/14, as well as with the current practice regarding the dissolution of the Assembly after the motion of no confidence of the Government.

65. More specifically, regarding the procedure, they stated that: (i) consultation without a constitutional basis with all parties represented in the Assembly was held, and the winning party of the elections of 6 October 2019 on the occasion of the appointment of the candidate for Prime Minister for the formation of the Government was bypassed; (ii) the determination without constitutional basis of the timeframe for the winning party of the elections to nominate the candidate for the formation of the Government and the claim by the President that LVV, as a winning party of the elections, has rejected the nomination of the candidate for Prime Minister in a non-expressive manner.

(i) Allegations of constitutional violation as a result of the issuance of the challenged Decree and the obligation of the President to declare early elections after the successful motion of no confidence in the Government.

66. The Applicants initially state that under Article 83 [Status of the President] which stipulates that the President is the head of state and represents the unity of the people of the Republic of Kosovo, the President is not allowed to represent group or political party interests. The President is out of separation of powers, and he is prohibited to exercise active functions in the political direction of the country. Therefore, according to them, the exercise of the powers of the

President "*must be in compliance with his function in terms of concrete, accurate and fair exercise of constitutional powers which correspond to the created constitutional situation*".

67. Regarding the role of the President after the vote of no confidence, the Applicants hold the view that in that case, *"The government is considered resigned, and the President through the decree should have dissolved the Assembly pursuant to Article 82. para. 2 of the Constitution of the Republic of Kosovo. So, the President has no constitutional basis to activate Article 95 of the Constitution [...], and much less Article 95 para.4 of the Constitution, due to the fact that between Article 100 para.6 and Article 95 lacks the connecting bridge covered by the explicitly expressed constitutional norm"*.

68. The Applicants argue that in the event of a vote of no confidence in the Government, the situation is not the same as after the elections in terms of the procedures for appointing a candidate for Prime Minister for the formation of the Government. There is no express norm in the Constitution that stipulates that after a successful motion of no confidence, the President begins the procedure under Articles 95.4 of the Constitution, through Article 84.4 after the application of Article 100.6 of the Constitution. This procedure followed by the President makes the challenged Decree unconstitutional.

69. To support these arguments, the Applicants referred also to the constitutions of other countries, namely the provisions governing the issue of the motion of no confidence, such as the Constitution of Croatia, Slovenia, Germany, Greece, Serbia, Albania and the Constitutional Framework for Provisional Government in Kosovo (hereinafter: the Constitutional Framework), which was in force until the entry into force of the Constitution of the Republic of Kosovo. They argue that if in the constitutions of the above countries, "*are explicitly provided the further steps which are to be taken by the Assembly for the deputies to exercise their right to prevent the dissolution of the Assembly, no other procedure is provided for in the Constitution of Kosovo after a successful motion of no confidence, but only the dissolution of the Assembly"*.

70. Therefore, the lack of these concrete constitutional provisions, as provided in the constitutions of other countries, made the Decree contrary to the Constitution. In the absence of this connecting provision that after the successful motion of no confidence to appoint the candidate for Prime Minister for the formation of the Government, Article 95 of the Constitution is not allowed to be activated, "*as what is not provided for in the Constitution cannot be applied"*.

71. Consequently, according to the Applicants, as there is no possibility of electing the Government after the vote of no confidence, the Constitution provides clear norms to resolve the current constitutional situation to protect democratic legitimacy, thus dissolving the Assembly. Therefore, the President, by issuing the Decree to mandate a candidate to form the Government, after the successful motion of no confidence, acted contrary to Article 82.2 of the Constitution, which article is naturally related to Article 100.6 of the Constitution.

72. The Applicants for support of their arguments are also referred to the decrees issued in similar previous situations regarding the dissolution of the Assembly, specifically in 2010 and 2017, where after the vote of no confidence, the Assembly was dissolved by Article 82.2 of the Constitution. They point out that *"in this regard, the practice of issuing decrees by Jakup Krasniqi, the Acting President of the Republic of Kosovo in 2010, and President Hashim Thaçi in 2017, clearly confirms that after the motion of no confidence in the government, the only constitutional way of action is the dissolution of the Assembly through Article 82.2 of the Constitution"*.

73. In this respect, they further emphasize that *"The practice of issuing decrees in the proper constitutional way following the successful voting of the no-confidence motion is about respecting democracy vox populi (the voice of the people), which will be represented in the legislation body. So this body elects the government (see Article 65.8 of the Constitution), which derives from the dominant and political power within the parliament and is rooted into the political force that wins the elections"*. This can also be an absolute or relative victory, according to the Court's Judgment in case KO103/14. Thus, this democratic legitimacy cannot be transferred to the parties that are ranked after the first place in the elections of 6 October 2019, to form a government without the winner of the elections.

74. They also argue that Article 82.2 does not contain an alternative provision for the dissolution of the Assembly, this provision expresses the only possible way to create the opportunity to maintain the constitutional order set out in Article 7 [Values] of the Constitution. "*The modal verb "may", stipulated in this constitutional provision, does not constitute an alternative to its application, but provides the only possible (most adequate) constitutional solution to enforce the will of the people, by holding parliamentary elections [...]"*. Therefore, for these reasons, they consider that the challenged Decree is also contrary to Article 84.4 in conjunction with Article 82.2, and Articles 4 and 7 of the Constitution.

75. Regarding the content of Article 95.5 of the Constitution, they further argue that Article 95.5 cannot be activated as in this case the Prime Minister has not resigned as provided in Article 95. 5 of the Constitution. Therefore, resignation and dismissal are not synonyms. And precisely because of this difference, according to them *"in this way, also the chains of the implementation of constitutional norms are separated"*. If the Prime Minister had resigned then the President would be obliged in consultation with the political parties or the coalition that has won the majority in the Assembly, to mandate the new candidate to form the Government.

76. Another case when paragraph 5 of Article 95 of the Constitution could be activated according to the Applicants, is the case of death, or permanent inability to exercise the function of Prime Minister. But the Constitution does not stipulate that in case of a vote of no confidence in the Government, Article 95. 5 of the Constitution is applied.

ii) Allegations of violation of the constitutional provisions during the procedure for the appointment of the candidate for Prime Minister for the formation of the Government through challenged Decree

77. Following their allegation that the President was obliged to announce the elections for the Assembly, the Applicants claim that other constitutional violations have been identified with the President's Decree, where the President, according to them, has unconstitutionally activated Article 95 of the Constitution, but after doing so, in an unconstitutional way has continued with other violations within Article 95 of the Constitution.

78. They emphasize that paragraph 5 of Article 95 of the Constitution consists of the following elements: (i) if the Prime Minister resigns or; (ii) for other reasons, his/her position remains vacant, the Government falls, and (iii) the President, in consultation with the political parties or the coalition that has won the majority in the Assembly, mandates the new candidate to form the Government.

79. First, regarding item (iii) mentioned above, the Applicants complain that the President has invited to consultations all parliamentary political parties as participants in the elections of 6 October 2019, thus violating Article 84.14 of the Constitution, which provision according to the interpretation of the Court in case KO103/14 requires that the President regarding the candidate for Prime Minister for the formation of the Government should consult only with the party or

coalition that has won the majority in the Assembly and not with other parties.

80. Second, the Applicants complain that *"after the successful vote of no confidence in the government as a whole, [...], under Article 84 par. 14 in conjunction with Article 95 par. 4, without waiting for the mandate of the political party that won the elections [6 October 2019], has appointed as a candidate for prime minister from the ranks of the political party which was ranked second in the early parliamentary elections of 6 October 2019. This unconstitutional decree preceded the exchange of letters dated 22 April 2020 and 29 April 2020 (The letters were not made public) between the President and the LDK. Thus, the issuance of this decree is in complete contradiction with Article 84 par. 4 in conjunction with Article 82 par. 2 and Article 84 par. 14 of the Constitution [...] "which stipulates that the President" appoints the mandate holder for the formation of the Government, upon the proposal of the political party or coalition, which constitutes the majority of the Assembly"*.

81. In this line of reasoning, the Applicants state that the President's Decree is contrary to the Constitution, as the party or coalition that won the elections of 6 October, 2019, namely the LVV, (i) is the only political party that should consult for the formation of the new Government according to Article 95.5 of the Constitution, and (ii) it is the only political party that has the right to propose the candidate for the formation of the new Government under Article 84.14 and Article 95 of the Constitution and Judgment of the Court in case KO103/14.

82. The Applicants also complain about the time limit for proposing a candidate for Prime Minister, stating that neither the Constitution, nor any law, nor any judgment of the Constitutional Court provides for a deadline for proposing a candidate by the winning party. Consequently, the President according to the Constitution has no right to set deadlines arbitrarily if they are not defined in the Constitution and the legislation in force. According to them, the constitutional deadlines start to flow only when to the President is nominated a candidate for Prime Minister. This is because the President only mandates the proposed candidate in accordance with the political will.

83. Therefore, according to the Applicants, *"the exclusivity of sending the name remains at the discretion of the winning party, and this discretion is unlimited"* and gives the winning party the opportunity to send *"the name of the candidate at the most appropriate moment that it considers that all political, administrative and technical requirements for sending such a name have been met"*. They point out

that this is also evidenced by the creation of constitutional institutions in 2014 when the formation of the government lasted six (6) months, only and exclusively as a result of not sending the name of the candidate for Prime Minister from the winning party to the President.

84. They further emphasize, citing the Commentary, the Constitution of the Republic of Kosovo *Hasani, Enver and Ivan, Čukalović (2013)* GIZ, Prishtina (hereinafter: the Commentary on the Constitution) that the President cannot invoke the constitutional jurisdiction "*ensuring the functioning of institutions"* to arbitrarily set constitutional deadlines, which were not by the Constitution itself. Therefore, his function as a guarantor of the constitutional functioning of the institutions defined by the Constitution does not *"seeks to give any additional competence to the President, but only to impose the obligation that the President has to guarantee the constitutional functioning of the institutions within his specific competencies"*.

85. They also point out that the lack of a deadline to propose a candidate for the winning party in the elections is intended to give the winning party room to negotiate the formation of a government, reasoning that *"the constitution-makers"* intended to set deadlines, they did so in concrete provisions of the Constitution, referring to the concrete provisions of the Constitution which set deadlines such as Article 66, paragraphs 1 and 2; Article 70.2; Article 82, paragraph 1; Article 86, paragraphs 2 and 6; Article 95, paragraphs 2 and 4; Article 100, paragraphs 3 and 5; Article 115, paragraph 5 of the Constitution. Therefore, allowing the President to set such a deadline that is not provided for in either the Constitution or other applicable legislation, means that the President is given the right of the "*constitution-maker"* which is the sole responsibility of the Assembly.

86. Therefore, they hold the position that setting the deadline through the President's letters, which in this case was the deadline of twenty (20) days for LVV to propose the candidate for Prime Minister, or any other time limit is arbitrary and is not provided for in the Constitution and applicable law, and this makes the Decree of the President unconstitutional, as well.

87. Furthermore, the Applicants reason that the drafters of the Constitution, by not setting a deadline for the proposal of the candidate for Prime Minister by the winning party, intended to give the election winner enough space to form a Government through the political process, thus deliberately leaving it open deadline and not giving the right to any institution to limit it. In this regard, they refer to the Court case KO119/14, where according to them the Court had

found that although the winning party had *"delayed the proposing of the name to the Speaker of the Assembly for 6 consecutive months, the Court nevertheless did not limit any deadline but simply found that the right to propose the name for the Speaker of the Assembly belongs only to the first ranked party in the elections, So even though the delay in that case was 6 months (in contrast of 20 days in the present case) and the non-sending of the name for the President of the Assembly had blocked the constitution of the Assembly, and the formation of the Government, too, the Court again did not terminate the right of the first party to send the name of the Speaker of the Assembly."* They also hold the position that the deadline is not consumed with the exchange of letters, especially when in these letters the LVV has stated that it does not reject the proposal of the candidate for Prime Minister.

88. The Applicants also challenge the President's position that by not nominating the candidate to form the Government, the LVV has waived their right to make such a proposal. They claim that the rejection of the proposal to nominate the candidate for the formation of the Government by the winning party of the elections, should be done explicitly and not considering that by not proposing the candidate according to the President's requests in exchange for letters with Mr. Albin Kurti, the winning party of the election has refused to submit such a proposal.

89. They consider that in certain cases the winner of the elections may notify the President that he does not want to exercise his right to propose a candidate for prime minister. According to them, there is such a practice in Kosovo, referring to *"The refusal of Mr. Veseli to nominate a new candidate for Prime Minister in 2019 following the resignation of Mr. Haradinaj"*. And according to them in this case, even though it was a matter of resignation and not a motion of no confidence, the President did not proceed further with the formation of the new Government with the political forces but dissolved the Assembly. According to them, the Judgment of the Court itself in the case KO103/14, in paragraph 87 provides for the possibility of the party to refuse to send the name for candidate for Prime Minister.

90. Therefore, they allege that the President in the present case, violated the Constitution when he considered that LVV has waived the right to nominate a candidate for Prime Minister, as LVV has never made an express refusal to nominate a candidate for Prime Minister. On the contrary, according to them, LVV had explicitly stated in the correspondence with the President that they are not rejecting the

proposal for the candidate for Prime Minister for the formation of the Government.

91. Finally, the Applicants point out that the actions taken in connection with the proposal of the candidate for Prime Minister for the formation of the Government, in addition to constituting procedural violations of the Constitution, with the granting of the candidate for Prime Minister to form the Government to the second party that emerged from the elections, by this action *"democratic legitimacy will change; it would violate the will of the citizens through the creation of artificial party conjunctures to create the government contrary to democratic legitimacy, respectively the voice of the people; would lose the meaning of the democratic race to win the parliamentary elections; it would be possible for the fall and formation of the new government through the creation of party parliamentary conjunctures to be very common (frequent); the functioning of the entire state apparatus under the management and control of the executive power would be disrupted as a result of the frequent alternation of political parties in the participation of the executive branch. In this way, the constitutional order of the Republic of Kosovo would be overturned"*.

92. As a summary of the allegations of the Applicants, for the reasons mentioned above, the Applicants consider that the Decree of the President is unconstitutional, as: (i) The President had the obligation to announce early elections for the Assembly after the successful motion of no confidence in the Government in accordance with Article 82, paragraph 2 of the Constitution and not to appoint a candidate for the formation of the Government; (ii) The President violated the Constitutional provisions during the procedure for the appointment of the candidate for Prime Minister for the formation of the Government through the challenged Decree, more specifically: (iii) The President has exceeded his powers provided by Article 95 of the Constitution when he invited consultations of all political parties represented in the Assembly (first and second consultative meeting with political parties) although with the Constitution he was obliged to consult only with the winning party of elections 6 October 2019, in this case only the LVV; (iv) The President bypassed the winning party of the elections of 6 October 2019 on the occasion of the appointment of the candidate for Prime Minister for the formation of the Government in violation of Article 84, paragraph 14 and Article 95 of the Constitution and Judgment KO103/19 of the Constitutional Court, as the right to propose a candidate for Prime Minister belongs only to the winning party of the elections, in this case only to the LVV; (v) neither the Constitution nor the Judgment KO103/14 provide a deadline for the

winning party to propose a candidate for the formation of the Government, so setting any deadline, in this case the 20-day deadline, in which case the LVV to propose the candidate for prime minister to form the Government, was arbitrary and without constitutional basis; (vi) neither the Constitution nor the Judgment KO103/14 foresee the possibility of rejection of the candidate's proposal for Prime Minister by the winning party in a non-expressive manner, therefore, the winning party may reject the proposal for the mandate only in an expressive manner.

Comments submitted by the interested parties regarding the merits of the referral

Comments of the President of the Republic of Kosovo, Mr. Hashim Thaçi

93. The President initially stressed that *"the referral in case KO72/20 should be declared inadmissible by the Constitutional Court, for the fact that it is unclear both in its accuracy and in its reasoning".*

94. Regarding the role and the competencies of the President, after counting the articles of the Constitution that are related to his competencies as articles: 4, 18, 60, 66, 69, 79, 80, 82, 83, 93, 94, 95, 103, 104, 109, 113, 114, 118, 126, 127, 129, 131, 136, 139 and 144 of the Constitution state that "*Applicants are not clear about the role and functions of the President [...], based primarily on the abovementioned articles of the Constitution, Law No. 03/L-094 on the President [...], the case law of the Constitutional Court, especially in the present case of the Judgment of the Constitutional Court in the case number KO103/14".*

95. The President emphasizes that his mandate is also of a political in nature, as the President participates in the management of public affairs. In this regard he refers to the Judgment KO28/12 and KO48/12 stating that "The Constitutional Court notes that the expression *"participate in the conduct of public affairs " Article 25 (a) of the ICCPR [International Covenant on Civil and Political Rights] is key to the exercise of the mandate of a President elected in a fair and legitimate manner under the Constitution as part of his/her duties, as provided by Article 4, [...]"* of the Constitution. While, "*Article 4 [Form of Government and Separation of Power] of the Constitution states that "The President of the Republic of Kosovo represents the unity of the people.... [and] ... is the legitimate representative of the country, internally and - 1 - externally, and is*

the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution".

96. According to the President *"This wording regarding the role of the President is key to one of the fundamental principles of the Constitution of Kosovo, namely the doctrine of separation of powers".* Some of the powers of the President very clearly affect the political life of the country, such as when making the appointment/proposal of the candidate for Prime Minister for the formation of the Government. In this regard, he also refers to the case of the Court KO12/18, stating that *"The Court considers that the constitutional bodies are obliged to respect each other's competencies in the exercise of their constitutional functions".*

97. Therefore, he adds that "*The President is the main factor that has the duty to maintain the unity of the people and the stability, as well as to guarantee the democratic functioning of the institutions of the Republic of Kosovo, in the concrete case, of the Government [...]. The President thus performs special functions and in no way can he be prohibited from performing these functions, because this contradicts the representation of the unity of the people as President. [...] Therefore, the duty of the President to guarantee the democratic functioning of the institutions is a permanent and continuous duty, which is performed by always taking into account the representation of the people and the protection of the interests of the citizens.*

98. Regarding the legal basis of the challenged Decree, the President emphasizes that it is fully in line with the constitutional scope and powers of the President, "*in particular with regard to Article 4 (1) and (3), Article 82, Article 83, Article 84 (2), (4) and (14) and Article 95 of the Constitution".*

99. After the President cites the abovementioned articles of the Constitution, he emphasizes that the link between the abovementioned articles of the Constitution has been confirmed in the practice of this Court, specifically referring to the paragraph 61, 66, 67, 68, 73, 80, 8, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95 and 95 of the Judgment in case KO103/14.

100. In this regard, he states that the provisions of Article 4 paragraphs 1 and 3, Article 82, Article 83, Article 84 (2), (4) and (14) and Article 95 of the Constitution as well as the Judgment of the Court KO103/14 constitute the main axis according to which the President proposed to the Assembly the candidate for Prime Minister and consequently has followed the procedures for the formation of the Government.

101. As for the no-confidence motion against the Government, the President points out, among other things, that the reason for the motion of no confidence was *" [...] the creation of the possibility of forming a new Government was in the request for motion, which would address the immediate challenges facing the country, both in the position of foreign policy and in the dynamics created within the country". In the course of this request, the Assembly of the Republic of Kosovo by Decision No. 07-V-013, of 25.03.2020, approved the No Confidence Motion against the Government of the Republic of Kosovo with the votes of more than two thirds (2/3) of the deputies of the Assembly (82 deputies) ".*

102. The President also emphasizes the fact that after the motion of no confidence "*has invited all political parties to the meeting to discuss further steps after the No Confidence Motion against the Government. The meetings were held in the Cabinet of the President of the Republic Kosovo on 01 and 02 April 2020. In these meetings with the leaders of the political parties, the absolute majority of them requested the President to avoid early elections and to form a new Government in the current composition of the Assembly of the Republic of Kosovo".*

103. Regarding the non-proposal of the candidate from the LVV, the President states that he has sent five (5) letters, by which he requested the President of the LVV to propose its candidate to form the Government. In this regard, the President emphasized that the LVV has not responded to any of the President's letters for the appointment of the candidate for Prime Minister. He further states that *"Responses to letters sent by the President have always come from the Caretaker Prime Minister. These letters show the tendency of the Caretaker Prime Minister to interfere with the competencies of the President, seeking clarification and showing him how to act in the concrete case. In this case, the Caretaker Prime Minister disregarded the powers of the President in the exercise of his functions, preventing him from performing his constitutional duties. This contradicts Article 4, Article 83, Article 84, Article 89 of the Constitution and the judgments of the Constitutional Court. The Constitutional Court in the Judgment in case No. K012/18 (11 June 2018) states: "[...] considers that the constitutional bodies are obliged to respect the competences of one-another during the exercise of their constitutional functions [...]"*

104. The President, on the basis of the above, also emphasized that *"The values of the constitutional order of the Republic of Kosovo, established not only in Article 7 of the Constitution, are based on the*

principles of democracy, respect for human rights and freedoms and the rule of law, non-discrimination, pluralism, separation of state powers and these require that constitutional norms not to be abused. If such an abuse occurs, as in this case, where the right to nominate a new candidate to form the Government from the Vetëvendosje Movement has not been exercised, the President is authorized to find a solution to overcome this situation, using and always respecting the spirit of the Constitution and the Judgment of the Constitutional Court in case KO103/14.

105. Therefore, the President maintains that *"Failure to declare or not send the name by the President of the Vetëvendosje Movement and his constant public statements in avoiding sending the name (finding all sorts of excuses in letters and statements, especially by reiterating the request for holding the elections and the dissolution of the Assembly sent on behalf of the Caretaker Prime Minister) have been sufficient arguments to show that the Vetëvendosje Movement has waived its right to nominate a candidate for Prime Minister. The Vetëvendosje Movement tried at all costs, to impose the dissolution of the Assembly and the announcement of early elections, and it has tried to do through the Caretaker Prime Minister, as well as in the meeting of 22 April 2020 with the leaders of parliamentary political parties, in which only the representative of Vetëvendosje Movement demanded the dissolution of the Assembly and the announcement of early elections. This situation of non-use of the right to obtain a mandate has been foreseen by the Constitutional Court in paragraph 87 of the Judgment in case No. K0103/14 (1 July 2014): "However, the Court notes that it is not excluded that the party or coalition concerned will refuse to receive the mandate".*

106. Regarding the deadline for proposal of the candidate for the Prime Minister, the President also states that *"it should be appreciated that the President in accordance with the rules, democratic principles, political correctness, predictability and transparency has made continuous efforts to consult with the Vetëvendosje Movement, which has won the largest number of seats in the Assembly and gave it the opportunity to nominate the candidate for Prime Minister from among their ranks. As noted above, the Vetëvendosje Movement has consistently requested the dissolution of the Assembly under Article 82, paragraph 2 of the Constitution".*

107. The President, after emphasizing the steps he has taken after the exchange of letters with the President of LVV and the meetings with the political parties and *"their unanimous declaration, except for the representative of the Vetevendosje Movement, who are for a new*

Government and for the country not to go to the elections, the President addressed the Democratic League of Kosovo as the second party emerged from the Early Elections for the Assembly of the Republic of Kosovo held on 6 October 2019, to propose the potential candidate for the formation of the Government of the Republic of Kosovo, which should ensure that he will have the right number of votes in the Assembly of Kosovo and pledge to create a stable and inclusive Government in accordance with the prevailing criteria for formation of the new Government".

108. Referring to Article 95 of the Constitution and paragraph 90 of Judgment KO102/14, the President stated that the challenged Decree *"is issued taking into account the fact that the Constitution gives the President the opportunity for discretion. The President issued this decree based on the meritocracy and actions of political parties and taking into account that the [the LDK] has the opportunity to make the Government without going to new elections [...] Therefore, when the President issued Decree No. 24/2020 on the nomination of the candidate for Prime Minister has acted within the constitutional scope, thus guaranteeing the principle of separation of powers and democratic values of government and representation of the best interest of the people of Kosovo, as a representative of their constitutional unity. But also guaranteeing the non-jeopardy and reduction of human rights and freedoms established in Chapter II and Chapter III of the Constitution".*

109. Regarding the Applicants' allegations that according to previous practices after the no confidence motion the Assembly was dissolved, the President emphasized that *"The claims of the Applicants that the President did not act in accordance with the earlier cases of the dissolution of legislatures do not stand at all. Even in this case, as in previous cases, the President took into account the will of the political parties, namely the will of the people's elected representatives. In the following three cases of dissolution of legislatures (Fourth, Fifth and Sixth Legislatures), the will of the political parties has been explicitly the dissolution of the Assembly and the President has decreed their will. Whereas, in the present case, the will of two thirds (2/3) of the people's representatives is to form a new Government and the country to not go in the elections and, in the course of this will, the President has acted".*

110. The President clarified this aspect by elaborating the course of the dissolution of the Assembly that took place in 2014, 2017 and 2019, adding that "*The Applicants must be clear that the President has in no way acted contrary to the Constitution. The President by Decree*

no. 24/2020 (30.04.2020) has protected the principle of constitutionality, given that he is representative of the unity of the people. The President, first of all, has taken into account the interest of the citizens of the Republic of Kosovo, as established in the Constitution. In order to overcome this situation, the full functioning and cooperation of vital state institutions of the Republic of Kosovo, such as the Assembly and the Government, is necessary. Paragraph 117 of the Judgment of the Constitutional Court in case no. KO12/18, inter alia reads: "[...] Key decisions in policy-making for the governance of a country must be made by the constitutional bodies who have democratic legitimacy, namely by the Assembly and the Government [...]", repeating the abovementioned reasons, according to which the President has decided to issue the challenged Decree.

111. Regarding the allegation that the President without waiting for the proposal of the winning party has proposed the candidate from the second party in the elections of 6 October 2019, the President emphasized that *"after the vote of no confidence motion, he has continuously consulted only with the party that has won the majority, in this case with Vetëvendosje Movement."* Adding that the winning party has consistently neglected the President and that "*Article 4 paragraph 3 and Article 84 (2) of the Constitution give him a constitutional competence that aims to ensure the democratic and constitutional functioning of institutions. The President emphasizes that his constitutional competence to nominate a candidate for Prime Minister, deriving from Article 84 (14) and Article 95 of the Constitution, is only one of the competencies through which the President can guarantee the democratic and constitutional functioning of institutions".*

112. Regarding the application of Articles 82 and 95 of the Constitution, the President stated that: *"the current situation in which the challenged Decree was issued is not "after the elections", as established in Article 95 paragraph 1 of the Constitution, but is after the vote of no confidence motion, where the post of Prime Minister has practically remained vacant. In such a situation, if the challenged Decree were not issued, the democratic principles and the entire constitutional system would be endangered, as the two-thirds (2/3) of the deputies of the Assembly expressed their vote of no confidence in the Government".*

113. Regarding the Applicants' allegation that the President should not activate Article 95 of the Constitution after the motion of no confidence, he states that *"Article 100 paragraph 6 and Article 82 paragraph 2 of the Constitution must be read in conjunction with*

Article 95 paragraph 5 of the Constitution. This is because of the different situations that can be created, as in the case of the current situation".

114. The President further stated that *"It should be borne in mind that Article 95 paragraph 5 of the Constitution (which the Constitutional Court has not interpreted in previous cases) refers to the procedure of forming the Government after the fall of a previous Government, as we have in the present case. In this case we cannot refer to the procedure of nominating the candidate for Prime Minister after the parliamentary elections, but we refer to the consultations with the political parties or coalitions to establish the Government, in case the Government falls. In this regard, Article 82 paragraph 2 of the Constitution is applied by the President if it is seen that there is no will from the parties represented in the Assembly to form the Government. Whereas, Article 95 paragraph 5 of the Constitution regulates the procedure for the mandate of the candidate for the establishment of the Government, after the fall of the Government. So, there are two completely different situations and we are not dealing with any collision of articles or prevalence of articles".*

115. In this regard, the President considers that *"these elements are related and that Article 95 paragraph 5 of the Constitution should be read in conjunction with Article 100 paragraph 6 of the Constitution, due to the fact that one of the other reasons when the post of Prime Minister remains vacant is when his/her Government is dismissed through the No Confidence Motion. This is strengthened by the argument that Article 95 paragraph 5 of the Constitution mentions the word "resignation of Prime Minister", whereas in Article 100 paragraph 6 of the Constitution mentions the word "...the Government is considered dismissed [...] ".In both these situations there is a legal effect of being resigned. Related analysis means that if the Prime Minister resigns and his Government is resigned, in any case his position remains vacant because in the event of a successful vote of no confidence, the Assembly, in addition to the Government, deprives the Prime Minister of legitimacy, leaving the Prime Minister without a constitutional mandate and consequently his position vacant in the legal-constitutional sense. The President considers that both in the case of the resignation of the Prime Minister and in the case of voting of the successful motion of no confidence, the Government falls and is considered resigned. Therefore, this is a new circumstance that puts into operation Article 95 paragraph 5 of the Constitution, which, we reiterate, that has not been interpreted by the Constitutional Court in the Judgment in case KO 103/14, as the fall of the Government and the Prime Minister constitutes a new circumstance from the situation*

when the Government is formed "after the elections", as established in Article 95 paragraph i of the Constitution".

116. The President further stated that: *"According to Article 95 paragraph 5, hypothetical circumstances when the Government falls may be: Resignation of the Prime Minister; The death of the Prime Minister; Severe illness of the Prime Minister; Punishment of the Prime Minister for a criminal offense, by a final decision and voting on the dismissal of the Government and the Prime Minister (Motion of No Confidence of the Government) [...] the Prime Minister and the Government are connected to each other in terms of legitimacy and the Assembly, when votes for the Government, also votes for the Prime Minister. On the other hand, when the Assembly takes the confidence of the Government through no confidence, it takes the latter also from the Prime Minister, because there is no logic for the post of Prime Minister to exist when a Government led by him/her has been given a vote of no confidence".*

117. Pertaining to the Applicants' references regarding the constitutions of other countries, the President emphasizes that *"these constitutional solutions differ from the context of the Republic of Kosovo in all respects. The Applicants should note that they only refer to articles that are appropriate for their arguments",* giving some examples in this regard. For example the President emphasized that *"there are Constitutions that do not specify exactly what actions the President can take after voting on the successful motion of no confidence in the Government, always in terms of action to create a new Government. In the Republic of Kosovo, however, the case is clear. Article 95 is the article that authorizes the President to act after the vote of no confidence motion in the Government of the Republic of Kosovo, as it is considered that the successful voting of the motion results in the legal-constitutional effect that the post of Prime Minister remains vacant (resigned Prime Minister).*

118. Regarding the content of Article 82 of the Constitution, the President argues that *Article 82 of the Constitution has two paragraphs. Paragraph 1 has three subparagraphs. Paragraph 1 defines three situations when the Assembly is dissolved automatically, if these situations occur. In the case of paragraph 2 of Article 82 of the Constitution, the matter is entirely different, because it is determined that "The Assembly may be dissolved by the President....*", the *expression* **"***may" does not constitute an explicit obligation for the President, but obliges the President to make an assessment of the circumstances of whether or not the Assembly may be dissolved, after voting on the successful motion of no confidence in the Government.*

Thus, the verb "may" shows that the dissolution or not of the Assembly is in the will of the President's assessment, after consulting with the political parties represented in the Assembly, which he did in this case. This is the reason why Article 82 of the Constitution is divided into two paragraphs, where the first paragraph defines the situations when the Assembly is necessarily dissolved, while the other paragraph defines the situation when the Assembly may be dissolved."

119. Regarding the Applicants' allegation that the President did not mention the paragraphs of Article 95 according to which he issued the Decree, the President clarified that *"in this case the preamble of the Decree stipulates Article 95 of the Constitution, without specifying the paragraphs, due to the fact that the President has activated Article 95 of the Constitution in entirety, including paragraph 5 of this article (Article 95 paragraph 5), as he considers that the post of Prime Minister has remained vacant and that the Government has fallen after the successful motion of no confidence. Another reason why in the preamble of the challenged Decree is Article 95 of the Constitution has to do with the fact that the President could not specify the paragraphs, because we are now in a different constitutional situation and not "after the elections". […]"*

120. Regarding the Applicants' allegation that the President is not "constitution-maker", the President emphasizes that *"he is clear about his function assigned by the Constitution, the laws and some Judgments of the Constitutional Court, which are already a constitutional norm. Therefore, the President reminds the Applicants that he has never played the role of a constitution-maker, but has only adhered to his powers set out in Articles 4, paragraph 3; 83, 84 (2) and (14) and 95 of the Constitution"* and Judgment KO103/14.

121. Finally, the President states that *"based on these arguments, Referral K072/20 should be declared inadmissible, because it is incompatible ratione materiae with the Constitution"*.

Comments of the caretaker Prime Minister Mr. Albin Kurti submitted on behalf of the caretaker Government

122. Regarding the dissolution of the Assembly, in accordance with Article 82.2 of the Constitution, the Prime Minister cites the Albanian and English version of paragraph 2 of Article 82 of the Constitution, emphasizing that: *"A comparison of the linguistic versions reveals the fact that during the translation of the text of the Constitution from English into Albanian, the verb "may" was translated as if the verb*

"can" had been used. In this way, the constitutional norm which in the original version (in English language) approved by the ICR [International Civilian Representative] has an authorizing/permitting provision, so it is a norm that recognizes to the President a competence and that in fact obliges the President to dissolve the Assembly, is being misinterpreted by the President and several political forces as an alternative norm, which leaves the matter of the dissolution of the Assembly to the discretion of the President. However, referring to hitherto constitutional practice and testimonies of the members of the Constitutional Commission, which will be elaborated below, it will be seen that there have never been any doubts about the obligation of the President to dissolve the parliament after a successful motion of no confidence".

123. The Prime Minister further added that *"In legal theory and practice, the character of the norm is determined not only by a verb in the sentence, but by the way it has been constructed. Consequently, the use of the verb "may" does not in itself determine that the norm has an alternative character. For the norm to be considered an alternative, it must include in the wording of its text at least another alternative that may be chosen by the body to which the discretion of assessment and selection between alternatives has been recognized".*

124. He added that *"examples of alternative norms we have in the Constitution of Kosovo, too. Thus, Article 62, paragraph 4 leaves it to the discretion of the Vice President of Municipality to refer a matter to the Constitutional Court, even after assessing the compliance of a municipal act with the freedoms and rights guaranteed to communities by the municipal assembly." [...] "In comparative constitutional law, alternative norms which leave to the discretion of a constitutional body the choice between alternatives are those after a motion of confidence or after voting a minority government. Such examples of wording of norms are for example: "If the Parliament votes a minority government, the President may appoint the Prime Minister/Chancellor or may announce elections*"; or "*If the Parliament withdraws its confidence from the Prime Minister, the latter may seek another governing partner, may request the declaration of emergency lawmaking, or may request the President to announce elections".*

125. Therefore, the Prime Minister maintained that *"Based on the wording of Article 82.2 "The Assembly may be dissolved by the President of the Republic of Kosovo following a successful vote of no confidence against the Government", it is noted that the Constitution-maker has provided no other alternative for the President. Therefore, this norm*

has always been understood in the context of a destructive motion of no confidence which, in addition to the dismissal of the Government, also results in the dissolution of the Assembly and the announcement of elections".

126. In this regard, the Prime Minister stated that *"the Constitutional Court of the Republic of Kosovo, in relation to the alternative character of constitutional norms, has concluded that if the Constitution-maker had intended to provide an alternative in the Constitution, it would have done so explicitly. For this reason, what has not been provided for in the Constitution cannot be considered as a hypothetical alternative".* He supports this argument based on paragraph 71 of the Court Judgment in case KO29/11, stating that *"If it had been the intention of the drafters of the Constitution to provide for an alternative election procedure, with only one candidate nominated, the Constitution would have expressly provided for such a procedure."* Therefore, according to him, "*In the same spirit, if the Constitution-makers had intended to present another alternative to the dissolution of the Assembly, then they would have done so in the Constitution".*

127. Regarding the Applicants' allegation that the Court should be based on the constitutional document that preceded the Constitution of the Republic of Kosovo, specifically the Constitutional Framework, the Prime Minister states that *", the Constitutional Court has used the Constitutional Framework to compare the amendment in constitutional arrangement of state bodies. Therefore, based on reading the decisions of the Constitutional Court, the comparison of the Constitution of Kosovo with the Constitutional Framework can be clearly seen".* In this regard, he referred to *"paragraphs 69, 70 and 71 of case No. KO19/11, in order to understand the reasons why the Constitution-maker has changed the constitutional arrangement regarding a certain situation, through the method of historical comparison of constitutional acts has achieved to bring to the surface the intent and the will of the legislator".*

128. In this respect, the Prime Minister emphasized that *"Prior to the declaration of Independence, in Kosovo was known the so-called "constructive motion of no confidence" based on which a government can only be dismissed if a new parliamentary majority immediately elects the successor to the Prime Minister of the dismissed Government. In such a situation, the Assembly is not dissolved but continues to function until the end of the term of the mandate provided by the Constitution".*

129. In the comparative aspect, the Prime Minister cited, among other things, the Constitution of Albania, emphasizing that *"Article 104 of the Constitution of Albania provides for the right of the Prime Minister to request a motion of confidence in the Assembly. Voting of a motion of confidence by less than half of the members of the Assembly leads to the dissolution of the Assembly by the President of the Republic within 10 days, more or less as in the case of Article 82.2 of the Constitution of Kosovo. [...] Article 105 of the Constitution of Albania stipulates the constitutional procedure of the motion of no confidence. Here, the voting of no confidence is conditioned with the election of more than half of the members of the Assembly of a new Prime Minister, as in the case of the Constitutional Framework".*

130. Regarding the Constitution of Germany, the Prime Minister emphasizes that "*The German Constitution provides for a motion of confidence in two provisions, Article 67 and Article 68 thereof. Article 67 provides for the possibility of a motion of no confidence requested by the parliament (Bundestag) only with the election of his successor. The President in this case only dismisses the Prime Minister and appoints the new election of the Bundestag for Kanzler. [...] While Article 68 provides for the possibility of a request for a vote of confidence by the Prime Minister (Bundeskanzler) himself and the obligation of the President, in case of failure of this request, to dissolve the parliament. [...] Both in the case of Article 67 and Article 68, the German Constitution leaves no room for the President's discretionary power, but in both cases clearly provides for his obligation to act in the manner set forth by the Constitution".*

131. The Prime Minister also emphasized that the comparative law, leads *"to the conclusion that except that in states where the right to try to form a new Government, after the overthrow of the previous composition of the cabinet, is expressly provided for in the Constitution, in those states, in contrast to Kosovo"* (i) the election of a deputy to the position of prime minister or minister does not result in the loss of his term as a member of Parliament; (ii) there are no guaranteed seats for minority representatives in parliament; (iii) there are no guaranteed seats for minority representatives in the composition of the Government*;*

132. Regarding the point (i) mentioned above, in the comments of the Prime Minister it is emphasized that *"The fact that upon his election to the position of Prime Minister or Minister, the deputy ends his term as a member of the Assembly of Kosovo, means his separation from the sovereign who legitimizes him directly. In the event of the fall of the Government, through a motion of no confidence, then all deputies*

elected to the Government would be excluded from institutional life. In this situation, they would be placed in an unequal position with other deputies, who could continue the term until the end. Detachment of the chain of constitutional legitimacy, which represents the essence of the principle of constitutional democracy, implies the undoing of the democratic order".

133. Regarding the constitutional and parliamentary procedures in Kosovo after the motion of no confidence, the Prime Minister also refers to practice in 2010 and 2017 where after the successful motion of no confidence the Assembly was dissolved, stating that in the interview of Acting President Mr. Jakup Krasniqi, *"who in an interview on 02.11.2010 had stated that "Perhaps it is good to clarify that this motion occurs according to the constitutional provision where the Assembly is discussed and at the end of this chapter, Article 82 provides that if the motion of no confidence is supported by 61 deputies, then there are no other procedures in the Assembly. The only procedure remains the dissolution of the Assembly and setting the date of the elections".* He added that *"Same findings as those of Mr. Jakup Krasniqi, who was a member of the Constitutional Commission, were publicly presented by the other member of this Commission, Prof. Dr. Arsim Bajrami [...]".*

134. The Prime Minister also referred to the speech of the current President who in his previous capacity of Prime Minister *"In the extraordinary meeting of the Assembly of Kosovo dated 02.11.2010, in the capacity of Prime Minister and initiator of the motion of no confidence, he requested for a vote in favor of the motion of no confidence, stressing that, "Today, I believe you will vote righteously by ending the institutional and political crisis and then going out to the citizens in new elections to regain their confidence. By taking action, which is fully in line with our Constitution, you pave the way for the creation of new, more powerful institutions of our state with a new legitimacy".*

135. Regarding the above, the Prime Minister concluded that "*In 2010, the first motion of no confidence was developed in Kosovo, with 66 votes in favor. On the same day, the Assembly was dissolved and the elections were announced. In 2017, a motion of no confidence was also held and on the same day the Assembly was dissolved and elections were announced, without any consultation with any of the political parties and coalitions represented in the Assembly",* adding that *"The argument used that there is a difference between the current motion of no confidence from the previous ones, because in 2010 and 2017 the political forces agreed to dissolve the Assembly*

and announce the elections does not stand. The Government reiterates that apart that such a consensus did not exist, the Constitution cannot be bypassed by political agreements".

136. Regarding paragraph 1 of Article 95 of the Constitution, the Prime Minister states that "*the President consults only with the political party or parliamentary group that has won the majority in the elections, whether absolute or relative (paragraph 84 of the Judgment). According to the Court, the right to propose a candidate belongs only to the winner of the elections, whether the absolute or relative winner. In this sense, the Court has emphasized that the President can bypass the winner of the election only if the winner expressly waives its right. But under no other circumstances".*

137. As to paragraph 2 of Article 95 of the Constitution, he stated that *"the Constitution has determined the flow of the time limit only after the candidate for Prime Minister has been appointed by the President. So, no deadline has been set in any moment earlier. This is in compliance with the examples of constitutions where the parliament elects the government, and where no deadlines have been set within which political forces are obliged to form a Government",* as well as in the parliamentary practice of Kosovo when the election of the Government has lasted up to six (6) months.

138. Then, according to the Prime Minister, paragraphs 3 and 4 of Article 95 provide for the procedures to be followed in the event that the proposed candidate fails to win the majority in the Assembly.

139. Regarding paragraph 5 of Article 95 of the Constitution, the Prime Minister stated that *"this paragraph leaves no doubt that it speaks for another situation, other than that after the resignation of the Prime Minister or the vacancy of his position due to death, inability to exercise the function or conviction for a criminal offense. Under no circumstances did the Constitution-maker equate such a situation with the situation after a successful motion of no confidence. However, even if this provision (paragraph 5) applied, or paragraph 4, the emphasis of the Constitution-maker, as considered by the Constitutional Court, is on the political party or coalition that has won the majority in the Assembly. According to the Constitutional Court "The requirement of "holding the majority in the Assembly" under Article 84 (14) of the Constitution must be read in conjunction with the provision of Article 95, paragraph 1, of the Constitution, i.e. the political party or coalition that has won the majority of seats in the Assembly, i.e. the highest number of seats".*

140. The Prime Minister added that *"It is important to note that in the same Judgment, the Court emphasized that the President is not allowed to impose himself in the process of formation of the Government, therefore, even if Article 95 of the Constitution applied, after a successful motion of no confidence, the President should adhere to his constitutional role and wait for the proposal from the political party. For more, see paragraph 68 of the Judgment in case KO 103/14 "As to point (b) After proposal by the political party or coalition, the Court is of the view that the proposal for the appointment must stem from a political party or coalition which will forward the name of the person for candidate for Prime Minister to the President of the Republic".*

141. He also emphasized that if Article 95, paragraph 5 of the Constitution was applicable after a successful motion of no confidence, then this would mean that the Acting President Jakup Krasniqi and President Hashim Thaçi violated the Constitution in 2010 and 2017, respectively, without inviting the winning party to propose a new candidate for Prime Minister.

142. The Prime Minster stated that the LVV has never waived its constitutional right and has consistently asked the President to clarify the legal basis for his actions under Article 95, as this article has 6 paragraphs but the President did not respond to these requests of the election winner interpreting this as a refusal to nominate the candidate for Prime Minister.

143. In sum, regarding this part, the Prime Minister stated that: *"the Government concludes that the President of the Republic of Kosovo, even if Article 95 applied after a successful motion of no confidence, has acted in violation of the Constitution because:* (i) has undertaken self-initiative in forming the Government; (ii) has consulted other political parties, in addition to the election winner (iii) has imposed a deadline contrary to the Constitution; (iv) has interpreted the request of the Prime Minister, Mr. Albin Kurti, to specify the legal basis of the actions of the President, as a waiver of the right to propose a candidate for Prime Minister; (v) has requested the second party to propose a candidate for Prime Minister, who he has mandated by the challenged Decree.

144. As regards the structure and the challenged Decree, the Prime Minister stated that "*while the preamble of the decree of the President does not specify what the concrete constitutional basis of his actions is, the decree has shortcomings regarding its structure and content. Thus, it is a legally invalid act, because public institutions, including*

the President, must reason the legal basis of his actions. […] Article 95 of the Constitution of Kosovo has six (6) paragraphs which regulate different issues from each other. For this reason, the President cannot invoke a general provision regulating several matters, to justify a concrete action. But he must present a concrete constitutional basis to reason the constitutionality of his decree".

145. Furthermore, after reiterating some of the arguments mentioned above regarding the steps to be taken after the vote of no confidence, the Prime Minister explained that regarding the Judgment of the Court No. KO103/14 *"has interpreted paragraph 4 of Article 95 of the Constitution, which, as stated several times, regulates the procedure of formation of the Government immediately after the general elections and the constitution of the Assembly. For this reason, this Judgment cannot justify the actions and the Decree of the President".*

146. The Prime Minister also emphasized that the challenged Decree *"provides for a 15-day deadline for the candidate proposed for Prime Minister. From the comparative law it was understood that when after a motion of no confidence the right to attempt to elect a new Government is provided, then it enables only one attempt. Thus, when a Government is elected immediately after the elections and in a constitutional way loses the confidence in the Parliament, then only one attempt is allowed. From the challenged act it is noticed that the President considered the fact that all procedures for the legitimacy and election of a new Government start from point zero, similar to the one immediately after the elections, valid".*

147. Also regarding the challenged Decree, he states that *"The challenged act is the result of a completely unconstitutional path which has been manifested by the unconstitutional self-initiative of the President to form the Government. That he has exceeded his competences in this regard is proved by his statement in which he also dictates the composition of the government cabinet that he will decree, otherwise he would not do so. He explicitly stated that, "On the issue of integrity, I want to be even more direct. I think and we will not tolerate having members of the government with indictments filed nor in other executive departments".*

148. Regarding the need for a Government with democratic legitimacy by the Assembly, the Prime Minister states that the President has based his unconstitutional self-initiative to form a Government by declaring that the country needs a Government which can take decisions to fight COVID-19 pandemic. In this respect, he states that *"With regard to decision-making regarding the public health emergency situation, it*

should be noted that at no stage, neither before nor after the motion of no confidence, has there been a failure of the Government to take the necessary measures to fight COVID-19 pandemic"

149. Therefore, the Prime Minister alleges that *"the allegation of the President regarding the representation of the interests of the Republic of Kosovo inside and abroad is ungrounded, because neither the Constitution nor any parliamentary law limits any of the competencies of the Government after the motion of no confidence. Moreover, the Constitutional Court has considered the Government to be functional even after the resignation of former Prime Minister Ramush Haradinaj".*

150. Finally, the Prime Minister proposed to the Court to render a Judgment by which declares the referral admissible and to declare the challenged Decree contrary to the Constitution as alleged by the Applicants.

Comments of the President of the Assembly, Mrs. Vjosa Osmani

151. In the comments regarding the Referral, the President of the Assembly initially stated that the President through the challenged Decree, has violated the principle of the separation of power, guaranteed by Article 4 [Form of Government and Separation of Powers].

152. She further noted that the principle of separation of powers is also elaborated in the Commentary of the Constitution and in the case law of the Constitutional Court, referring to paragraph 54 in case KO104/14 and case KO98/11 where the principle of separation of powers and the checks and balances between them was emphasized.

153. In this respect and by emphasizing the role of the Assembly regarding the constitution-making and obligation that the implementation of the Constitution brings, she states that "*The Constitution of the Republic of Kosovo originates from the people and has been implemented through voting by the necessary majority of deputies of the Assembly of Kosovo, being listed as the basis of the legal-political functioning of the country. Each article and paragraph of the Constitution is inviolable and unamendable, as long as the representatives of the sovereign do not decide otherwise, through the stipulated constitutional procedures for the amendment of the highest legal act of the Republic of Kosovo. As such, all the constitutional provisions are directly applicable by each institution and body in the Republic of Kosovo, as stipulated under paragraph 4 of Article 16 of the Constitution, that highlights that "Every person and entity in the*

Republic of Kosovo is subject to the provisions of the Constitution". She added that *"Thus, the Constitution has expressively given the right to make the constitution only to the Assembly of Kosovo, namely to the deputies who have won the mandate in accordance with the Constitution and laws in force.*

154. Therefore, the President of the Assembly held the position that "*In this sense, the Constitution does not recognize in any way the competence of the constitution-making to the President of the Republic of Kosovo. And in the present case, the President does not enjoy this right even in terms of setting deadlines regarding the appointment of the candidate for Prime Minister of the country, as long as there is no such constitutional norm.* This is, according to her, because, "*According to the Constitution, in the process of forming institutions, namely the election of the government, the President has the sole competence to propose to the Assembly the name of the candidate determined by the political entity that has won the relative majority in the election. Until this name is sent to the President by that political entity, the Constitution has not given the President any competence or active role".*

155. In relation to the present case, she stated that "*based on the above-mentioned arguments, as well as on the letters sent by the President to the winning entity of the elections where he [the President] states that "[...] I regret to conclude that with your actions, you have not exercised the right to propose the new candidate to form the government, in accordance with the CEC Decision on certification of final results of the early elections for the Assembly of Kosovo, namely his Decree, it can be concluded that the President has overstepped his constitutional powers in relation to his claims to set constitutional deadlines for nomination by the first entity, or even for ascertaining the rejection of the mandate, without such an expressive statement by the winning entity of the elections".*

156. According to her, *"So, the President of the country, by setting a deadline, has created a new constitutional norm, for an issue for which the constitution remains silent. The Constitution does not set deadlines regarding the time available to the winning entity to send the name of the candidate for Prime Minister. Thus, it should be clarified that the only constitutional deadlines set in this regarding begin to be consumed only after the formal mandate of the mandate holder by the President of the country".*

157. Regarding the meaning of the term "amendment" and her allegation that the Decree of the President has the effect of supplementing or

modifying the Constitution, the President of the Assembly states that "*Any supplementation, alteration or modification of a text according to the Cambridge Dictionary means the amendment or according to the language of the Constitution of Kosovo, a change [...]* In this sense, the President of the Assembly requests the Court to "*assess the fact that the risks of quasi-amendment are of a completely constitutional nature*." *There are four substantial risks that are manifestly related to the Constitution of Kosovo and its spirit. First, they dim the line that separates the constitutional from the unconstitutional and jeopardize the obscurity of the usual hierarchy of institutions in a constitutional democracy. Second, supporting these non-constitutional strategies for constitutional level change may reveal, or even reinforce, a discrepancy between constitutional design and political practice, which consequently constitutional actors may exploit for political purposes. Third, the avoidance of formal amendment rules damages the Constitution itself and the purpose of codification. And finally, this approach completely eliminates the legal certainty that is vital to the functioning of a democracy with a functional rule of law".*

158. Therefore, the President of the Assembly maintained the position that such a form of amending the Constitution violates the principle of supremacy of the Constitution, guaranteed by Article 16 [Supremacy of the Constitution] of the Constitution. Consequently, according to her, the challenged Decree of the President is incompatible with Article 65 of the Constitution [Competencies of the Assembly] which provides that the Assembly decides to amend the Constitution by 2/3 of votes of all its deputies. Furthermore, according to her, the challenged Decree, "*interfering in the competencies of the Assembly, is contrary to Article 4 of the Constitution [Form of Government and Separation of Power] paragraph 1 of this Article"* and *"an attitude that would legitimize or legalize such a decree would radically change our constitutional system, giving the decrees of the President constitutional supremacy over the Constitution itself".*

159. Therefore, as a conclusion in this regard, she stated that *"The lawmaker deliberately did not set a constitutional deadline before the formal nomination by the political entity that won the election, to create the necessary time space for the political entity to be able to create the parliamentary majority by reaching agreements with other political entities. Such a finding is confirmed by the practice of the Constitutional Court itself, where in case KO29/11, paragraph 71, it is specified that "if the purpose of the drafters of the Constitution would have been to present an alternative procedure for elections, with only one candidate nominated, the Constitution would expressly*

stipulate such a procedure". Even in the present case, the lack of such a norm proves that if the legislators wanted to set a deadline, they would have done so as they had explicitly done in many other cases in constitutional provisions."

160. She further added that *"The Constitutional Court, through previously treated cases has created the necessary space for political entities to regulate political interaction on their own, without setting a time limit for such a matter. This is evidenced through paragraph 127 of case KO119/14, where the Court found that "it is the right and duty of all members of the Assembly to find a way to elect the President and Deputy Presidents of the Assembly, in accordance with the constitutional provisions in conjunction with the relevant Rules of Procedure of the Assembly and make the Assembly functional". So, even though the Applicants in the present case argued that the first party for months did not send a name for President of the Assembly (keeping the institutions unformed), and that it should not be waited infinitely but the right for proposals to be given to the others, the Court ruled that only the first party could nominate that name. Thus, the Court did not set deadlines, but left such a thing to political life, that is, for the deputies to find a way to create the necessary majority. The court never set to the deputies a deadline to 'find this way".*

161. The President of the Assembly also alleged that in relation to the issuance of the challenged Decree, "*The President has self-determined competencies for final interpretation of the Constitution".* In this regard, she states the competence of the final interpretation of constitutional provisions is defined by the Constitution. *"Such competence is given exclusively to the Constitutional Court, which according to the constitutional definition is "[...] an independent organ in protecting the constitutionality and is the final interpreter of the Constitution",* according to Article 112 of the Constitution.

162. She added that *"The concept that the Constitutional Court is the final authority for the interpretation of the Constitution is related to the institutional hierarchical position that this paragraph gives to this Court. In this sense, this paragraph puts the Constitutional Court at the highest point of the institutional hierarchy in terms of the function of interpretation of the Constitution".* This, according to her, in the institutional sense, has four meanings*:* (i) that no other state institution can take or exercise the function of final constitutional interpretation on behalf of the Constitutional Court; (ii) that, even if any other state institution has made the interpretation or referred to the constitution to exercise its competence, this can be considered definitively determined only if it passes through the review filter of the

Constitutional Court; (iii) no other state institution may use its factual prerogatives to establish sub-concepts of the meaning of the constitution, and that such prerogatives may be considered constitutional only if they pass through the review of the Constitutional Court, and (iv) No other state institution can evade the obligation to follow the interpretation of the constitution according to the Constitutional Court, since the latter, according to this paragraph, is the last institutional authority for its interpretation.

163. She also claimed that *"Through this form of supplementation of the Constitution by decree, the President has made it impossible for the Constitutional Court to exercise another competence: that of exercising its jurisdiction in assessing the constitutionality of amendments, as provided in Article 113.9 of the Constitution. The decree is an amendment that has set a time limit by reducing a certain right of a subject. So, this means that certain individuals have been denied the right to be elected, as a result of setting a non-constitutional time period. Thus, the Decree in question also is contrary to Article 45 [Freedom of Election and Participation], paragraphs 1. and 2. According to the Constitution, such a right may be restricted only by a Court decision, and not by a Decree of the President as in this case"*.

164. In this regard, she also referred to several cases of the Constitutional Court which reviewed the constitutionality of constitutional amendments, such as case KO29/12 and KO48/12, stating that *"the Constitutional Court clarified the following: "The Court considers that the proposed amendment does not change the substance of Article 45.1. Therefore, the Court does not consider it necessary to further assess the constitutionality of the proposed amendment. Therefore, the Court concludes that the proposed amendment to Article 45.1 does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution". This interpretation of the Court in the case KO29/12 and KO48/12 is also an additional argument or signal that the determination of such deadlines in the Constitution, what the President has tried to do by the Decree, can only be done by constitutional provisions. At this point, I would like to clarify that the purpose is not to prejudge the interpretation that the Court may make of a constitutional amendment setting deadlines, but to clarify that the practice of the Constitutional Court recognizes the standard of restriction of this right only by constitutional provision and by no means by any other act, as it is now the case of the Decree of the President"*.

165. She also emphasized the role of the President as the representative of unit of the people referring also to paragraph 63 of case KO2013/14, stating that the Court *"had found that "[...] The Court considers that it is reasonable for the public to assume that their president, who "representing the unity of the people" and not a sectional or party political interest, will represent them all. Every citizen of the Republic of Kosovo is entitled to be assured of the impartiality, integrity and independence of their President"*.

166. She further also referred to the Opinion of the Venice Commission CDL-AD(2019)019-e, which addressed the competencies of the President of Albania which, among others, noted that *"the President must to remain outside partisan politics, in order to ensure, among other things, fair competition between the parties and the functioning of the rule of law and other activities of the state"*. She adds that *"since the role of the President in Kosovo is such that it requires the representation of the unity of the people and full political neutrality, thus protecting, as the Venice Commission itself suggests, regular functioning of the form of governing. The form of governing cannot be defended by violating its most fundamental principle, that of separation of powers"*.

167. Finally, the President of the Assembly requested the Court *"to issue a Judgment, whereby it holds that the Decree no. 24/2020, of the President, is incompatible* with *the Constitution because through this Decree, the President of the country has overstepped his powers by interfering in the powers of other institutions and consequently falling in violation to the constitutional principle of separation of powers"*.

Comments of the Parliamentary Group of LDK

168. Regarding the Applicants' allegation, the President was obliged, that in accordance with Article 82.2 to dissolve the Assembly, following the no confidence motion, the Parliamentary Group of LDK stated that *"the President has no right to automatically dissolve the Assembly pursuant to Article 82, point 2, after the successful vote of the motion of no confidence against the Government, without having in advance the will of the majority of political entities represented in the Assembly. In the present case, if the President were to dissolve the Assembly without the prior will expressed by the majority of the political entities represented in the Assembly, he would arbitrarily terminate the mandate of the deputies of the Assembly, thus committing a serious violation of the Constitution"*. They add that dissolution of the Assembly based on Article 82.2, could not have been

done by the President, *"not only because of the adverb MAY, but also because the drafters of the Constitution did not define the moment when there is a successful vote of the motion of no confidence against the Government, as a moment when the country automatically goes to the elections, but they left the possibility to avoid the elections, to create a parliamentary majority, and consequently to establish a new Government"*.

169. They state that the verb "may" interpreted by the Applicants as the only option is also contradictory and illogical because "allowing the only option" means an obligation which would best reflected by the word "must" or "obliged" and not by the word "may".

170. They state that about this issue, the Constitutional Court had given its assessment also in Judgment KO130/14, where in point 94 states: *"Since, under the Constitution the President of the Republic represents the state and the unity of the people, it is the President's responsibility to preserve the stability of the country and to find prevailing criteria for the formation of the new government in order for elections to be avoided"*.

171. The Parliamentary Group of LDK, with regard to the allegation of the Applicants that there is no relation between Article 100.6 and Article 95 of the Constitution, stated that *"there is a substantial and functional relation between Article 100, paragraph 6, Article 82, paragraph 2, and Article 95, paragraphs 4 and 5 of the Constitution and that the allegation of the Applicant[s] to prevent the President from exercising his powers in relation to Article 95 is unfounded, because, as such, it limits the President's ability to exercise its function in accordance with Article 84, paragraph 2, of the Constitution, where as one of its main competencies is stated that he "Guarantees the constitutional functioning of institutions defined by this Constitution". Such allegations of the Applicant[s] have a blocking character, because they try at all costs to block the absolute parliamentary majority to establish the Government"*.

172. They add that *"The causal link between these constitutional paragraphs lies in the fact that the Government has fallen (as a result of the motion of no confidence) and that the President of the Republic has continued consultations with political parties represented in the Assembly to mandate the new candidate to form the Government."*

173. Regarding the role of the President as *"representative of the unity of people of the Republic of Kosovo",* the Parliamentary Group of LDK holds the position that "*the competencies of the President very clearly*

affect the political life in the country, he has a leading role of the constitutional procedure in the creation of the Government, which is the subject matter of this Referral."

174. Regarding the time limit for the proposal of the candidate to form the Government, the Parliamentary Group of LDK stated that *"the Constitution of the Republic has not explicitly set a deadline in this phase, but has defined a deadline of 15 days after the mandate by the President, the Prime Minister is obliged to present the composition of the Government before the Assembly. The drafter of the Constitution has left this deadline open, because it has considered that it is in the interest of the political entities represented in the Assembly, and it is in the public interest for the Government to be established as soon as possible. However, it is being confirmed now that not setting a "reasonable deadline" for sending the candidate's candidacy for Prime Minister to be mandated by the President of the Republic could be misused to the point of abuse by the relative winner of the election".*

175. Therefore, they state that *"According to the spirit of the Constitution, it remains in the obligation of the President [...] to exhaust all possibilities, within an optimal time, to enable the relative winner of the elections to propose the candidate for Prime Minister. At the moment when it assesses that the relative winner of the elections does not have the will to propose the candidate for Prime Minister and that under certain conditions it is trying to block the establishment of the new Government, the President should consult the political entities represented in the Assembly, and then to ascertain that the relative winner has no chance of forming a parliamentary majority. In the event that the political entities represented in the Assembly prove the creation of a new parliamentary majority, the President is obliged, in accordance with the constitutional norm, to decree the candidate for Prime Minister from this new parliamentary majority".*

176. Therefore, they state that despite that the President has sent several letters to the LVV, *"except for not sending its candidate for Prime Minister to the President, it has never expressed readiness to establish a new Government"*. Therefore, according to them, following the consultations with the political parties, and taking into account that the majority of political parties expressed themselves in favor of the formation of the new government, the President has acted in conformity with paragraphs 90, 92, 92 and 94 of Judgment KO103/14. They also stated that "*allegation* [of the Applicants] *that the President should wait for the winning party "to send the name of the candidate at the most appropriate moment, when it considers that all political,*

administrative and technical conditions have been fulfilled", is completely erroneous. First of all, it is not clear what is meant by "political, administrative and technical conditions".

177. Referring to Judgment KO103/14, the Parliamentary Group of LDK stated that *"In paragraph "dh" [of item II of the enacting clause of this Judgment]: "In case the proposed candidate for Prime Minister does not receive the necessary votes, the President of the Republic, at his/her discretion, pursuant to Article 95, paragraph 4, of the Constitution, appoints another candidate for Prime Minister after consultation with the parties or coalitions (registered in accordance with the Law on General Elections) that meet the above mentioned requirements, i.e. a party or coalition that was registered as electoral subject in accordance with the Law on General Elections, has its name on the electoral ballot, participated in the elections and passed the threshold".*

178. They further stated that examples of the constitutions of other countries referred to by the Applicants *"are not objective references that help the claimant's arguments. Moreover, the constitutional provisions of our Constitution are very clear and there is no room for constitutional dilemmas. This argument is reinforced by point 95 of Judgment 130/14: "Therefore, the Court concludes that the constitutional provisions are sufficiently clear and compatible to lead to the establishment of a new government in accordance with the will of the voters".*

179. The Parliamentary Group of LDK *"requests the Court to EXCLUDE the review of the Constitution of Serbia from the comparative analysis provided by the Applicant. This is because the examination of a document where the citizenship of Kosovo is EXPRESSIVELY denied, can produce unpredictable constitutional and political consequences for the country."*

180. Regarding the allegation of the Applicants that the democratic legitimacy cannot be transferred to the parties ranked after the first place in the elections of 6 October 2019, the Parliamentary Group of LDK stated that *"such claims are unfounded and even absurd. In a parliamentary reply, even with a proportional electoral system, such as we have it, no relative winner of the election has the monopoly of democratic legitimacy, much less in cases where it abstains/refuses to exercise constitutional rights. The Constitutional Court has tried to respond to this case with Judgment 130/14, namely in point 87 where it states that "However, the Court notes that it is not excluded that the party or coalition concerned* [the winning party] *will refuse to receive*

the mandate. Therefore, based on these assessments, the Constitutional Court has also provided opportunities to get out of such a situation."

181. Regarding the allegation of the Applicants that the President made an unconstitutional act when, after the vote of the motion of no confidence in the Assembly he has invited all political parties in consultation for the formation of the Government of Kosovo, the Parliamentary Group of the LDK stated that *"the consultations with parliamentary political entities, after the successful vote of motion of no confidence against the government, fall entirely on the constitutional mandate of the President of the country to take all actions in accordance with the expressed will of the majority of political entities represented in Assembly."*

182. They added that *"The refusal of the caretaker Prime Minister to propose a candidate for Prime Minister from the political entity he leads should be interpreted as an attempt by the caretaker Prime Minister to impose the dissolution of the Assembly, contrary to the expressed will of the Assembly with the motion of no confidence against the Government. Furthermore, the refusal to nominate a candidate for the establishment of the Government by the caretaker Prime Minister, who leads the relative winning party of the elections, may be seen as an attempt to usurp executive power contrary to the will of the Assembly, expressed in the motion of no confidence against the Government".*

183. Finally, the Parliamentary Group of LDK emphasized that some of the consequences of the lack of the Government with full constitutional competencies may be: (i) the inability to respect the principle of separation of powers and parliamentary control over the executive bodies; (ii) inability to proceed draft laws; inability to have different initiatives to addressing in the Assembly; (iii) inability to propose and approve social and fiscal packages; (iv) inability to make decisions to support certain businesses and social categories; Inability to supplement and amend the Law on Budget. Therefore, they requested the Court to declare the Referral as manifestly ill-founded and to hold that the challenged Decree is in compliance with the Constitution.

Comments of the deputies of the Assembly, Behxhet Pacolli and Mirlindë Sopi–Krasniqi from the AKR, supported by deputies Endrit Shala, Haxhi Shala and Albulena Balaj–Halimaj from NISMA

184. The above-mentioned deputies state that *"in order to assess the challenged decree, the Constitutional Court should take into account the overall role of the President of the Republic of Kosovo and the competencies defined by the constitution, both the competencies of the President under Article 84 and the other competencies which are defined to the President of the Republic of Kosovo outside Article 84. Above all, there are two competencies attributed to the President by the Constitution and which define his role in the constitutional system of Kosovo, through which the President can materialize other constitutional competencies. Article 83 of the Constitution provides that the President is the head of state and represents the unity of the people, while Article 4.3 and Article 82.2 provide that the President guarantees the democratic and constitutional functioning of the institutions".*

185. They further challenge the interpretation made by the Applicants regarding Article 82.2 of the Constitution where the Applicants state that in case of a successful motion of no confidence, the President must announce the elections. In this regard, they consider this interpretation "*completely erroneous for two reasons: firstly, this is in contradiction with the hitherto parliamentary practice, and secondly, this is also incompatible with the constitutional provisions, namely Article 95.5. The Applicants should be clear that in 2010 (a practice they quote in their Referral) the Assembly was dissolved by the President under completely different circumstances, where a coalition partner had left the coalition and that a constitutional crisis had been created because in that time, the former President of Kosovo, Mr. Sejdiu, was found in a serious violation of the constitution. Also, the dissolution of the Assembly was done after a motion of no confidence against the government that had been in the third year of the mandate. This motion of no confidence in 2010 was even demanded by the then Prime Minister himself. Also, the will of the political parties in 2010 was to dissolve the Assembly and not to form a new government, as it was objectively impossible to form that government, which did not have a mandate of more than a year.[…] Even in 2017 the situation was the same, when the Assembly was dissolved after a motion of no confidence, but the legislature at that time had already entered its fourth year of the mandate and that political parties had not been willing to form a new government".*

186. Therefore, they hold the position that the current circumstances are completely different, emphasizing the fact that the Assembly in in the beginning of its mandate and the absolute majority of the political parties have declared themselves for the formation of the new Government.

187. Regarding the allegation of the Applicants that Article 95 of the Constitution does not define how the President should act following a motion of no confidence, they state that *"for the Applicants it should be clear that there are other cases in the world where the constitutions do not specify how the President will act after a motion of no confidence", adding that "the connecting bridge that determines how the President should act after a vote of no confidence against the government is Article 95.5 of the Constitution."* They allege that "*the expression …. "or for any other reason the post becomes vacant" means cases when the post of Prime Minister remains vacant, except for his/her resignation."* And that this also includes the cases when the confidence in the Government is withdrawn through a motion, as in the present case.

188. Moreover, according to the above-mentioned deputies, verb "may" used in Article 82.2, that the President may dissolve the Assembly means that it *"falls on the right of the President to assess the factual and constitutional circumstances, as representative of unity of the people and guarantor of democratic functioning of institutions, whether the Assembly should be dissolved or not. In this case, when the President assessed the dissolution of the Assembly or not according to Article 82.2, he assessed the will of the absolute majority of parliamentary political parties and the new circumstances of the case, especially the mandate of the Assembly and the need for a new, ethical and non-dismissed government, such as the current government. In the framework of his function as a representative of unity of the people, the President must also take into account the will of the parliamentary political parties, especially when it comes to the dissolution of the Assembly in this case. As mentioned above, the President, assessing the political circumstances and the democratic functioning of the institutions, acted also in 2010 and 2017."*

189. Regarding the allegation of the Applicants that the President should have waited the proposal of LVV for the candidate for Prime Minister, the above-mentioned deputies stated that *"though the right to propose the candidate for prime minister is given to the winning party in Article 84.14 of the Constitution, this does not mean in any way that the winning party may abuse with its right to propose the candidate, in the sense that it may delay the proposal of the candidate for prime minister indefinitely. […] The right of the winning party to propose a candidate for prime minister is not an absolute right, it is even more relativized when the situation and constitutional circumstances, as in this case are not "after the elections" but after the successful motion of no confidence against the government,*

where clearly the parliamentary majority, or the position of the deputies of the Assembly of the Republic of Kosovo has changed in relation to the position which was after the elections of 6 October 2019. In this case, it was the role of the President to assess the situation and act towards guaranteeing the democratic and constitutional functioning of the institutions".

190. Referring to paragraph 94 of Judgment KO113/14, which provides that *"Since, under the Constitution the President of the Republic represents the state and the unity of the people, it is the President's responsibility to preserve the stability of the country and to find prevailing criteria for the formation of the new government in order for elections to be avoided",* the above-mentioned deputies stated that *"In this case, it is clear that the burden of maintaining the country's stability and representing the unity of the people, in terms of forming a new government, falls on the President. According to this paragraph, the Constitutional Court requires the President to find prevailing criteria to enable the formation of the government and thus avoid elections. The requirement of the Constitutional Court for the President to avoid elections is an important criterion that the burden falls on the President that by playing the role of the representative of the unity of the people to form a functional government and not create circumstances to announce the elections".*

191. Finally, considering the Decree of the President compatible with the Constitution, the abovementioned deputies stated that *"assessing the circumstances of the present case, the Constitutional Court should take into account the will of the deputies, the behavior of the winning party of the relative majority during the consultation process with the President and the discretion and role of the President in establishing prevailing criteria, in order to avoid new elections, as provided by the Constitutional Court in case KO103/14".*

Comments of the Deputy President of the Assembly and deputy of LVV Arbërie Nagavci

192. Regarding the allegations that the President was obliged to dissolve the Assembly after the no confidence motion, the Deputy President of the Assembly, Arbërie Nagavci, alleges that the challenged Decree is incompatible with the Constitution because the President, after the motion of no confidence against the Government, was obliged to dissolve the Assembly based on paragraph 2 of Article 82 of the Constitution.

193. In this regard, she emphasized that *"in our constitutional system, first of all, we point out that the President of the Republic of Kosovo as a neutral power or as a representative of neutral power, which is above the parties, does not enter into the separation of powers and does not perform any executive function in the political direction of the country. The concept of the head of state, therefore, is more of a formal constitutional category that belongs to the President of the Republic, but that does not mean that the President of the Republic is vested with governing characteristics. Put in this context, Article 83 illustrates the formal position of the President of the Republic as head of state and not his substantial competencies/authority. It is in this direction that the status of the President of the Republic of Kosovo is exactly defined in the sense that "The President is the head of state and represents the unity of the people of the Republic of Kosovo." From this constitutional provision it is understood that the President of Kosovo is not allowed to represent any group or political party interests but represents them all together, which gives substantial meaning to the representation of the unity of the people of a state"*.

194. In this context, she added that *"in performing the function of the head of state, according to this Article, the President of the Republic must adhere to these four principles: a) expression of neutrality: b) state credibility: [...] c) objectivity: and, d) limiting this function to formal aspects: the definition set out in Article 83 for the President of the Republic as head of state must be interpreted narrowly, excluding any space that implies a substantial authority of governance to the benefit of the President of the Republic"*.

195. Therefore, she claimed that *"the President of the Republic, on 30 April 2020, issued Decree no. 24/2020 in full contradiction with Article 84 para. 4 in conjunction with Article 82 para. 2 and Article 84 para. 14 in conjunction with Article 95 of the Constitution of Kosovo, by decreeing a new candidate for prime minister, who has not been proposed by the political party or coalition that won the elections."*

196. Also, she emphasized that *"the Constitution of the Republic does not provide for any active step or responsibility of the President to assess or consider in advance the political will of political entities, such as consultation with political parties or parliamentary groups regarding the dissolution of the Assembly or not. However, within the logic of the President to take into account the will of political entities to declare the elections or not, the two political entities that make up about 50% of voters from the elections of 6 October 2019, have declared to be for elections. In addition to VETËVENDOSJE! Movement, PDK also demands elections after the pandemic"*. And in

this case, the only constitutional requirement for the dissolution of the Assembly is the successful vote of the motion of no confidence against the Government.

197. She added that *"in exercising this competence [dissolving the Assembly], the President of the Republic does not enjoy the discretion to decide, as the decision to dissolve the Assembly is preceded by another condition, such as the successful vote of the motion of no confidence, as well as the lack of an alternative defined by the Constitution for another action.*

198. The Deputy President Arbërie Nagavci, also alleged that *"If the interpretation of the President would be correct that the Assembly is not dissolved after the successful vote of no confidence, but only after the failure to elect the Government and the President, then the provision in Article 82 paragraph 2 is completely unnecessary and without any function. Because, the Assembly, in case of failure to elect the government or the president within the deadline set by the Constitution, is automatically and by itself dissolved in accordance with Article 82, paragraph 1.1, and Article 82 paragraph 1.3, but also in accordance with Article 95, paragraph 4. Even after the successful voting of the no-confidence motion, if the voting of the motion was related to the election of the new Government, the Assembly would be dissolved without activating Article 82 paragraph 2".*

199. She further adds that *"various states through constitutional regulation have limited the constitutional effects of the no-confidence motion to avoid the dissolution of the Assembly, and this has usually been done through two general models: first, a prime minister or government can be dismissed by a vote of no confidence, only by electing another prime minister or government at the same time. Secondly, after the vote of no confidence, there is a definite possibility and deadline that the Assembly can elect a new Government. The Constitution of Kosovo does not provide for either the first option or the second option, except for the action for the dissolution of the Assembly".*

200. She supported this argument also based on the parliamentary practice of 2010 and 2017 when after the motion of no confidence, early elections where announced and no new Government was formed.

201. Moreover, regarding the right of the President for consultations with the political parties to decide on the dissolution of the Assembly, she emphasizes that the Constitution specifies accurately the cases when the President may consult various parties regarding his competencies,

referring to concrete cases such as "*appointing the candidate for prime minister after consultations with the party or coalition that has won the required majority, or when declaring a state of emergency in consultation with the Prime Minister, or when deciding for the formation of diplomatic and consular missions of the Republic of Kosovo, based on consultation with the Prime Minister, as well as for various appointments, the President of the Republic of Kosovo and the Prime Minister, after consulting with the Government, jointly appoint Director, Deputy Director and General Inspector of the Kosovo Intelligence Agency*".

202. As a result, she considered that the President was obliged to dissolve the Assembly after the motion of no confidence rather than to issue the Decree on appointing the candidate for the formation of the Government.

203. Regarding Article 95 of the Constitution, the Deputy President of the Assembly emphasizes that the President, in the challenged Decree *"does not specify in what paragraph of Article 95 of the Constitution he bases his decree to appoint Mr. Avdullah Hoti as a candidate for Prime Minister"*. In this regard, she added that *"As it is known, Article 95 "Election of the Government" contains six paragraphs which regulate different situations. Article 95 defines at least three different situations from each other in the election of the Government. Respectively, paragraph 1 of Article 95 defines the procedure and criteria of the proposal after the election of the candidate for Prime Minister by the President, in consultation with the party or coalition that has won the necessary majority in the Assembly to form the Government, [...] Whereas, paragraph 4 of Article 95, determines the authorization of the President to appoint another candidate according to the same procedure, in case the composition of the Government does not receive the required majority of votes according to Article 95 paragraph 2 and Article 95 paragraph 3. And finally, paragraph 5 of Article 95 stipulates that if the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government*.

204. Therefore, according to her, *"By not specifying in what paragraph of Article 95 it is based, the President manifests that he was aware of the unconstitutionality of the decree, but tried to make it impossible to identify the incompatibility of the decree with the Constitution, without defining a clear constitutional basis. He acted exactly*

opposite when he decreed Mr. Albin Kurti as a candidate for Prime Minister, where he accurately referred to paragraphs 1 and 2 of Article 95 of the Constitution of the Republic of Kosovo, in the Decree No. 05-2020, of 20.01.2020. [...] However, in the manner in which the President has acted, Decree No. 24/2020 would be incompatible with paragraph l of Article 95, paragraph 2 of Article 95, paragraph 4 of Article 95, and paragraph 5 of Article 95".

205. In the same line with the Applicants, the Deputy President, also emphasizes that *"The President of the Republic of Kosovo does not have the constitutional authorization to arbitrarily set deadlines that the Constitution does not provide as to when the political party or coalition that has won the required majority must submit a proposal."* She added that *"With this, the President has taken the role of interpreter, and moreover, the one to supplement the Constitution."* She also emphasizes that the President may not consider that LVV has refused to submit the candidate for Prime Minister in the absence of a constitutional deadline and in the absence of an expressively refusal. In this regard, she also refers to the previous practice when in 2014, the formation of the government lasted 6 months as a consequence of not forwarding the name of the candidate by the winning party. In conclusion, the Deputy President of the Assembly considered that the challenged Decree is not compatible with the Constitution.

Comments of deputy Arban Abrashi

206. Regarding the Applicants' allegations that the President was obliged to dissolve the Assembly, the deputy Arban Abrashi stated that paragraph 2 of Article 82, the dissolution of the Assembly is left only as an option of the President, which is taken into consideration by the President after the successful motion of no confidence against the Government. Regarding this argument, he also bases it on the Commentary on the Constitution.

207. According to him, *"there is nothing that stops him, moreover the President must create opportunities for the election of the new Government, when for this there is political will expressed by the majority of parliamentary political parties, and especially when the Assembly of Kosovo continues to further have a mandate, and in particular by taking into account the well-known practices in the world (in states with a parliamentary system) where, the creation of*

a new government, following the motion of no confidence in the government, is taken into consideration after the motion of no-confidence (destructive motion of no confidence) or even alongside it (constructive motion of no confidence)".

208. He further stated that if the purpose of the drafters of the Constitution was to make the dissolution of the Assembly mandatory in the event of a vote of no confidence against the Government, then this would be included in paragraph 1 of Article 82 and would continue as sub-paragraph 4 of paragraph 1 which provides for the cases when the dissolution of the Assembly is mandatory.

209. To support his argument that the dissolution of the Assembly after the motion of no confidence is not mandatory, he refers to the *Travaux Preparatoires* of the Constitution, where according to him, the preliminary draft has explicitly stated that the Assembly "must" be dissolved. Therefore, according to him, the drafters of the Constitution, by not approving such proposals with full awareness and purpose had formulated this provision with alternative content, where the dissolution of the Assembly would come into question only if the Assembly would be unable to form the new government.

He also referred to the practice of Sweden, Canada and Germany, emphasizing that when a motion of no confidence against the Government is submitted, this is seen as an opportunity to change the Government and not necessarily to go to new elections. Deputy Arban Abrashi also emphasizes that unlike 2019, when the Assembly with 89 votes "for" has decided to dissolve the Assembly, in the current circumstances most political entities have declared in favor of creating a new Government.

210. Regarding the delays of six (6) months in the formation of the Government in 2014, the deputy in question emphasized that the delays at that time occurred as a result of not constituting the Assembly, and not because of non-appointing the candidate for Prime Minister, as alleged by the Applicants.

211. Regarding the allegation of the Applicants, that the Decree is unconstitutional, as only the first party has the right to propose the candidate for Prime Minister, the deputy Arban Abrashi emphasized that *"The Decree of the President [...] is in full compliance with the Constitution, more specifically with Article 84, paragraph 4 and 14, and Article 95 and based on and considering Judgment [...] KO103/14. This is because, according to the Constitution, the President is allowed to issue Decrees, as he is authorized by the*

Constitution (84.14) to appoint a candidate for Prime Minister for the formation of the government, as in Article 82.2 of the Constitution it is stipulated that he may (not necessarily) dissolve the Assembly, as it is also implied that if he does not do so, the President may proceed with the procedure for appointing a new candidate for Prime Minister".

212. He emphasized that according to the interpretation of the Applicants, the parliamentary majority *"is completely unnecessary in our pluralistic system, because the first, always according to their* [the Applicants'] *interpretations, in addition to priorities recognized by the Constitution, has the absolute right to decide and to impose the decision on the parliamentary majority but also to other authorities, which as in this case, could be the President".* In the present case, according to deputy Arban Abrashi, regardless of numerous meetings and correspondence, LVV had not proposed the candidate for Prime Minister. Therefore, it is not a matter of the actions of the President which contradict Article 84.14 of the Constitution but rather of intentional inaction of the first political entity (relative winner) in the elections.

213. Deputy Arban Abrashi emphasized that despite the priority that the first political party has in the procedure constructed clearly by the Constitution, this right is not absolute and unlimited in time and the allegation that this matter has been left intentionally without a deadline with the purpose of leaving sufficient time to the first political entity to build coalitions is unfounded because, according to him, eventual consultations for the formation of the Government are conducted after appointing the candidate for Prime Minister through Decree by the President and not before it as the Applicants allege.

214. Therefore, he considers that "*the President has acted correctly when, after five (5) letters and two (2) meetings which he has had in a period of about twenty (20) days with the first political party that emerged from the elections, which had not been successful in the sense of proposing the name of the candidate for Prime Minister with the public justification that "we are in favor of elections", by Decree No. 24/2020, has proposed to the Assembly of Kosovo the candidate for Prime Minister from the ranks of another (second) political party who has proved to have the sufficient majority in the Assembly of Kosovo to form the Government".*

215. Therefore, the President, in accordance with Judgment KO103/14, has proposed to the Assembly the candidate for Prime Minister from an entity which has the greatest likelihood of forming the Government.

He adds that the President, through the appointment of the candidate for prime minister, "participates", is involved, by acting concretely in the formation of the Government. In every case that the President would not act in accordance with his constitutional authorizations, thus "allowing" the disruption of the functioning of certain institutions in discrepancy with the Constitution, in this case allowing for a long time the non-establishment of the new Government but for the country to be governed by a Government which has been dismissed through the motion of no confidence.

216. Based on the foregoing, deputy Arban Abrashi requested the Court to hold that the challenged Decree is compatible with the Constitution.

Comments of the Ombudsperson

217. The Ombudsperson, in his comments regarding the Referral, emphasizes that he does not find a basis to submit *Amicus Curiae* to this Referral given that the European Court of Human Rights leaves margin of appreciation to states and this is acceptable in cases where the matter is addressed within the constitutional order. He emphasizes that the text of the Constitution has an "objectively identifiable" meaning and has not changed over time. Therefore, he adds that referral KO 72/20 is exclusively concentrated in constitutional provisions, for the analysis and interpretation of which the Constitutional Court is the final authority.

218. In this respect, according to the Ombudsperson, the Constitution "*should be seen in the authentic purpose of the Commission for Drafting of the Constitution to determine what is the constitutional spirit that this Commission has reflected in its text*". In this regard, he stated that "*considering the interpretation that the Constitutional Court will make regarding this case of a special importance for the constitutional order in the country, the Ombudsperson emphasizes the value of the authenticity of the spirit conveyed by the Constitution of the country, displayed through the [Travaux preparatoires] of the Constitutional Commission which has worked on its drafting*."

219. Moreover, in the letter of the Ombudsperson addressed to the Court, it was stated that "*the Ombudsperson would like to remind that the files of the preparatory works for the drafting of the Constitution are in the State Archives Agency of Kosovo".*

Regarding the allegations for the request for imposition of interim measure

220. The Court clarifies that all allegations and counter allegations regarding the request for imposition of interim measure have been elaborated in the Decision on Interim Measure in Case KO72/20, of 1 May 2020. As a result, the Court does not find it necessary to repeat the latter in this Judgment.

Practices hitherto regarding the dissolution of the Assembly

221. The Court will further elaborate all the practices hitherto regarding the dissolution of the Assembly since the entry into force of the Constitution on 15 June 2008, including the procedure followed and the legal basis for the dissolution of the Assembly.

The third legislature of the Assembly of the Republic of Kosovo – Motion of no confidence against the Government

222. On 17 November 2007, the elections for the Assembly were held.

223. On 4 and 9 January 2008, the constitutive session of the Assembly was held, in which Mr. Jakup Krasniqi was elected President of the Assembly.

224. On 9 January 2008, the Assembly voted the Government with Prime Minister Mr. Hashim Thaçi.

225. On 2 November 2010, the Presidency of the Assembly reviewed and put on the agenda for the Plenary Session the motion of no confidence against the Government proposed by 40 deputies of the Assembly.

226. On the same day, the Assembly, in its plenary session reviewed the motion of no confidence against the Government. The proposers justified the Motion as follows:

> *"The institutional crisis, caused after the decision of the Constitutional Court of the Republic of Kosovo, where it found serious violations of the Constitution by the President, which resulted in resignation of the President of the Republic of Kosovo, and the withdrawal of the Democratic League of Kosovo from the government coalition, risks to derive into a general institutional crisis in the country. To exit from this crisis, the Parliamentary Group of AKR, supported by 40 deputies, submits a Motion of No Confidence against the Government and requests the Assembly to take other actions pursuant to the Constitution.*
> *[...]*

The citizens of Kosovo today turned their eyes to this temple, which has in its hands whether it will stop the misgovernment and further degradation of the country's institutions or will allow this crisis to deepen further.
[...]
We invite you to support this motion, as the only way out of this institutional crisis that has engulfed the country and to condemn this bad governance.
[...].

227. On the same date, the Assembly, in conformity with Article 100 of the Constitution, issued a Decision on the approval of the motion of no confidence against the Government of Kosovo.

228. On the same date, the caretaker President, Mr. Jakup Krasniqi, pursuant to Article 82.2, Article 84.4 and Article 90 of the Constitution, issued a Decree on the dissolution of the third legislature of the Assembly.

The fourth legislature of the Assembly of the Republic of Kosovo – Dissolution of the Assembly by 2/3 of the deputies

229. On 12 December 2010, the elections for the Assembly were held.

230. On 2011 February 2008, the constitutive session of the Assembly was held, in which Mr. Jakup Krasniqi was reelected President of the Assembly.

231. On 22 February 2011, the Assembly voted the Government with Prime Minister Mr. Hashim Thaçi.

232. On 7 May 2014, the Assembly in an extraordinary session, upon the proposal of a group of 57 deputies of the Assembly, in conformity with Article 69, paragraph 4, Article 82, paragraph 1, point 2 of the Constitution issued a Decision [No. 04-V-841] for the dissolution of the fourth legislature of the Assembly.

233. On the same day, the President of the Assembly, Mr. Jakup Krasniqi, through a letter [Prot. No. 415] informed President Ms. Atifete Jahjaga for the above-mentioned Decision, stating, *"You are kindly asked, in accordance with [Article 82, paragraph 1, point 2] of the Constitution [...] to take the necessary actions to Decree the Decision of the Assembly [...] for the dissolution of the fourth Legislature of the Assembly [...]"*

234. On the same day, President Ms. Atifete Jahjaga, pursuant to Article 82, paragraph 1, point 2, and Article 84, point 4 of the Constitution, issued a Decree [DV-001-2014] on the dissolution of the fourth legislature of the Assembly.

The fifth legislature of the Assembly of the Republic of Kosovo – Motion of no confidence against the Government

235. On 8 June 2014, the elections for the Assembly were held.

236. On 8 December 2014, the constitutive session of the Assembly was held, in which Mr. Kadri Veseli was elected President of the Assembly.

237. On 9 January 2015, the Assembly voted the Government with Prime Minister Mr. Isa Mustafa.

238. On 5 May 2017, a group of 42 deputies of the Assembly submitted a motion of no confidence against the Government, with the following reasoning: *"The government cabinet has created deep public distrust and reflects signs of a total dysfunction within itself. In this sense, a significant part of the country's institutions are completely non-functional. [...] The Parliament has repeatedly failed to have a quorum even for voting of laws sponsored by the government. There are also many deputies from the ranks of this coalition who have already declared themselves against the continuation of this government coalition.*
[...]
We consider that the only solution to get the country out of this situation, in which practically all institutions are dysfunctional, is free and democratic elections."

239. On 10 May 2017, the Assembly in a plenary session, in conformity with Article 100, paragraph 6 the Constitution, issued Decision [no.05.V-465] on the Approval of the Motion of No Confidence against the Government of Kosovo.

240. On the same date, the President of the Assembly, Mr. Kadri Veseli, through a letter [Prot. No. 544] notified President Mr. Hashim Thaçi for the above-mentioned Decision whereby the motion of no confidence against the Government was voted.

241. On the same date, President Mr. Hashim Thaçi, in conformity with Article 82, paragraph 2, and Article 84, point 4 of the Constitution, issued Decree [DV-001-2017] on the dissolution of the fifth legislature of the Assembly.

The sixth legislature of the Assembly of the Republic of Kosovo – Dissolution of the Assembly by 2/3 of the deputies

242. On 11 June 2017, the elections for the Assembly were held.

243. On 7 September 2017, the constitutive session of the Assembly was held, in which Mr. Kadri Veseli was elected President of the Assembly.

244. On 9 September 2017, the Assembly voted the Government with Prime Minister Mr. Ramush Haradinaj.

245. On 19 July 2019, the Prime Minister Mr. Ramush Haradinaj resigned.

246. On 2 August 2019, President Mr. Hashim Thaçi, through a letter [Prot.No.1246] requested Mr. Kadri Veseli from the coalition of Democratic Party of Kosovo, Alliance for the Future of Kosovo, Initiative for Kosovo, Justice Party, Movement for Unity, Albanian Demo-Christian Party of Kosovo, Conservative Party of Kosovo, Democratic Alternative of Kosovo, Republicans of Kosovo, Partia e Ballit, Social Democratic Party, Balli Kombëtar of Kosovo, in a capacity of a winner, according to the results of the elections of 11 June 2017, to propose the new candidate for the formation of the Government.

247. On the same date, Mr. Kadri Veseli through a letter [Prot.No.1246/1] notified President Mr. Hashim Thaçi that "*based on the current political circumstances, the political will expressed publicly by the parties of the winning coalition, as well as in my judgment of what is best now for the citizens and the Republic of Kosovo, I will not propose a new candidate as mandate holder to form a new government.*" He also notified the President that he has convened a meeting of the Presidency of the Assembly for 5 August 2019 to discuss together with parliamentary groups the convening of an extraordinary session for the dissolution of the current legislature of the Assembly.

248. On 22 August 2019, the Assembly in the plenary session, upon the proposal of a group of 98 deputies of the Assembly, in conformity with Article 82, paragraph 1, point 2 of the Constitution issued a Decision [No. 06-V-378] for the dissolution of the sixth legislature of the Assembly.

249. On the same day, the President of the Assembly, Mr. Kadri Veseli, through a letter [Prot.No. 06/35531] notified President Hashim Thaçi for the above-mentioned Decision, emphasizing *"You are kindly*

asked, in accordance with [Article 82, paragraph 1, point 2] *of the Constitution [...] to take the necessary actions to Decree the Decision of the Assembly [...] for the dissolution of the sixth Legislature of the Assembly [...]"*

250. On the same day, President Mr. Hashim Thaçi, in conformity with Article 82, paragraph 1, point 2, and Article 84, point 4 of the Constitution, issued a Decree [193/ 2019] on the dissolution of the sixth legislature of the Assembly.

Relevant provisions of the Constitution

Constitution of the Republic of Kosovo

"Article 4
[Form of Government and Separation of Power]

1. Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them as provided in this Constitution.
2. The Assembly of the Republic of Kosovo exercises the legislative power.
3. The President of the Republic of Kosovo represents the unity of the people. The President of the Republic of Kosovo is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution.
4. The Government of the Republic of Kosovo is responsible for implementation of laws and state policies and is subject to parliamentarian control.
5. The judicial power is unique and independent and is exercised by courts.
6. The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution.
7. The Republic of Kosovo has institutions for the protection of the constitutional order and territorial integrity, public order and safety, which operate under the constitutional authority of the democratic institutions of the Republic of Kosovo.

Article 7
[Values]

1. *The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-*

discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

2. *The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life.*

Article 65
[Competencies of the Assembly]

The Assembly of the Republic of Kosovo:

(1) adopts laws, resolutions and other general acts;
(2) decides to amend the Constitution by two thirds (2/3) of all its deputies including two thirds (2/3) of all deputies holding seats reserved and guaranteed for representatives of communities that are not in the majority in Kosovo;
(7) elects and may dismiss the President of the Republic of Kosovo in accordance with this Constitution;
(8) elects the Government and expresses no confidence in it;
(9) oversees the work of the Government and other public institutions that report to the Assembly in accordance with the Constitution and the law;
[...]

Article 82
[Dissolution of the Assembly]

1. *The Assembly shall be dissolved in the following cases:*

(1) if the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister;
(2) if two thirds (2/3) of all deputies vote in favor of dissolution, the Assembly shall be dissolved by a decree of the President of the Republic of Kosovo;
(3) if the President of the Republic of Kosovo is not elected within sixty (60) days from the date of the beginning of the president's election procedure.

2. *The Assembly may be dissolved by the President of the Republic of Kosovo following a successful vote of no confidence against the Government.*

Article 83
[Status of the President]

The President is the head of state and represents the unity of the people of the Republic of Kosovo.

Article 84
[Competencies of the President]

The President of the Republic of Kosovo:

[...]
(2) guarantees the constitutional functioning of the institutions set forth by this Constitution;
(3) announces elections for the Assembly of Kosovo and convenes its first meeting;
(4) issues decrees in accordance with this Constitution;
[...]
(14) appoints the candidate for Prime Minister for the establishment of the Government after proposal by the political party or coalition holding the majority in the Assembly;
[...]
(30) addresses the Assembly of Kosovo at least once a year in regard to her/his scope of authority.

Article 95
[Election of the Government]

1. After elections, the President of the Republic of Kosovo proposes to the Assembly a candidate for Prime Minister, in consultation with the political party or coalition that has won the majority in the Assembly necessary to establish the Government.
2. The candidate for Prime Minister, not later than fifteen (15) days from appointment, presents the composition of the Government to the Assembly and asks for Assembly approval.
3. The Government is considered elected when it receives the majority vote of all deputies of the Assembly of Kosovo.

4. If the proposed composition of the Government does not receive the necessary majority of votes, the President of the Republic of Kosovo appoints another candidate with the same procedure within ten (10) days. If the Government is not elected for the second time, the President of the Republic of Kosovo announces elections, which shall be held not later than forty (40) days from the date of announcement.
5. If the Prime Minister resigns or for any other reason the post becomes vacant, the Government ceases and the President of the Republic of Kosovo appoints a new candidate in consultation with the majority party or coalition that has won the majority in the Assembly to establish the Government.
6. After being elected, members of the Government shall take an Oath before the Assembly. The text of the Oath will be provided by law.

Article 100 [Motion of No Confidence]

1. A motion of no confidence may be presented against the Government on the proposal of one third (1/3) of all the deputies of the Assembly.
2. A vote of confidence for the Government may be requested by the Prime Minister.
3. The motion of no confidence shall be placed on the Assembly agenda no later than five (5) days nor earlier than two (2) days from the date it was presented.
4. The motion of no confidence is considered accepted when adopted by a majority vote of all deputies of the Assembly of Kosovo.
5. If a motion of no confidence fails, a subsequent motion for no confidence may not be raised during the next ninety (90) days.
6. If a motion of no confidence against the Government prevails, the Government is considered dismissed.

The assessment of the admissibility of the Referral

251. In order for the Court to adjudicate the Applicant's Referral, it is necessary to examine first whether the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure have been fulfilled

252. In this respect, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides: *"The Constitutional Court decides only on matters referred to the Court in a legal manner by authorized parties".*

253. In addition, the Court refers to paragraph 2 (1) of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:*
>
> *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;*
> *[...]."*

254. In this regard, the Court also refers to Article 29 [Accuracy of the Referral] and 30 [Deadlines] which provide:

> *Article 29*
> *Accuracy of the Referral*
>
> *1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, [...].*
>
> *2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;*
>
> *3. A referral shall specify the objections put forward against the constitutionality of the contested act.*
>
> *Article 30*
> *Deadline*
>
> *A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.*

255. The Court also refers to Rule 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure, which provides:

> *"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.*
>
> *(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.*
>
> *(3) The referral shall specify the objections put forward against the constitutionality of the contested act.*
>
> *(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act."*

256. Below, the Court will assess: (i) if the Referral has been filed by an authorized party, as provided in subparagraph (1) of paragraph 2 of Article 113 of the Constitution and paragraph 1 of Article 29 of the Law; (ii) the nature of the challenged act; (iii) the accuracy of the Referral, as required by paragraphs 2 and 3 of Article 29 of the Law and paragraphs (2) and (3) of Rule 67 of the Rules of Procedure; and (iv) if the Referral has been filed within six (6) months after the entry into force of the challenged act, as defined in Article 30 of the Law and paragraph (4) of Rule 67 of the Rules of Procedure.

(vi) Regarding the Authorized Party

257. The Assembly, pursuant to Article 113.2 (1) of the Constitution, is authorized to refer before the Court the question of compatibility with the Constitution of (i) laws; (ii) decrees of the President; (iii) decrees of the Prime Minister; and (iv) of regulations of the Government. Article 29 of the Law specifies that the Assembly is an authorized party before the Court, if the relevant referral has been filed by one fourth (1/4) of the deputies of the Assembly. The same requirement is specified in paragraph 1 of Rule 67 of the Rules of Procedure.

258. In the circumstances of the present case, the Court notes that the Referral was signed by 30 (thirty) deputies of the Assembly. Therefore, the Court considers that the Referral was filed by one fourth (1/4) of the deputies of the Assembly, pursuant to Article 113, paragraph 2,

subparagraph 1 of the Constitution in conjunction with Article 29, paragraph 1 of the Law. Consequently, the Applicants are an authorized party.

(vii) Regarding the challenged act

259. In this respect, the Court emphasizes that based on Article 113.2 (1) of the Constitution, the Assembly, namely one fourth (1/4) of its deputies, as explained above, may challenge the compatibility of *"laws"*, "*decrees of the President*", "*decrees of the Prime Minister*", and "*regulations of the Government*" with the Constitution.

260. In this regard, the Court notes that the Applicants specified the act, the constitutionality of which they challenged before the Court, namely the Decree of the President, no. 24/2020, dated 30 April 2020. Consequently, the Court finds that the challenged Decree meets the requirements to be considered by the Court under Article 113.2 (1) of the Constitution.

(viii) Regarding the accuracy of the Referral and the specification of the objections

261. The Court recalls that Article 29 of the Law and Rule 67 of the Rules of Procedure, provide that (i) a referral filed under Article 113.2 (1) of the Constitution shall specify whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with Constitution; and (ii) shall specify the objections put forward against the constitutionality of the challenged act.

262. In the present case, the Applicants (i) object the challenged act - the Decree of the President of the Republic of Kosovo, no. 24/2020, of 30 April 2020, in entirety, and (ii) submitted the referred objections against the constitutionality of the challenged act in accordance with Article 113, paragraph 2, subparagraph 1 of the Constitution, Article 29, paragraphs 2 and 3 of Law, and Rule 67, paragraphs (2) and (3) of the Rules of Procedure.

(ix) Regarding the deadline

263. The Court recalls that Article 30 of the Law and Rule 67 of the Rules of Procedure provide that a referral filed under Article 113.2 (1) of the Constitution shall be filed within six (6) months after the entry into force of the challenged act.

264. The Court emphasizes that the challenged Decree was issued on 30 April 2020, while it was challenged before the Court on the same day. Consequently, the Referral was filed within the time limit provided in Article 30 of the Law and Rule 67, paragraph (4) of the Rules of Procedure.

Conclusion regarding the admissibility of the Referral

265. The Court finds that the Applicants: (i) are an authorized party before the Court; (ii) challenge an act which they have the right to challenge; (iii) have specified that they challenge the act in its entirety; (iv) have filed the constitutional objections against the challenged act; and, (v) have challenged the relevant acts within the deadline.

266. Therefore, the Court declares the Referral admissible and will further review its merits.

MERITS OF THE REFERRAL

I. Introduction

267. The Court initially recalls that the Applicants, namely one-fourth (1/4) of the deputies of the Assembly, specifically thirty (30) Members of Parliament, request the constitutional review of Decree no. 24/2020 of 30 April 2020 of the President of the Republic of Kosovo, claiming that the latter is contrary to paragraph 4 of Article 84; paragraph 2 of Article 82; paragraph 1 of Article 4; paragraph 14 of Article 84; and Article 95 of the Constitution. These claims have been supported by the caretaker Prime Minister and the President and the Deputy President of the Assembly. The same claims have been opposed by the President, the Parliamentary Group of LDK and its deputy, Arban Abrashi, as well as the deputies of the parliamentary political entities AKR and NISMA. The latter claim that the challenged Decree of the President is in compliance with the aforementioned articles of the Constitution.

268. The Court emphasizes that the constitutional matter entailed by this Judgment is compatibility with the Constitution of the President's challenged Decree, whereby Mr. Avdullah Hoti was proposed to the Assembly as a candidate for Prime Minister. In the context of the constitutional review of the aforementioned Decree, and based on the claims of the Applicants and the objections of the respective parties, the Court will initially assess whether after the successful vote of no confidence in the Government, as defined in Article 100 of the Constitution, the President, pursuant to paragraph 2 of Article 82 of

the Constitution, is obliged to dissolve the Assembly, namely if the successful vote of no confidence prevents the election of a new Government. In connection and subject to this analysis, the Court will further assess what is the procedure to be followed for the formation of a new government, after a successful vote of no confidence by the Assembly, and more precisely the interconnection of Article 100 of the Constitution regarding the Motion of No Confidence in Article 95 of the Constitution regarding the Election of the Government. And finally, the Court will assess whether under the circumstances of the present case, namely after the motion of no confidence voted by two-thirds (2/3) of all the deputies of the Assembly on 25 March 2020, the procedure followed for the formation of the new government and the appointment of the candidate for Prime Minister, has resulted in a constitutional Decree or not.

269. The Court emphasizes that in the course of the constitutional review of this Decree, it will focus on the analysis of the applicable provisions of the Constitution, but also on its Judgment in Case KO103/14, whereby paragraph 14 of Article 84 of the Constitution in conjunction with paragraphs 1 and 4 of Article 95 of the Constitution, were interpreted. Furthermore, based on the hitherto practice, in the course of its assessment, the Court will also take into account: (i) the comparative analysis of the relevant provisions for the circumstances of the present case of a number of Constitutions, including those referred to the Court by the Applicants and other interested parties; (ii) the contributions of the Forum of the Venice Commission regarding the circumstances of the present case; and (iii) Relevant opinions of the Venice Commission. Finally, the Court will also consider the preparatory documents for drafting the Constitution of Kosovo which, as explained in the proceedings before the Court, were made available to the Court for the first time by the State Archives of the Republic of Kosovo, through the Assembly. The Court will present the findings of the comparative analysis, the contribution of the Forum of the Venice Commission and the preparatory documents for the drafting of the Constitution, in the following section entitled Preliminary Matters and will refer to them to the extent it is necessary and relevant, during the constitutional review of the challenged Decree.

270. The analysis of the constitutional review of the challenged Decree will be divided into three parts, according to the following structure: (i) Article 82 of the Constitution regarding the Dissolution of the Assembly; (ii) Article 100 of the Constitution regarding the Motion of No Confidence and Article 95 of the Constitution regarding the Election of the Government and the relevant interconnection between

them; and (iii) implementation of the constitutional procedure set out in Article 95 of the Constitution resulting in the challenged Decree; and finally (iv) the Court will present the Conclusions regarding the constitutionality of the challenged Decree.

271. In the necessary assessments concerning points (i), (ii) and (iii) explained above, and for each of them, the Court will present: (i) the essence of the claims of the Applicants and the parties supporting these claims; (ii) the essence of the arguments of the opposing party and the supporting parties; and (iii) the Response of the Court, which will include the general principles relating to the case under review and their application under the circumstances of the present case.

272. Lastly, the Court will also address: (i) the interim measure; (iii) the request of the Applicants for hearing session; and finally, the Court will present (iv) the Conclusions of the Court and the respective Enacting Clause.

II. Preliminary Matters

273. As noted above, in order to facilitate and support the necessary analysis to assess the constitutionality of the challenged Decree, the Court will present below: (i) the findings of the comparative analysis of the various Constitutions concerning the dissolution of Assemblies in cases of successful vote of no confidence and/or election of new Governments; (ii) the contribution of the Forum of the Venice Commission concerning the same matters; and (iii) an overview of the evolution of articles relevant to the circumstances of the present case, namely Articles 82, 95 and 100 of the Constitution, as reflected in the preparatory documents for the drafting of the Constitution.

(i) Comparative Analysis

274. The claims of the Applicants, as well as of the other interested parties, have included references to a number of Constitutions in support of their arguments and counter-arguments. The Applicants, through their respective comments submitted to the Court, referred to the Constitutions of Croatia, Slovenia, Germany, Greece, Serbia, Albania and the Constitutional Framework, while on the other hand, the President referred to the Constitutions of North Macedonia, Montenegro and Austria. Despite specific claims and counterclaims of the Applicants and the interested parties regarding the relevant provisions of these Constitutions, the Court engaged in a comparative analysis of the constitutional provisions governing the motion of confidence and no confidence in these Constitutions and others in the

region and beyond, in order to determine whether there is a common denominator throughout all these Constitutions relating to the procedures to be followed after a successful vote of no confidence by the respective Assemblies. Below, the Court will present this comparative analysis, focusing only on the provisions of the respective Constitutions relating to the formation of the Government, the motion of no confidence and the dissolution of the Assembly in the event of a successful vote of the motion of no confidence and only until to the extent that it is relevant to the circumstances of this case.

275. The Constitution of Albania, with regard to the election of the Prime Minister/Government, in Article 96, provides that: (i) The President of the Republic, at the beginning of the legislature, as well as when the post of the Prime Minister remains vacant, appoints the Prime Minister on the proposal of the party or coalition of parties that have the majority of seats in the Assembly. This article does not specify the time limit within which the President appoints the candidate for Prime Minister for the first time, however it sets a period of ten (10) days for each subsequent appointment; (ii) provides for three attempts to elect the Prime Minister, in accordance with the procedure provided in this article, before the Assembly is dissolved. In its articles 104 and 105, the Constitution provides for the procedure of the motion of confidence and no confidence. In the event of a successful vote of no confidence, the Assembly elects another Prime Minister within fifteen (15) days. If this process fails, the President of the Republic dissolves the Assembly.

276. The Constitution of Montenegro, in Article 103 provides that the President proposes the candidate for the Prime Minister within thirty (30) days from the day of constitution of the Assembly. Articles 106 and 107 provide for the matters of no confidence and confidence, respectively. According to Article 110 of this Constitution, the mandate of the Government shall cease when the Prime Minister resigns or on the occasion of the loss of confidence by the Assembly. The same article specifically provides that the Government whose mandate has ceased shall not dissolve the Assembly. Article 105 specifies that the resignation of the Prime Minister shall be considered resignation of the Government.

277. The Constitution of Northern Macedonia, in Article 90, provides that the President is obliged, within ten (12) days of the constitution of the Assembly, to entrust the mandate for the formation of the Government to a candidate of the party or parties which has/have the majority in the Assembly. This article does not specify the consequences of not electing the Prime Minister. In its Article 92, on the other hand, it

defines the procedure related to a vote of no confidence. The same article provides that if this vote is successful, the Government is obliged to submit its resignation. Further, Article 93 sets out that the resignation of the Prime Minister, his/her death or permanent inability to perform his/her duties, results in the resignation of the Government, and that the latter remains on duty until the election of a new Government. Despite the fact that the Constitution does not explicitly provide that another government shall be elected after a motion of no confidence, based on the response of the North Macedonia submitted to the Court through the Forum of the Venice Commission (see paragraph 302 of this Judgment), such a practice is applicable in the constitutional system of the North Macedonia.

278. According to Article 98 of the Constitution of Croatia, the President shall entrust the mandate to form the Government to a person who, based on the distribution of seats in the Croatian Parliament and completed consultations, enjoys the confidence of the majority of all Members of the Parliament. The Constitution does not specify the time limit within which this mandate is entrusted. Based on Articles 109 and 109a, if the first process of formation of the Government, according to the procedure provided in these articles, fails, the President shall confer the mandate to another candidate. If event the second attempt fails, according to Article 109b, the President shall appoint an interim non-partisan government and simultaneously call for an early election for the Croatian Parliament. Article 113 of this Constitution defines the procedure of vote of confidence. Among others, it specifies that if a vote of no confidence is passed against the Prime Minister or the entire Government, the Prime Minister and the Government shall resign. If a vote of confidence in the new Prime Minister-Designate and the members put forward as members of the Government is not passed within thirty (30) days, the Speaker of the Croatian Parliament shall notify the President and the latter shall immediately dissolve the Assembly and simultaneously call a parliamentary election. Finally, according to Article 104, the President may, on the proposal of the Government, with the countersignature of the Prime Minister and after consultations with representatives of parliamentary parties, dissolve the Croatian Assembly if the latter passes a vote of no confidence in the Government or fails to adopt the state budget within 120 days from the date on which it is proposed.

279. According to Article 111 of the Constitution of Slovenia, after consultation with the leaders of parliamentary groups, the President proposes to the National Assembly a candidate for President of the Government. If the election process fails, according to the process and deadlines set out in this Article, the President but also groups of

deputies may propose candidates for Prime Minister. Therefore, several candidates for Prime Minister may be proposed. If all of them fail to get the required votes, the President shall dissolve the Assembly and call elections, unless the Assembly proves with a sufficient number of votes that it will be able to elect another candidate. The vote of no confidence and the vote of confidence are provided for in Articles 116 and 117. In relation to the first, it specifically provides that the National Assembly may pass a vote of no confidence in the Government only by electing a new Prime Minister on the proposal of at least ten (10) deputies and by a majority vote of all deputies. While in relation to the second, it provides that if the Government does not receive the support of a majority vote of all deputies within thirty (30) days, the National Assembly must elect a new Prime Minister or in a new vote to express confidence in the caretaker Prime Minister, and if this fails, the President of the Republic dissolves the National Assembly and calls new elections.

280. The Constitution of Greece in Article 37 provides that the President shall appoint the candidate for Prime Minister from the party having the absolute majority of seats in the Parliament. It does not specify the time limit within which this appointment takes place, however, it sets three-day deadlines for each subsequent candidate for Prime Minister if the first fails, making three additional attempts before the Assembly is dissolved. On the other hand, Article 38 of this Constitution provides that the President relieves the Cabinet from its duties if the Cabinet resigns, or if the Parliament withdraws its confidence, as defined in Article 84, and that in such circumstances, the relevant paragraphs of Article 37, for the election of the Prime Minister, are analogously applied. This Constitution does not provide for the dissolution of the Parliament after a successful vote of no confidence, but under Article 41 thereof, and as far as the circumstances of the case are relevant, it determines the dissolution of the Assembly only upon the condition that two consecutive governments have resigned or have been voted against by the Assembly and if the composition of this Government does not guarantee its stability.

281. The Constitution of Germany, on the other hand, provides for the so-called constructive vote of no confidence in Article 67 thereof. It provides that the Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. It provides that the Federal President must comply with the request and appoint the person elected. While Article 68 of the Constitution defines the vote of confidence and the dissolution of the Bundestag, whereby it provides that if a motion of

the Federal Chancellor for a vote of confidence is not supported by a majority of the Members of the Bundestag, the Federal President may, upon the proposal of the Federal Chancellor, dissolve the Bundestag within twenty-one (21) days. Once the Bundestag elects another Federal Chancellor by a majority of its Members, the right of dissolution shall lapse.

282. Otherwise, the Constitution of Austria, in Article 74 only provides that if the National Council withdraws its confidence from the Government or from individual members thereof, through a motion, the Federal Government or the concerned Federal Minister shall be removed from office. However, through the response provided to the Court through the Forum of the Venice Commission, Austria had emphasized that if the Federal President appoints a new Government in which the required majority of Parliament has confidence, the mandate of the Assembly may continue regardless of the changes in Government.

283. Beyond the references submitted by the Applicants, the Prime Minister and the President, the Court has also analyzed relevant provisions in a number of other Constitutions which reflect diverse solutions regarding the procedures followed for the election of new governments, after a successful vote of the motion of no confidence in the Government by the Assembly.

284. The Constitution of Bulgaria regulates the procedure of formation of the Government in Article 99, which provides that following consultations with parliamentary groups, the President shall appoint the Prime Minister-designate nominated by the party holding the highest number of seats in the National Assembly to form a government. It does not specify the time limit within which the President appoints the Prime Minister. If this process fails, it provides for three additional attempts to form a government, within the time limits and according to the procedure provided in this Article, before the process of dissolving the National Assembly begins. Article 89 of this Constitution provides for the process of a motion of no confidence in the Prime Minister or the Council of Ministers which, if successful, results in the resignation of the Government. Article 111 of the same Constitution also provides that the authority of the Council of Ministers shall expire, inter alia, upon passing a motion of no confidence, and that the respective resignation results in a process of electing a new Council of Ministers.

285. In the Czech Republic, Article 68 of the Constitution provides that the President of the Republic appoints the candidate for Prime Minister and that latter fails to receive the required votes, the process is

repeated, resulting in another candidate for Prime Minister. If this process fails, the same article provides for two additional attempts to elect a Prime Minister, according to the procedure and time limits set out in the same article. According to Article 35 of this Constitution, only if all attempts to elect a Prime Minister fail, the President dissolves the Assembly. Articles 71 and 72 of the Constitution provide for the vote of confidence and the vote of no confidence, respectively. Successful passing of the latter results in the resignation of the Government, according to Article 73 of the Constitution. The Constitution does not provide for a specific procedure as to how the Assembly acts to elect a new government following a successful motion of no confidence, but it only determines that the Assembly is dissolved only after the failure of the third attempt to elect a Prime Minister, as provided in Article 35 in conjunction with Article 68 of the Constitution.

286. The Constitution of Hungary, in Article 16 thereof, defines the procedure for the formation of the Government. It provides that the Prime Minister shall be elected by the Parliament on the recommendation of the President of the Republic. If this process fails, an additional effort is foreseen to elect a Prime Minister, according to the procedure set out in this article. In Article 21, the Constitution regulates the process of motion of no confidence, whereby it is required to propose another person to serve as Prime Minister. Therefore, the Hungarian Parliament simultaneously expresses its lack of confidence in the Prime Minister and elects as Prime Minister the person proposed through the motion of no confidence. Article 3 of this Constitution provides that the President may dissolve the Parliament and simultaneously announce elections if and when, *inter alia*, the Parliament fails to elect the person proposed by the President to serve as Prime Minister within forty (40) days of presentation of the first nomination, but also requires of him/her to ask the Prime Minister, the Speaker of the House and the heads of the parliamentary groups for their opinions, before doing so.

287. The Constitution of Estonia, in Article 89 thereof, provides that the President of the Republic shall, within fourteen (14) days after the resignation of the Government, designate a candidate for Prime Minister. If this process fails, this article provides for two additional attempts to elect a Prime Minister, through the procedure and time limits provided for in this article, before calling early elections. Article 92 of the Constitution provides that the Government shall resign, *inter alia*, even in the event of the expression of no confidence in the Government or the Prime Minister by Riigikogu (equivalent of the Assembly). The motion of no confidence is provided for in Article 94

of this Constitution and it provides that if no confidence is expressed in the Government or the Prime Minister, the President of the Republic may, upon the proposal of the Government and within three days, announce extraordinary elections for the Riigikogu.

288. The Constitution of Lithuania in Article 92 thereof provides that the Prime Minister shall, with the approval of Seimas (equivalent of the Assembly), be appointed and dismissed by the President of the Republic. Article 101, on the other hand, provides that the Government must resign when Seimas, by a majority vote of all members of Seimas, expresses no confidence in the Government or the Prime Minister. That said, Article 84 of the Constitution of Lithuania also gives the President the competence to submit to Seimas the candidature of a new Prime Minister for consideration, within fifteen (15) days of the resignation of the Government. However, Article 58 of the Constitution of Lithuania provides that pre-term elections to the Seimas may also be announced by the President, *inter alia*, upon the proposal of the Government, in cases where a motion of no confidence has been successfully voted.

289. The Constitution of Georgia provides for both a vote of confidence and a vote of no confidence in Articles 56 and 57, respectively, thereof. The first regulates the process of formation of the Government after resignation of the Prime Minister and provides that the Parliament will hold a vote of confidence in the Government proposed by a candidate for the office of the Prime Minister nominated by the political party which has secured the best results in the parliamentary elections. Failure to elect the Government enables the Parliament to dissolve the Assembly, however the dissolution will not be possible if the Parliament passes by a majority of its members the vote of confidence in the Government proposed by a candidate for the office Prime Minister appointed by more than one-third of the total number of the Members, according to the time limits and the process provided in this article. On the other hand, based on Article 57 of the Constitution, it is required that after a vote of no confidence, the initiators propose a candidate for the office of the Prime Minister, and the candidate for the office of the Prime Minister to propose a new composition of the Government to the Parliament.

290. The Constitution of Armenia, in Article 149 provides that immediately after commencement of the term of the newly-elected National Assembly, the President shall appoint as Prime Minister the candidate nominated by the parliamentary majority formed under the procedure prescribed by Article 89 of the Constitution. In case this election fails, a new election for the Prime Minister is held, according to the process

provided in this article, where the candidates for Prime Minister, nominated by at least one-third of the total number of Deputies, are entitled to participate. If even this process with more than one candidate fails, the National Assembly shall be dissolved by virtue of law. Otherwise, this article also provides that if the Prime Minister submits a resignation or in other cases when the office of the Prime Minister becomes vacant, the factions of the National Assembly shall be entitled to nominate candidates for Prime Minister within a period of seven (7) days after accepting the resignation of the Government. Article 115 of the Constitution provides for the non-confidence against the Prime Minister. It specifies that the process is allowed only if a candidate for new Prime Minister is simultaneously nominated. If adopted successfully, the Prime Minister is considered to have submitted resignation. If the election of the Prime Minister fails, then, based on Article 92 of this Constitution, extraordinary elections are announced.

(ii) The Contribution of the Forum of the Venice Commission

291. The Court will present below the responses of the Forum of the Venice Commission. As explained in the Procedure before the Court section (see paragraphs 19 and 20 of this Judgment), the Court had addressed questions pertaining to the motion of no confidence and the dissolution of respective parliaments to the members of the Forum of the Venice Commission. Responses have been received from the United Kingdom, Germany, Austria, Sweden, Liechtenstein, the Czech Republic, Slovakia, Bulgaria, Croatia, North Macedonia, South Africa, Moldova and Brazil.

292. The response from the United Kingdom specifies that (i) where two/thirds (2/3) of the House of Commons passes a motion requiring a general election to take place on the basis that it has no confidence in the government, a general election must take place before any party can try to form a government; and (ii) if a motion of no confidence passes otherwise than as above and after fourteen (14) days no new government is able to command the confidence of the House of Commons, the present government is able to seek to form a new government e.g., if they were under a new leader, and the official opposition to try to form a government as well. If a new government commands the confidence of the House, there will be no general election until the scheduled time (or a further no confidence motion). If it does not, there must be a general election.

293. The response from Germany specifies that (i) pursuant to Article 62 of the Basic Law, the Federal Government consists of the Federal Chancellor and the Federal Ministers. Pursuant to Article 67 of the Basic Law, the *Bundestag* may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected. This provision is aimed at ensuring democratic legitimation and the functioning of the Federal Government. Pursuant to Article 65 of the Basic Law, the Federal Chancellor determines and is responsible for the general guidelines of policy. The *Bundestag* itself is not dissolved given that citizens elect its Members for a four-year period and new elections are to be avoided; (ii) pursuant to Article 68 of the Basic Law, the Federal President may dissolve the *Bundestag* upon the proposal of the Federal Chancellor within 21 days if a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the *Bundestag*. This right of dissolution lapses as soon as the *Bundestag* elects another Federal Chancellor by the vote of a majority of its Members; and (iii) the Federal Constitutional Court decided on the dissolution of the *Bundestag* in the context of a motion of confidence pursuant to Article 68 of the Basic Law in 2005 and in 1983. In these two decisions, the Federal Constitutional Court emphasized that the vote of confidence aiming at dissolution is only justified if the viability of a Federal Government which is anchored in Parliament has been lost. Viability means that the Federal Chancellor determines the general guidelines of policy, and is supported by a majority of Members of the *Bundestag*. Furthermore, "*three constitutional organs – the Federal Chancellor, the Bundestag and the Federal President – may each prevent a dissolution of the Bundestag according to their free political assessment. This helps to ensure the reliability of the presumption that the Federal Government has lost its parliamentary viability*".

294. The response from Austria specifies that, (i) if a vote of no confidence in Government (or in a minister) has been adopted by Parliament, the Federal President is obliged to remove Government (or the minister concerned) from office (Article 74, paragraph 1, of the Federal Constitutional Act); and (ii) that in a parliamentary system, "*this is a quite extraordinary event normally leading to snap elections which, in turn, end Parliament's term before time*". However, from a legal point of view, this consequence is not mandatory: if the Federal President appoints a new Government (or a new minister) in whom Parliament (or, more specifically, the majority of the members of

Parliament) has full confidence, Parliament's legislative term may be continued regardless of the change in the Government.

295. The response from Sweden specifies that (i) the Swedish Constitution states that if the Parliament lacks confidence in the Prime Minister, the Government or any other minister, it may force the Government or the minister to resign by deciding on a motion of no confidence. At least thirty-five (35) members of the Parliament must propose such a motion for a vote to take place, while a majority of the members (175) of the Parliament must vote in favor of the proposal in order for the Parliament to declare its distrust of the Government or a minister. If the Parliament concludes that it does not have confidence in the Prime Minister, the entire Government must resign or call an extraordinary election to the Parliament within a week; (ii) if no extraordinary election is called upon, the Government will hold their former positions until a new government has taken office. Theoretically a new government would take office within the same legislature and rule until the next ordinary election. But if the Government had to resign after a motion of no confidence, the Parliament would probably not be capable to find a new Government supported by the whole Parliament, and therefore a new extraordinary election would take place. The new Parliament and Government will only rule until the next ordinary election, which is a set year, every fourth year. A Government has never resigned in Sweden in modern time, due to a motion of no confidence.; and (iii) according to the Swedish Constitution the dissolvent of the Parliament can only happen if the Government calls for an extraordinary election. Such an election can be the result of motion of no confidence on the Government as mentioned above.

296. The response from Liechtenstein specifies that, (i) according to article 80 of the Constitution, if the Government should lose the confidence of the Reigning Prince or of Parliament, its authority to exercise its functions shall expire. Until a new Government takes office, the Reigning Prince shall appoint a transitional Government to manage the entire National Administration in the interim (article 78 paragraph 1), in application of the provisions of article 79 paragraphs 1 and 4; (ii) the procedure of forming a new Government is not explicitly addressed in Article 80. That is why Article 79(2) on the general procedure on the formation of a new Government is applicable; (iii) Therefore and within the same legislature, it is upon the Reigning Prince to form a Government once the Government loses the confidence of either Parliament or the Reigning Prince. Subsequently, the Reigning Prince and Parliament may agree on the formation of a new Government according to Article

79(2) of the Constitution; and (iv) there is no obligation to dissolve the Parliament following a motion of no confidence on the Government.

297. The response from the Czech Republic specifies that (i) after the Assembly of Deputies adopts the resolution of no confidence or rejects the Government's request for a vote of confidence, the Government is required to submit its resignation; (ii) following the resignation of the Government, the Constitution does not automatically require the dissolution of the Parliament, but relies on the formation of a new Government within the same Assembly of Deputies; (iii) if the Government receives a vote of no confidence from the Assembly of Deputies, the President of the Czech Republic shall appoint new Prime Minister and, on the basis of their proposal, the other members of the government. If the government appointed on the second attempt does not receive a vote of confidence from the Assembly of Deputies either, the President of the Republic shall appoint the Prime Minister based on a proposal by the Chairperson of the Assembly of Deputies (Art. 68 para. 4 of the Constitution). The Constitution defines explicitly these three attempts to appoint the government and to receive a vote of confidence by the Assembly of Deputies; (iv) in case that the Assembly of Deputies does not adopt a resolution of confidence in a newly (on the third attempt) appointed government by the Prime Minister (appointed by the President of the Republic on the basis of a proposal of the Chairperson of the Assembly of Deputies), the President of the Czech Republic may, but does not have to, dissolve the Assembly of Deputies (Art. 35 para. 1 letter a) of the Constitution). This condition has been defined strictly so that the dissolution of the Assembly of Deputies follows the exhaustion of political possibilities to appoint a new government from the then Assembly of Deputies.

298. The response from the Slovak Republic specifies that (i) the Constitution allows for the formation of a new Government within the same legislature following the vote of no confidence in the previous Government (see Art. 115); and (ii) the President may dissolve the National Council, if it fails to approve a newly formed Government's programme within a period of six months following the formation of the new Government. Each newly formed Government presents its programme to the National Council, and according to the Constitution this is also a question of confidence in the respective Government (see Art. 102.1.e and Art. 113 of the Constitution); and finally (iii) the President may also dissolve the National Council if the National Council fails to vote within a period of three months on a bill proposed and declared by the Government to be a question of confidence (Art. 102.1.e and Art. 114.3 of the Constitution).

299. The response from Bulgaria specifies that (i) the legal framework is included in the Constitution (Article 89) and in the Rules of Procedure of the National Assembly. The motion of no confidence may be presented to the Council of Ministers and the Prime Minister. However, the motion of no confidence in an individual minister is not envisaged. One-fifth (1/5) of national representatives may initiate a no-confidence motion against the Council of Ministers or the Prime Minister in the National Assembly. The proposal may be for a specific case, as well as for the overall program or for the overall policy of the Government. In any case, the motion for a no-confidence motion must be justified. If the motion of no confidence is directed against the general policy of the Government and is rejected, a subsequent motion of no confidence for any particular case within a period of 6 months is not permitted as it is *"absorbed by the motion rejected by the general policy, with exception of the violation of the Constitution committed during that period"*. The proposal is approved when more than half of all National Representatives have voted for it, namely, the qualified majority. Voting is open. The structured place of the constitutional framework (Article 89) is in the third Chapter "National Assembly", which confirms this institution as the strongest weapon that the National Assembly has against the Government; (ii) the legal consequences of a successful motion of no confidence in the Government or the Prime Minister are the obligatory resignation of the Government and the termination of its powers (in accordance with Article 111, paragraph 1, item 1.). In this case, the current Bulgarian Constitution does not provide for the dissolution of the National Assembly on the proposal of the Prime Minister, but an attempt to form a new Government during the term of the same Assembly. When the National Assembly approves a no-confidence motion against the Prime Minister or the Council of Ministers, the Prime Minister offers the resignation of the Government. Due to the successful motion of no confidence against the Government, its powers as a regular government end; it becomes a " dismissed government" and continues to perform its functions until the formation of a regular government in accordance with Article 99, paragraph 6 of the Constitution as follows: (i) after consultations with parliamentary groups, the President mandates the candidate for prime minister appointed by the numerically largest parliamentary group, to form a Government; (ii) when the candidate for Prime Minister does not propose the Council of Ministers within seven days, the President entrusts this task to a candidate for Prime Minister appointed by the parliamentary group which numerically the second largest; (iii) if the Council of Ministers is not nominated in this case as well, the President shall mandate some of the other major parliamentary groups to nominate a candidate for Prime Minister within the period referred to in the preceding

paragraph; (iv) when the required mandate is successfully completed, the President proposes to the National Assembly to elect the candidate for Prime Minister. The constitution does not specify when does the formation of the new government begin, but the answer lies in the specifics of the situation - as soon as possible; (iii) only when no agreement has been reached on the formation of the Government during the procedure described above, the President shall appoint an interim cabinet, dissolve the National Assembly and schedule new elections within two (2) months after the expiration of the credentials of the previous National Assembly (Article 64, paragraph 3). The act by which the President dissolves the National Assembly and also sets the date for the elections for the new National Assembly. In this case, the President may not dissolve the National Assembly during the last three months of the President's term. If the Parliament is unable to form a Government within that period, the President shall appoint an interim cabinet; and (iv) as stated in the case ("CODICES Research Result: BUL-1994-3-002"), with Decision no. 4 of 1994 for the constitutional case no. 8/1994, the Constitutional Court of Bulgaria interpreted Article 111, paragraph 1 of the Constitution and ruled that the resignation constitutes a free expression of the will of the Government or its leader, and not the fulfillment of a constitutional obligation. The Council of Ministers and the Prime Minister are not obliged to state the reasons for their resignation. However, according to Bulgaria's response, in cases where the Prime Minister is obliged by the Constitution to resign from the Government, the termination of competencies occurs based on the decision of the National Assembly, which votes the motion of no confidence or when the Government does not receive the required confidence. Apart from these two clearly regulated situations with the Constitution, the Prime Minister has no constitutional obligation to resign from the Government. Such an obligation does not arise when the National Assembly rejects proposals made by the Council of Ministers or the Prime Minister, including legislative initiatives. With Decision no. 13 of 1992 for the constitutional case no. 27/1992, the Bulgarian Constitutional Court interpreted Article 89, paragraph 3 of the Constitution, stating that: "*When the National Assembly rejects a motion of no-confidence against the Council of Ministers, the new motion of no confidence for the same reasons shall not be allowed within the next six months.*" When the National Assembly has rejected a motion of no-confidence against the Council of Ministers for its general policy, no new motion of no-confidence may be adopted within six (6) months under Article 89.3 of the Constitution on any grounds other than the violation of the Constitution committed within this period. By Decision no. 20 of 1992 for the constitutional case no. 30/1992, the Constitutional Court of Bulgaria interpreted the Constitution and the rules for the formation

of the new Government, the competencies and the term of the interim government and the status of the National Assembly dissolved under the conditions of Article 99.5 of the Constitution, and of the National Representatives of the dissolved National Assembly.

300. The response of Bulgaria also stated that, (i) after the President has given the mandate to the first and second largest parliamentary group to form a Government, the President is no longer limited by the number of parliamentary groups and is not obliged to give the mandate to any of the candidates for Prime Minister appointed by any of them (is not obliged to give the mandate to the third largest parliamentary group). In this case, the President is authorized to decide which parliamentary group to nominate a candidate for Prime Minister. When there are three parliamentary groups, the President is obliged to instruct the third parliamentary group to nominate a candidate for Prime Minister. The mandate ends successfully in the sense of Article 99.4 of the Constitution, when the candidate for Prime Minister, by fulfilling the requirements for admissibility, submits to the President a composition of the Council of Ministers. This does not exclude changes in the composition proposed before the vote by the National Assembly. When the National Assembly elects a Prime Minister but refuses to elect the Council of Ministers proposed in structure and composition, it is considered that the mandate of this candidate has failed and the procedure for electing a government continues by giving the mandate to a candidate from another parliamentary group, or in the manner specified in Article 99.5 of the Constitution. Following the resignation of the elected Government, the formation of a new Government shall be carried out in accordance with the procedure provided for in Article 99 of the Constitution, regardless of the duration of this Government; and (ii) the Provisional Government is temporarily appointed by the President when the constitutional possibilities for the formation of a Government with the confidence of the National Assembly have been exhausted. The term of competencies shall continue until the formation of a Government in accordance with the procedure laid down in Article 99 of the Constitution. Upon the appointment of a Provisional Government, the resigned government ceases to function. The Provisional Government exercises the competencies of the Council of Ministers set out in Chapter Five of the Constitution. Some limitations of its functions stem from the fact that it does not receive its mandate from the Assembly. It is not subject to definition or legislation, but is a consequence of time limitations during which the Provisional Government acts, as a consequence of its intention to manage current domestic and foreign policy issues, towards holding parliamentary elections and forming a Government by the newly elected National

Assembly, its nature is a consequence of the limited parliamentary control exercised over it and the absence of parliament when the National Assembly is dissolved and a new National Assembly is not elected, as well as by the non-parliamentary source of its powers. The Provisional Government is not subject to parliamentary oversight which aims to exercise political responsibility; and (iii) the competencies of the dissolved National Assembly under the conditions of Article 99.5 of the Constitution have ended. Its powers may be renewed only in the circumstances referred to in Article 64.2, and for this purpose it shall be convene by order of Article 78 of the Constitution. Following the dissolution of the National Assembly, also the competencies of the people's representatives have ended. This means that, inter alia, they lose their parliamentary immunity, cease to receive compensation as MPs, cannot exercise parliamentary control and parliamentary committees will finish their action.

301. The response from Croatia specifies that (i) the Constitution regulates two types of procedure regarding a motion of no confidence in the Government (either the Prime Minister or the whole Government): the first one is immediately after the parliamentary elections (Articles 109, 109a and 109b); and the second one (also called the Government's non-confidence and a *real* dissolution of the Croatian Parliament) is not immediately after the parliamentary elections (Article 113). It additionally explains that in the first case, according to Article 109a.1 of the CRC, the deadline for the Government's reshuffling is 60 days (30 days + 30 additional days) while in the second case, according to Article 113.7, the deadline is only 30 days, however, if the attempt of the Government's reshuffling fails, the President of the Republic of Croatia has to call for an early election for Croatian Parliament: according to Article 109b in the first case; and according to Article 113.7 in the second case; (ii) the Croatian Parliament can dissolve itself on its own under Article 77.1 or the Croatian Parliament can be dissolved under Article 104 and Article 113.7 by the President of the Republic of Croatia; (iii) if the no confidence motion is passed through the Parliament, there is no (automatic) mandatory constitutional obligation to dissolve the Parliament. Only if the attempt of the Government's reshuffling fails, the President of the Republic of Croatia has to call for an early election for the Croatian Parliament (Article 113.7 of the Constitution) and the Parliament has to be dissolved either by itself or by the President of the Republic; and finally (iv) according to the Croatian response, "*The facts of your case are as follows: the parliamentary elections were on 6 October 2019; the Government assumed the office on 3 February 2020; the vote of no confidence motion was passed through Parliament on 25 March 2020. If these facts are correct, Article 113.7 of the CRC will be applied*

in Croatia." In the end, the 30-day deadline (under Article 113.7 of the CRC) to prove the formation of a new government was successfully used in 2003 and 2009 in Croatia, but not in 2016 when early parliamentary elections were held and then the new Government took office on 19 October 2016. The Thirteenth Government of the Republic of Croatia was headed by Prime Minister Tihomir Orešković from 22 January to 19 October 2016. It was formed after the 2015 parliamentary elections. The negotiation process that led to its formation was the longest one in the history of Croatia. On 16 June 2016, the Orešković Government lost the motion no-confidence in the Assembly. A subsequent attempt by the Patriotic Coalition to form a new parliamentary majority, with Finance Minister Zdravko Marić as Prime Minister, failed and the Assembly voted for its dissolution on 20 June 2016. The dissolution took effect on 15 July 2016, which enabled the President of the Republic of Croatia to officially call the elections for 11 September 2016. Orešković's cabinet served in the capacity of caretaker (as a technical government) until the time when the new Government took office after the 2016 elections.

302. The response from North Macedonia specified that (i) there is no specific constitutional provision that allows the formation of a new Government within the same legislature after the vote of no confidence against an elected Government. However, there is a practice in the work of the Assembly on this issue when after voting the motion of no confidence in the current Government, the mandate to form a new Government is given to the other party or coalition; (ii) there is no constitutional provision for the dissolution of the Assembly after a motion of no confidence against the Government. According to Article 63.6 of the Constitution, the Assembly is dissolved when a majority of the total number of representatives votes in favour of dissolution. This dissolution depends only on the decision of the members of the Assembly.

303. The response from the Constitutional Court of South Africa specifies that (i) a motion of no confidence has been held to be a mechanism of fundamental importance to the functioning of South Africa's constitutional democracy. Its primary purpose *is "to ensure that the President and the national executive are accountable to the [National] Assembly made up of elected representatives."* A motion of no confidence thus plays an important role in *"giving effect to the checks and balances element of our separation-of-powers doctrine"* and advancing our "*democratic hygiene"*. As the Constitutional Court observed in *United Democratic Movement*: "*A motion of no confidence constitutes a threat of the ultimate sanction the National Assembly can impose on the President and Cabinet should they fail*

or be perceived to have failed to carry out their constitutional obligations. It is one of the most effective accountability or consequence-enforcement tools designed to continuously remind the President and Cabinet of what could happen should regular mechanisms prove or appear to be ineffective. This measure would ordinarily be resorted to when the people's representatives have, in a manner of speaking, virtually given up on the President or Cabinet. It constitutes one of the severest political consequences imaginable – a sword that hangs over the head of the President to force him or her to always do the right thing."; (ii) the right to have a vote of no confidence debated in the National Assembly is recognised as one that is enjoyed by members of both majority and minority parties. Members of the majority party may not frustrate the ability of a member of a minority party to propose a motion of no confidence for debate before the National Assembly, regardless of the prospects of success of such a motion. A motion of no confidence represents a motion, by the South African public, through their elected representatives in the National Assembly acting as a collective, to end the mandate bestowed on an incumbent President or Cabinet. The effect of a successful vote of no confidence in the President is that the President and the entire incumbent Cabinet, as well as all Deputy Ministers, must resign; (iii) The Rules of the National Assembly regulate the exercise of the right flowing from section 102(2) of the Constitution. However, as the Constitutional Court held in the case *Mazibuko*, *the Rules may not "deny, frustrate, unreasonably delay or postpone the exercise of the right."*; (iv) chapter 5 of the Constitution (sections 83 to 102) regulates the executive authority of South Africa, which, as noted above, is vested in the President, who exercises it together with the Members of his Cabinet. Article 102 of the Constitution provides for two types of motions of no confidence: one in relation to the Cabinet, excluding the President, and one in relation to the President as an individual; (v) the mechanism established in Article 102(1) of the Constitution has not yet been utilised in South Africa. It is clear from the language of this sub-section that a successful motion of no confidence will result in a reconstitution of the Cabinet by the President, while the President himself will remain in office. Moreover, there is no indication that the success of a motion of no confidence in Cabinet will have any effect on Parliament (namely, the National Assembly and the National Council of Provinces). Indeed, the manner in which a motion of no confidence shall amount to constitute an important factor against this: it is the National Assembly itself that is responsible for a motion of no confidence being passed – if the success of the motion resulted in the dissolution of the National Assembly, it would require the Assembly to vote against its own interests. Accordingly, if a motion of no confidence made in terms

of Article 102(1) is successful, then there is no requirement for the Parliament to dissolve: the President must simply repeat the process of appointing the members of his Cabinet. There is no South African jurisprudence specifically considering the application of this sub-section. Adopting a purposive interpretation of the sub-section, it is apparent that it does not envisage for the President to simply re-appoint the same Cabinet: this would defeat the clear purpose of the Article and render it as having no effect; (vi) the Constitution provides for two ways in which the President's term of office may come to an end prior to its expiration. The first of these is by resolution supported by at least two thirds of the members of the National Assembly, on grounds of serious violations of the Constitution, serious misconduct, or inability to perform his official functions. The second is via a motion of no confidence, adopted by a majority of the National Assembly, which would compel the President, members of Cabinet and Deputy Ministers to resign. This latter mechanism is provided for in Article 102(2) of the Constitution, which reads: "*If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and other members of the Cabinet and any Deputy Ministers must resign*." Like Article 102(1), Article 102(2) does not envision the dissolution of Parliament, or preclude the formation of a new executive, absent the dissolution of Parliament. However, the dissolution of Parliament due to a vacancy in the office of the President is expressly addressed in Article 50(2) of the Constitution, which provides that: "*The Acting President must dissolve the National Assembly if— a) there is a vacancy in the office of the President; and b) the Assembly fails to elect a new President within 30 days after the vacancy occurred*." Accordingly, to the extent that the President and the Cabinet are removed as a result of a successful motion of no confidence, the National Assembly has 30 days during which it should elect a new President, who must, in turn, elect a new Cabinet. Rule 15 of the National Assembly Rules provides that: "*At the first sitting, after its election of a Speaker and Deputy Speaker, the House must, in accordance with section 86(1) and (2), read with Schedule 3 to the Constitution, elect one of its members as the President of the Republic*."; (vii) Article 86 of the Constitution provides that: "*(1) At its first sitting after its election, and whenever necessary to fill a vacancy, the National Assembly must elect a woman or a man from among its members to be the President; . . . (3) An election to fill a vacancy in the office of the President must be held . . . no later than 30 days after the vacancy occurs*." Accordingly, based on the above, there does not appear to be any law precluding the election of new members of the executive from within the National Assembly, which will not dissolve as a result of the removal from office of the

Cabinet, or the President and the Cabinet. However, interpreted purposively, it is assumed that the same individuals could not simply be re-elected from the ranks of the members of the National Assembly. The alternative would, moreover, undermine the principle of legality, which is a component of the rule of law in South Africa. Legality requires persons exercising public power to, amongst other things, do so rationally, that is, in a manner that demonstrates a rational connection between the purpose for which the power was given and the evidence before the person(s) exercising the power and follows a rational process; (viii) There is no requirement to dissolve the Assembly, however, as noted above, the Acting President is required, in terms of Article 50 (2) of the Constitution, to dissolve the National Assembly if there is a vacancy in the office of the President and the National Assembly fails to elect a new President within 30 days of the vacancy occurring; and (viii) there has not yet been a successful motion of no confidence in South Africa. Accordingly, South African jurisprudence has not directly engaged in the questions posed. However, the South African Constitutional Court has addressed adjacent issues that have arisen in relation to the application of Article 102(2) of the Constitution. First, in the *Mazibuko case*, the applicant gave notice of a motion of no confidence against the President. Due to a lack of consensus amongst the internal committees of the National Assembly, the motion was not brought before the Assembly. The applicant was unsuccessful in her application to the High Court for an order directing the Speaker to take the necessary steps to have the motion of no confidence presented. The applicant took the High Court judgment on appeal to the Constitutional Court, which held that Article 102(2) of the Constitution confers on a member of the Assembly the entitlement to give notice of and have a motion of no confidence in the President tabled and voted on in the Assembly within a reasonable time. The Court held that the primary purpose of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly, which is made up of democratically elected representatives of the people. To the extent that the Rules of the National Assembly did not vindicate the rights of members of the Assembly to have a motion of no confidence formulated, discussed and voted for in the Assembly within a reasonable time, the Court found that they were inconsistent with Article 102(2) of the Constitution and invalid. Second, the legal issue raised in *United Democratic Movement* was whether the Constitution requires, permits, or prohibits votes by secret ballot in motions of no confidence against the President. The Constitutional Court held that a motion of no confidence fundamentally serves the purpose of enhancing the effectiveness of regular accountability mechanisms and of safeguarding the best interests of the South African people. It also

held that the Speaker does have the power to prescribe that a motion of no confidence in the President be conducted by secret ballot under appropriate circumstances. The decision to determine the voting procedure in conducting a motion of no confidence, in terms of its constitutional powers under Article 57 of the Constitution, was held to remain with the National Assembly. Finally, the South African response maintains that to the extent that the term "government" is interpreted narrowly, to refer to the Cabinet and/or the President, then the position appears to be that of a new Cabinet, or a new President *and* Cabinet (as the case may be), must be appointed following a successful motion of no confidence. As explained above, if the majority of members of the National Assembly pass a motion of no confidence in the Cabinet, then the President is required to appoint a new Cabinet. If that majority passes a motion of no confidence in the President, then the President, his or her Cabinet and all Deputy Ministers are required to resign. There is no requirement that Parliament dissolve in either event - save for a situation in which the President has resigned on the ground of a successful motion of no confidence and a new President is not appointed within 30 days. Outside of this eventuality, there is no legal obligation to dissolve Parliament following a motion of no confidence.

304. The response of Moldova specifies that, (i) Yes, it is possible to form new Government within the same legislature, following a motion of no confidence. According to Article 103 para. 2 of the Constitution of Republic of Moldova, in cases where Parliament has passed a vote of no confidence in the current Government, or the Prime Minister has been removed from office, or as provided for by para. (1) above [the Government shall exercise its mandate up to the date of validation of the election of the new Parliament], the Government shall only exercise the administration of the public affairs until the new Government will be sworn in. Moreover, Article 85 para.1 provides the power of the President to dissolve the Parliament in the event of impossibility to form the Government for a period of three(3) months; (ii) Article 85 of the Constitution of the Republic of Moldova, which provides the dissolution of Parliament, provides the following: (1) In the event of impossibility to form the Government or in case of blocking up the procedure of adopting the laws for a period of three months, the President of the Republic of Moldova, following consultations with parliamentary fractions, may dissolve the Parliament; (2) The Parliament may be dissolved, if it has not received the vote of confidence for setting up of the new Government within 45 days following the first request and only upon declining at least two requests of investiture; (3) The Parliament may be dissolved only once in the course of one year; and (4) The Parliament may not be dissolved

within the last 6 months of the term of office of the President of the Republic of Moldova nor during a state of emergency, martial law or war.

305. The Constitutional Court of Moldova has interpreted whether the first and the second paragraph of this article establishes a discretionary power or a mandatory obligation in its Judgment no. 30 of 1 October 2013 on the interpretation of the Article 85 para. 1 and para. 2 of the Constitution; (iii) the relevant findings from the Constitutional Court Judgement no. 30 of 1 October 2013 on the interpretation of Article 85 para. 1 and para. 2 of the Constitution, include that the Court notes that, as a whole, Article 85 has the status of a balancing mechanism, a mechanism which is applied in order to avoid or overcome an institutional crisis or a conflict between the legislature and the executive; that the Head of State's discretionary power to dissolve or not Parliament in the event of a no confidence vote to form the Government occurs after the expiration of forty five (45) days from the first request and the rejection of at least two investiture requests until the expiration of the term of 3 months; if the Parliament has failed to invest the Government within three months, the Head of State is obliged to dissolve the Parliament, thus his discretionary power to dissolve Parliament becomes an obligation imposed by the will of the constituent legislator. Also, from the tenor of the collaboration and mutual control between the legislative and the executive power, the Head of State duty is to concur to overcome the political crisis and the conflict between the powers, and not to keep the crisis situation indefinite, fact that does not correspond to the general interests of the citizens, holders of national sovereignty; and regardless of the circumstances that led to the absence of the confidence vote, the failure to form the new Government within three months will inevitably lead to the dissolution of Parliament; and (iv) the Constitutional Court also found that the President of Republic of Moldova is obliged to dissolve the Parliament after three (3) months, if it fails to form the Government, inclusively if the confidence vote to form a Government is not accepted.

306. Finally, the response of Brazil specifies that Brazil's presidential system does not provide for motions of no confidence or dissolution of Parliament, as set out in the Constitution proclaimed in 1988.

(iii) Preparatory Documents for the Drafting of the Constitution

307. As reflected in the proceedings before the Court, the Court has received the preparatory documents for the drafting of the

Constitution of the Republic of Kosovo. These documents, to which the Court has access for the first time, are analyzed solely with the aim of determining the purpose of the drafters of the Constitution regarding the Dissolution of the Assembly, the Election of the Government, and the Motion of No Confidence/Confidence, reflected in the Constitution as Articles 82, 95 and 100, which reflect the essence of the case before the Court. The same are not determinant for the decision of the Court.

308. The Court also emphasizes the fact that it has received this documentation from the State Archive of the Republic of Kosovo as a certified copy of the original documentation found in the Kosovo Archive, following a proposal made by the Ombudsperson and following a request from the Court addressed to the Assembly. On the basis of this documentation, and especially on all draft drafts of the Constitution that are part of this material, the Court, in the following, will reflect the evolution of the above articles, during the drafting of the Constitution, starting with Article 82, 95 and 100, respectively. The Court also emphasizes the fact that the language used in the preparation of the drafts of the Constitution does not always reflect harmonized terminology and also contains eventual technical errors. The court will present this language exactly as it is reflected in these preparatory drafts.

In relation to the dissolution of the Assembly

309. The earliest draft of the Constitution that is part of this documentation is that of 21 May 2007. At this stage of drafting, in addition to the numbers of the articles, the draft Constitutions do not contain the titles of the articles nor the numeration of the relevant paragraphs. The dissolution of the Assembly, in Article 80 of this draft, had five paragraphs, which stipulated that the Assembly is dissolved in the following cases: (i) when within the period 60 days from the day of the appointment of the candidate for Prime Minister by the President, the Government cannot be formed; (ii) when 2/3 of the deputies vote for dissolution; (iii) when within 60 days from the day of the beginning of the procedure, the President of Kosovo is not elected; (iv) by decision of the President after consultations with the parliamentary groups represented in the Assembly; and (v) the dissolution of Parliament shall be made by a decree of the President.

310. A document, entitled "*Questionnaire on Constitutional Issues: Points on Political Guidelines"*, of 1 June 2007, which, based on the minutes being an integral part of the preparatory documents, turns out to have been prepared by the Constitutional Commission for the Political and Strategic Group and the Unity Team, includes, to the extent relevant

the circumstances of the case, also the following questions: (i) in question 11, respectively *"Who should be able to dissolve the Assembly and call early elections"*, had listed the following alternatives : a) self-dissolution by 2/3 of the votes; b) the President of Kosovo; c) by the proposal of the Government; d) any of the above; and e) no possibility of dissolution of the Assembly; and (ii) in question 26, respectively "*Resignation - if the Prime Minister resigns will the whole government fall?"*. In the same document, entitled "Questionnaire on Constitutional Issues" but three weeks older, respectively of 20 June 2007, beyond the above two questions, there is also question 30, respectively *"Should the current system of motion of no confidence vote (positive vote of no confidence) continue"*. The same questions are reflected in another document *"Questionnaire on Constitutional Issues"* bearing no date.

311. The next draft included in the preparatory documents is the one of 16 October 2007, *entitled "The Final Draft of the Working Group (GR-III) "Kosovo Institutions."* Article 80, respectively, the Dissolution of the Assembly, reflects the same content, with the exception of: (i) the combination of point ii with point v, as explained above; and (ii) point iv, more precisely, the sentence "*by decision of the President following the consultation with the parliamentary groups represented in the Assembly"*, which, unlike the previous draft, is not reflected in this draft.

312. The next draft included in the preparatory documents is of 21 November 2007. Article 80 regarding the Dissolution of the Assembly, already titled, has four items in a single paragraph, marked as a), b), c) and d). Unlike the previous draft, its item d) contains "*The Assembly may be dissolved by the President following a successful vote of no confidence in the Government."* Points a), b) and c) remain the same, with points (i), (ii), and (iii) of the previous draft.

313. The next draft included in the preparatory documents is date 14 December 2007. Article 80, regarding the Dissolution of the Assembly, does not reflect changes, but the draft reflects a number of comments for consideration.

314. The next draft included in the preparatory documents is of 22 December 2007. Article 80, regarding the Dissolution of the Assembly, has four points in the same paragraph, including the dissolution of the Assembly, *"when the Assembly votes on no confidence against the Government",* in its last point. The document reflects comments, including a comment which recommends that this point be deleted, and a new paragraph be added regarding this point.

315. The next draft included in the preparatory documents is of 2 February 2008. Article 82, regarding the Dissolution of the Assembly, is now already divided into two paragraphs. The first paragraph is structured in three sub-paragraphs, which provide for three circumstances in which the Assembly is distributed: (1) when within a period of sixty (60) days from the date of appointment of the candidate for Prime Minister by the President of the Republic of Kosovo, the Government cannot be formed; (2) when two thirds (2/3) of all deputies vote for the dissolution of the Assembly, the dissolution shall be done by a decree of the President of the Republic of Kosovo; (3) when the President of the Republic of Kosovo is not elected within sixty (60) days from the day of the commencement of the election procedure. Whereas, paragraph two of the same Article, has only one point and it determines that *"The Assembly can be dissolved by the President of the Republic of Kosovo, after the successful vote of no confidence in the Government."*

316. In the following, in the draft documents is included also a draft bearing no date, entitled "*Public Comments on the Draft Constitution of the Republic of Kosovo"*, which based on the minutes of the Constitutional Commission included in the preparatory documents, turns out to be the draft of the last Constitution of February 2008. This document does not reflect that there have been comments regarding Article 82 concerning the Dissolution of the Assembly.

317. The next and final draft included in the preparatory documents is date 13 March 2008. Article 82, regarding the Dissolution of the Assembly, reflects the current content of Article 82 of the Constitution.

In relation to the Election of the Government

318. The draft Constitution of 21 May 2007, in Article 104 defines the way of electing the Government. As explained above, at this stage of drafting, in addition to the numbers of articles, the draft Constitution does not contain titles of articles or enumeration of the relevant paragraphs. This Article specifies as follows: (i) after the elections or when the Prime Minister resigns or for any other reason, his post becomes vacant, the President of Kosovo, after consultation with the political parties represented in the Assembly, proposes to the Assembly a candidate for Prime Minister; (ii) The Prime Minister, no later than 15 days after the appointment, presents the composition of the Government to the Assembly of Kosovo and requests the voting of the Government by the Assembly of Kosovo; (iii) The Government or its member shall be deemed elected when they receive a majority of

the votes of the Members of the Assembly of Kosovo; (iv) When the proposed composition of the Government does not receive the necessary majority of votes, the President of Kosovo appoints another candidate with the same procedure within ten(10) days. When the Government is not elected for the second time, then the President of Kosovo announces the early elections which must be held no later than 45 days from their announcement; and (v) the function of the Government is exercised by the existing Government until the election of the new Government.

319. The next draft, namely that of 16 October 2007, Article 104, concerning the Election of the Government, reflects the following changes: the first point above has been reformulated as follows: (i) The President of Kosovo, after the elections and consultations with political parties or the coalition that has the necessary majority in the Assembly to form the Government, proposes to the Assembly the candidate for Prime Minister; point two is added as follows (ii) With the fall of the Prime Minister the Government falls; the re-formulated point from the previous draft is added (iii) When the Prime Minister resigns or for other reasons, his post becomes vacant, the President of Kosovo mandates the new candidate; the abovementioned point (ii) becomes the next point and contains as follows (iv) The Prime Minister no later than 15 days after the appointment presents the composition of the Government before the Assembly of Kosovo and requests the vote of the Assembly; the above-mentioned point (iii) of the previous draft, becomes the next point and contains as follows (v) The Government is considered elected when it receives the majority of votes of the Members of the Assembly of Kosovo; The above point (iv) of the previous draft becomes the next point with the following content (vi) When the proposed composition of the Government does not receive the required majority of votes, the President of Kosovo appoints another candidate with the same procedure within 10 days. When the Government is not elected for the second time, then the President of Kosovo announces the early elections which must be held no later than 40 days from their announcement; while the last point, remains the same, (vii) the existing Government exercises its duty until the election of the new Government.

320. The next draft, namely that of 21 November 2007, concerning the Election of the Government, already listed as Article 96 and entitled, contains seven paragraphs. They contain exactly the following: 1) The President of Kosovo, after elections and consultations with political parties or the coalition that has the necessary majority in the Assembly to form the Government, proposes to the Assembly the candidate for Prime Minister; 2) The candidate for Prime Minister, no later than 15

days after the appointment, presents the composition of the Government to the Assembly of Kosovo and requests the vote of the Assembly; 3) The Government is considered elected when it receives the majority of votes of the deputies of the Assembly of Kosovo; 4) When the proposed composition of the Government does not receive the required majority of votes, the President of Kosovo, appoints another candidate with the same procedure within 10 days. When the Government is not elected for the second time, then the President of Kosovo announces the early elections which must be held no later than 40 days from their announcement; 5) When the Prime Minister resigns or for any other reason his post becomes vacant, the President of Kosovo appoints a new candidate; 6) The existing Government exercises its duty until the election of the new Government; and 7) With the fall of the Prime Minister, the Government falls.

321. The next draft, respectively that of 14 December 2007, Article 96, regarding the Election of the Government, does not reflect changes, but the draft reflects a number of comments for consideration.

322. The next draft, namely that of 22 December 2007, in its Article 93 concerning the Election of the Government, reflects changes. It already reflects the following five paragraphs: 1) The President of Kosovo, after elections and consultations with political parties or the coalition that has won the majority in the Assembly proposes to the Assembly the candidate for Prime Minister, to form the Government; 2) The candidate for Prime Minister, no later than 15 days after the appointment, presents the composition of the Government before the Assembly of Kosovo and requests the approval of the Assembly; 3) The Government is considered elected if it receives the majority of votes of the deputies of the Assembly of Kosovo; 4) If the proposed composition of the Government does not receive the required majority of votes, the President of Kosovo, appoints another candidate with the same procedure within 10 days. If the Government is not elected for the second time, then the President of Kosovo announces the elections, which must be held no later than 40 days from the day of their announcement; 5) When the Prime Minister resigns or, for other reasons, his / her position becomes vacant, the Government falls, and the President of the Republic of Kosovo, in consultation with the political parties or the coalition that has won the majority in the Assembly, mandates the new candidate, to form the Government.

323. The next draft, namely that of 2 February 2008, in its Article 95 concerning the Election of the Government, reflects the current Article 95 of the Constitution, with three exceptions (i) in its first paragraph, in contrast to the previous draft it refers to the *"party"* in the singular;

(ii) the third paragraph requires the vote of *"all deputies"* as opposed to the previous draft in which it refers to "*votes of deputies"* for the approval of the Government; and (iii) does not contain the sixth paragraph of the current article of the Constitution, respectively "*After being elected the members of the Government shall take an oath before the Assembly. The text of the oath will be provided by law".*

324. The draft entitled "*Public Comments on the Draft Constitution of the Republic of Kosovo"* does not reflect that there have been influential comments on the final content of Article 95.

325. The next and final draft included in the preparatory documents, namely that of 13 March 2008, in Article 95 concerning the Election of the Government, reflects the content of Article 95 of the Constitution, with the exception of the sixth paragraph concerning the oath of the members of Government.

In relation to the Motion of Confidence

326. The draft Constitution of 21 May 2007, in Article 105, defines the Motion of Confidence. As explained above, at this stage of drafting, except for the numbers of articles, the draft Constitution does not contain titles of articles or enumeration of the relevant paragraphs. This article specifies the following: (i) the motion of no confidence may be presented against the Prime Minister or any of the members of the Government on the proposal of one third (1/3) of the deputies of the Assembly; (ii) The vote of confidence of the Government may also be requested by the Prime Minister; (iii) The motion of no confidence shall not be voted before the elapse of three days from its submission. The submitted motion of no confidence shall be put on the agenda of the Assembly within five days from the day of its submission to the Assembly; (iv) The motion of no confidence shall be deemed to have been accepted if more than half of the members of the Assembly of Kosovo have voted for it; (v) When a motion of no confidence is rejected by a majority of the Members of Parliament, the submitters of the motion may again submit a motion of no-confidence, after a period of three months; (vi) When the no-confidence motion has been voted against the Prime Minister or the Government as a whole, the Government shall be considered dismissed and the President of Kosovo shall appoint a new candidate for Prime Minister within 10 days; (vii) when the motion of no confidence relates to a member of the Government, the Prime Minister makes his replacement within 15 days; and (viii) after the resignation of the Prime Minister the mandate of the Government is considered to have been terminated.

327. The next draft, namely that of 16 October 2007, in its Article 105 concerning the Motion of Confidence, reflects the following changes: points (i) and (ii) remain the same; the next point is amended as follows (iii) the motion of no confidence shall be put on the agenda of the Assembly within five days from the day of submission; points (iv) and (v) remain essentially the same; the next point is modified as follows (vi) When the motion of no confidence is voted against the Prime Minister or the Government as a whole, the Government is considered dismissed; the point (vii) remains the same; while the above-mentioned (viii) of the previous draft is not included in this draft, which reads exactly as follows "*following the resignation of the Prime Minister, the mandate of the Government is considered to have been terminated.*"

328. The next draft, namely that of 21 November 2007, concerning the Motion of Confidence, already listed as Article 97 and titled, contains six paragraphs. They contain exactly the following: 1) the motion of no confidence may be presented against the Prime Minister or any of the members of the Government on the proposal of one third (1/3) of the deputies of the Assembly; 2) The Prime Minister may also request the vote of confidence of the Government; 3) The Motion of Confidence shall be put on the agenda of the Assembly within five days from the day of submission; 4) The motion of no confidence is considered to have been voted if more than half of the deputies of the Assembly of Kosovo have voted for it; 5) When the motion of no confidence does not receive the required majority of the votes of the deputies, the submitters of the motion may again submit a motion of no confidence, only after a period of three months; 6) When the motion of no confidence has been voted against the Prime Minister or the Government as a whole, the Government shall be considered dismissed.

329. The next draft, respectively that of 14 December 2007, in Article 97 concerning the Motion of Confidence, does not reflect differently, but the draft reflects a number of comments for consideration.

330. The next draft, namely that of 22 December 2007, in Article 98 concerning the Motion of No Confidence, remains essentially the same, but the draft reflects a number of comments for consideration. The next draft, namely that of 2 February 2008, Article 100, concerning the Motion of Confidence, does not reflect substantive changes.

331. The draft entitled ""*Public Comments on the Draft Constitution of the Republic of Kosovo"*, of the month of February 2008, reflects that

there have been specific comments, from a commenter identified as PAI, regarding the Motion of Confidence, recommending, inter alia, but specifically, that this article be amended to include the *"constructive motion"*, respectively the conditioning of the presentation and voting of the motion of no confidence with the proposal of the new candidate for Prime Minister.

332. The next and final draft included in the preparatory documents, namely that of 13 March 2008, in Article 100 concerning the Motion of Confidence, reflects the content of Article 100 of the Constitution, with the exception of its sixth paragraph, respectively *"If the no-confidence motion is voted against the Government as a whole, the Government is considered dismissed"*, and which is not included in this draft and is added to the final draft of the Constitution.

III. In relation to Article 82 [Dissolution of the Assembly] of the Constitution

333. The Court recalls that the constitutional question concerning Article 82.2 of the Constitution relates to the final constitutional interpretation of whether the Constitution obliges the President to dissolve the Assembly following a successful motion of no confidence against the Government or only enables him to dissolve the Assembly.

334. The submitting deputies allege that the President is obliged to dissolve the Assembly according to Article 82.2 of the Constitution; Meanwhile, the President, as an opposing party, claims that this norm does not oblige him to dissolve the Assembly, but gives him the opportunity to dissolve the Assembly, depending on the will of the majority of parties and coalitions represented in the Assembly to form a new Government.

335. For the purposes of dealing with this specific claim, the following, and as explained above, the Court shall present: (1) The essence of the Applicants' claims and the supporting comments submitted by the interested parties (see paragraphs 62- 92, 122-167 and 192-205 of this Judgment for a detailed reflection of these claims and supporting comments); (2) The essence of the arguments of the opposing party and other interested parties which have supported the opposing party (see paragraphs 93-121, 168-191 and 206-216 of this Judgment for a detailed reflection of the objections and comments in favor of such opposition); and (3) the Court's response in respect of this specific claim.

The essence of the Applicants' allegations

336. Applicants, respectively the thirty (30) submitting deputies, in essence, allege that Article 82.2 of the Constitution obliges the President to dissolve the Assembly following a successful motion of no confidence against the Government. Applicants' allegations for the unconstitutionality of the President's challenged Decree have been supported by the Prime Minister, the Speaker of the Assembly and the Deputy Speaker of the Assembly - always for specific reasons stated by each party concerned in their submissions submitted to the Court and presented in detail in paragraphs 62-92, 122-167 and 191-205 of the present Judgment.

337. According to the Applicants: (i) The President should have dissolved the Assembly by the Decree on the basis of Article 82.2 of the Constitution; (ii) The Constitution, except for the dissolution of the Assembly, does not provide for any other procedure following the motion of no confidence; (iii) Article 82.2 of the Constitution leads to a one-way street and does not allow the application of Article 95 of the Constitution due to the lack of a constitutional provision that can be considered as a constitutional connecting bridge between Article 100 and Article 95 of the Constitution; (iv) the practice of decrees issued in 2010 and 2017 clearly proves that after the motion of no confidence against the Government, the only constitutional path of action is the dissolution of the Assembly through Article 82.2 of the Constitution; (v) The Constitution has clearly defined Article 82.2 as the only constitutional gateway to unblock the constitutional institutions of the Republic of Kosovo; (vi) the transition from a constructive motion of no confidence to a kind of destructive motion of no confidence, has been made in order to make it clear that the dismissal of the Government results in the dissolution of the Assembly and the announcement of new elections; (vii) practice shows that after every motion of no-confidence against the Government, the constitutional provisions have been materialized naturally, followed by the dissolution of the Assembly by the President on the same day; (viii) Article 100.6 of the Constitution is naturally bound by Article 82.2 of the Constitution; (ix) Article 82.2 of the Constitution does not constitute an alternative constitutional provision (of possibility) for the dissolution of the Assembly but constitutes the only possible path; and (x) the modal verb *"may"* used in Article 82.2 of the Constitution does not constitute an alternative to its application, but provides the only (most adequate) constitutional solution possible to enforce the will of the people through parliamentary elections for electing new representatives in constitutional institutions.

338. According to the Prime Minister: (i) The textual content of Article 82.2 constitutes the only constitutional norm applicable to cases following the successful vote of no confidence against the Government; (ii) The Constitution-maker has left no alternative but to have the Assembly dissolved by the President through Article 82.2 of the Constitution; (ii) the verb *"may"* ["may" in English] used in Article 82.2 of the Constitution has an authorizing / permitting provision, so it is a norm that recognizes a President's competence and in fact obliges the President to dissolve the Assembly; (iii) the use of the verb *"may"* in Article 82.2 of the Constitution does not in itself stipulate that the norm has an alternative character, because for a norm to be considered an alternative it must contain in the wording of its text at least one alternative that can be chosen by the body, who has been recognized its discretion in evaluating and choosing between alternatives; (iv) Article 82.2 of the Constitution only provides that the President is authorized/ empowered to dissolve the Assembly following a successful motion of no confidence, but leaves no other alternative at his discretion; and, (v) the interpretation of Article 82.2 of the Constitution must be made with reference to other methods of constitutional interpretation, so that the true meaning of the norm can be deduced from other sources, other than linguistic formulation.

339. According to the President of the Assembly, there are three main reasons why the President's challenged Decree is unconstitutional, as follows: (i) The President has not respected the constitutional principle of separation of powers; (ii) The President, by his Decree, has intended to amend the country's Constitution, a competence which belongs exclusively to the Assembly; and, (iii) the President has incorporated in himself competencies for the interpretation of the Constitution which, according to positive law, belong to the Constitutional Court. The President of the Assembly, in her comments did not present any specific comments regarding Article 82.2 of the Constitution.

340. According to the arguments of the Deputy President of the Assembly: (i) The Decree of the President was issued in violation of Article 82.2 of the Constitution because he should have decreed the dissolution of the Assembly; (ii) after the motion of no confidence against the Government, the Constitution authorizes the President in accordance with his constitutional role, only to dissolve the Assembly and set an election date; (iii) Article 82.2 of the Constitution, which provides for the dissolution of the Assembly, is related only to Article 100.6 of the Constitution, which deals with the motion of no confidence, and Article 84.3, which deals with the competence of the President to call elections; (iv) if the President's interpretation would be correct that

the Assembly is not dissolved after the motion of no confidence against the Government then the norm of Article 82.2 is completely unnecessary and without any function; (v) Article 82.2 of the Constitution exists due to the fact that there is no alternative to establishing a new Government following the successful voting of the motion of no-confidence against the Government, therefore the dissolution of the Assembly and the announcement of elections are envisaged as a constitutional way out; (vi) it is clear that the constitution-maker, through Article 82.2, allows for legitimate government, aiming to restore legitimacy to the Assembly through elections; (vii) the distinction between the Constitution and the Constitutional Framework clearly proves that the constitution-maker transcends the model of constructive motion; and, (viii) the President's action in the circumstances of this case is contrary to the parliamentary practice up to the present in the Republic of Kosovo in similar cases, in 2010 and 2017, when the Government of the country was dismissed by a motion of no confidence.

The essence of the arguments of the opposing party

341. The opposing party, namely the President, in essence, claims that the Constitution does not oblige the President to dissolve the Assembly after the successful motion of no confidence against the Government. In support of the constitutionality of the President's challenged Decree, submissions were submitted by the LDK Parliamentary Group, AKR MPs supported by NISMA MPs, and LDK MP, Arban Abrashi - for the specific reasons mentioned by each interested party in their submissions submitted to the Court and reflected in paragraphs 93-121, 168-191 and 206-216 of the present Judgment.

342. According to the President: (i) Article 82 of the Constitution is divided into two paragraphs, where the first paragraph defines the situations when the Assembly is compulsorily dissolved, while the other paragraph defines the situation when the Assembly *"may"* be dissolved; (ii) when issuing the Decree, the President has taken into account the avoidance of elections and the will of the people's elected representatives; (iii) LVV(Vetëvendosje Movement) has requested the dissolution of the Assembly under Article 82.2 of the Constitution, but the President, taking into account the constitutional competencies, the spirit of the Constitution and the standards of Judgment KO 103/14, had to find a way to form the Government, in order to materialize the will of the political parties through constitutional procedures for the formation of the Government, according to Article 95 of the Constitution; (iv) in all three cases of past legislatures, namely the fourth: 2014 (2014), the fifth (2017) and the sixth (2019), the will of

political parties has clearly been the dissolution of the Assembly and the President has decreed this will of theirs, while in this case, the will of two thirds (2/3) of the people's representatives is to form a new Government and the country not to go to early elections; (v) taking into account the will of the political parties, respectively 2/3 of the deputies not to dissolve the Assembly, the President has represented the will of the people's elected representatives, who have deemed it necessary to establish a new Government; (vi) going to new elections, despite the will of all political parties represented in the Assembly not to go to early elections (except for LVV), would constitute a constitutional violation; (viii) citizens in a country with parliamentary democracy do not elect the Government, but elect the Assembly and the citizens, when voting, expect the Assembly to have a four (4) year mandate; (ix) The President, by issuing the challenged Decree, took into account the new constitutional circumstances, namely the passing of the motion of no-confidence with 2/3 of the votes of the deputies, the expressed will of the deputies for the new Government, and the mandate of the Assembly until the end of 2023; (x) Articles 100.6 and 82.2 of the Constitution must be read in conjunction with Article 95.5 of the Constitution due to the various situations that may arise, as in the case of the current situation; (xi) for the first time in constitutional practice, most of the political parties represented in the Assembly have declared and asked the President not to dissolve the Assembly, but to follow the constitutional procedures for the creation of a new Government; (xii) Article 82.2 of the Constitution is applied by the President if it is seen that there is no will on the part of the parties represented in the Assembly to form the Government; (xiii) the expression *"may"* used in paragraph 2 of Article 82 of the Constitution does not constitute an express obligation for the President, but obliges the President to assess whether the Assembly can be dissolved or not, after a successful motion of no confidence against the Government; and, (xiv) the verb *"may"* used in paragraph 2 of Article 82 of the Constitution indicates that the dissolution of the Assembly is at the discretion of the President, after consultation with the political parties and coalitions represented in the Assembly.

343. According to the LDK Parliamentary Group: (i) The President does not have the right to automatically dissolve the Assembly under Article 82.2 of the Constitution after a successful motion of no confidence, without first having the will of the majority of political entities represented in the Assembly. ; (ii) Article 82.2 cannot be used automatically by the President not only because of the verb "may" but also because the drafters of the Constitution did not define the moment when there is a successful vote of no confidence in the Government as the moment when the country automatically goes to

elections, but they have left the possibility to avoid the elections, to create a parliamentary majority, and consequently to establish a new Government; (iii) the most contradictory claim of the Applicants relates exactly to the interpretation of the word "may" used in paragraph 2 of Article 82 as they emphasize that such provision does not have an alternative character, but has the character of allowing only one possibility, because the expression *"allowing the only possibility"* implies an obligation (which would best be reflected by using the word *"should" or "obliged"* and not in the word *"may"*); (iv) Article 82.1 has been intentionally omitted by the Applicants, even though that paragraph has explicitly defined three moments when the country automatically goes to elections, namely three moments when the Assembly is mandatorily dissolved; and, (v) none of the conditions provided for the necessary dissolution of the Assembly provided for in Article 82.1 of the Constitution have been met in the circumstances of the present case.

344. According to AKR deputies supported by NISMA deputies: (i) The court must take into account the new political and constitutional circumstances and the fact that for the first time in Kosovo we have a situation when at the beginning of the Assembly's term we have a change of the parliamentary majority in disfavor of the Government; (ii) the interpretation of the Applicants that Article 82.2 compels the President to dissolve the Assembly is completely wrong, as the dissolution of the Assembly would be contrary to parliamentary practice and contrary to Article 95.5; (iii) in 2010 the Assembly was dissolved by the President in completely different circumstances and this dissolution was made in the third year of the mandate of the Assembly; whereas, in 2017, the Assembly was dissolved following a motion of no confidence, but the legislature at the time had already entered its fourth year of office, and political parties had not been willing to form a new Government; (iv) the present circumstances are quite different because the Assembly is at the beginning of its term and all parliamentary political parties, the absolute majority of them, have declared themselves in favour of formation of a new Government; (v) The President when deciding to take action for dissolving the Assembly or taking constitutional steps to establish a new Government, has taken into account the will of the qualified parliamentary majority who have declared in favour of a new Government and not for the dissolution of the Assembly under Article 82.2; and, (vi) the President, within the framework of his function as a representative of the unity of the people, must also take into account the will of the parliamentary political parties, especially when it comes to the dissolution of the Assembly in this case.

345. According to the MP Arban Abrashi from LDK: (i) the mandate of the Assembly lasts four (4) years, except when this body, after the creation of the circumstances and the constitutional conditions being met, is dissolved prior to the completion of its regular and complete term; (ii) The Assembly shall be dissolved prior to the end of its full term under the conditions laid down in paragraph 1 of Article 82, in cases where the Assembly becomes a body which cannot fulfill its constitutional legal responsibilities, such as the election of other important bodies such as election of the Government or the President; (iii) according to paragraph 2 of Article 82 the Assembly may be dissolved (optional) even after the successful vote of the no-confidence motion against the Government and here the dissolution of the Assembly is left only as an opportunity for the President; (iv) had the dissolution of the Assembly been mandatory after the motion of no confidence, then the drafters of the Constitution would continue to regulate this situation in Article 82, paragraph 1, precisely by continuing with only one subparagraph 4 of only one paragraph, and not of move to a new paragraph as is the case with paragraph 2 of Article 82 of the Constitution; (v) in other parliamentary practices the motion of no confidence is seen as a possibility for changing the Government and not necessarily going to new elections; (vi) in 2019, the legislature of the Assembly was dissolved as political entities, all without distinction, had declared against the formation of the Government and in favor of new elections; and, (vii) on the basis of the Applicants' claims, it turns out that if through the Decree of the President would have been proposed for Prime Minister a candidate from LVV, then this decree would have not been contrary to Article 82.2 of the Constitution.

RESPONSE OF THE COURT – in relation to Article 82 of the Constitution

General principles related to the dissolution of the Assembly by the President

346. The Constitution of the Republic of Kosovo consists of a unique set of constitutional principles and values on the basis of which the state of the Republic of Kosovo is built and should function. These principles and values embody and reflect the spirit of the Constitution, which is transposed into each of its norms. As such, the Constitution and each of its norms must be interpreted in interdependence with each other and not isolated from each other, and always taking into account its principles and values. No norm of the Constitution can be interpreted separately and isolated from the principles and values proclaimed in the Constitution, including its Preamble. No constitutional norm can be taken out of context and interpreted mechanically and

independently of the rest of the Constitution. This is due to the fact that the Constitution has an internal cohesion according to which each part has a connection with its other parts. This approach is also recommended by the Opinions of the Venice Commission, which will be explained below.

347. For the purposes of the interpretation of paragraph 2 of Article 82 of the Constitution which provides that *"the Assembly may be dissolved by the President of the Republic of Kosovo, following a successful vote of no confidence against the Government"*, it is necessary to first analyze the following two basic issues: (i) the role of the Assembly in the constitutional system of the Republic of Kosovo; and, (ii) the role of the President in the constitutional system of the Republic of Kosovo. With regard this essential analysis, the Court will refer to the general principles set out in the Constitution and reflected in its case law up to the present, by taking into account the relevant circumstances of the present case. Subsequently, in the section "Court's Responses", Article 82 of the Constitution will be interpreted in its entirety, and in particular paragraph 2 of Article 82 of the Constitution.

Assembly in the constitutional system of the Republic of Kosovo

348. The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum or other forms in compliance with this Constitution. (See Article 2 of the Constitution).

349. In particular, the elected representatives of the people are the members of the Assembly elected in free and democratic elections. The exercise of sovereignty through the people's elected representatives is the main and most widespread mode of expression of what *"stems from the people"* and to reflect it in concrete actions and decisions through the system of representative democracy.

350. The Assembly as a legislative institution is elected for a mandate of four (4) years. After the regular mandate of the Assembly, the country automatically goes to elections. So the purpose of a constitution-based legislature is to complete its four (4) year mandate. In new elections, the people vote and elect the new legislature, with the conviction that that legislature will represent them for the next four (4) years. This represents the regular election cycle of the people's representatives in the Assembly. Despite this regular cycle of representative democracy, the mandate of the Assembly may end before the end of the regular four (4) year mandate, only according to the regulation defined by

Article 82 of the Constitution, which specifically defines three (3) mandatory Assembly dissolution situations and, one (1) possible situation of dissolution of the Assembly. Exceptionally, the mandate of the Assembly may be extended beyond the regular four (4) year constitutional mandate, only under the circumstances of the State of Emergency. (See Article 66 of the Constitution).

351. Among the basic values on which the constitutional order of the Republic of Kosovo is based and which are embodied in the Constitution, among others, are *"democracy'* and *"rule of law"* and *"separation of powers"*. (See Article 7 of the Constitution). Democracy in the Republic of Kosovo is based on the constitutional principle of separation of powers and checks and balances among them. (See Article 4 of the Constitution). Moreover, pursuant to Article 4 of the Constitution concerning the form of government and the separation of powers: (i) The Assembly exercises legislative power; (ii) The government is responsible for implementation of laws and state and policies and is subject to parliamentarian control; and (iii) the Judiciary is unique and independent and exercised by courts. The Constitutional Court and the President also have a special place in the separation of powers. The first protects the constitutionality of the country and makes the final interpretation of the Constitution; while the second represents the unity of the people and is a guarantor of the democratic functioning of the institutions of the Republic of Kosovo.

352. In addition to the Constitution and the obligation to exercise legislative power in accordance with the Constitution, the Assembly is not subject to any other authority, while deputies as representatives of the people are not subject to any binding mandate. As one of the main branches of Government, the Assembly has an obligation to respect the independence of other powers as well as other branches have an obligation to respect the independence of the Assembly. This interaction represents the core of the value that the separation of powers embodies as a fundamental principle in a democratic system. Respect for this value is a prerequisite for the implementation of the rule of law in the Republic of Kosovo.

353. All powers without exception, be they part of the classical triangle of separation of powers, or other important part of the structure of the state, have a constitutional obligation to co-operate with each other for the common good and in the best interest of all citizens of the Republic of Kosovo. All these powers have the obligation to perform their public duties in order to implement the values and principles on which the Republic of Kosovo is built to function. In this respect, the loyal cooperation between constitutional / public institutions is a

constitutional obligation and loyalty to the formal and public oath on the occasion of assuming constitutional responsibilities by each holder of the relevant public function.

354. As a legislative institution directly elected by the people, the Assembly has a range of competencies which are specifically defined in the Constitution. Among the main competencies of the Assembly, in terms of the circumstances of the concrete case, is the competence to *"elect the Government"* and to express *"no confidence"* to it.

355. In this regard, in the case law of this Court it is emphasized that "*Democracy, 'voxpopuli' (the voice of the people), requires the election of those who will represent the voice of the people in the legislative body of the state. In a parliamentary democracy, this [Assembly] is the highest governing entity vested with a variety of powers, which at the same time is subject to the principle of separation of powers and checks and balances among them. One of the main responsibilities of parliament is to decide by voting who should be empowered with executive functions. The Government derives from the prevailing political power within parliament and has its roots in the political force that wins elections. That could be an absolute or a relative win."* (see the Judgment KO 103/14, paragraph 4).

356. The Constitution has provided for different ways of granting consent by the Assembly, for certain issues, depending on the type of action or decision required to be (under)taken by the elected representatives of the people. For decisions of high importance, such as the dissolution of the Assembly by the deputies themselves, it is foreseen the voting by two thirds (2/3) of the votes of all the deputies of the Assembly. For the amendment of the Constitution, the voting is envisaged through two thirds (2/3) of the votes of all the deputies of the Assembly, including two thirds (2/3) of all the deputies who hold the guaranteed seats for the representatives of the communities that are not majority in the Republic of Kosovo. For some other actions or decisions, the simple majority of all members of the Assembly is sufficient, such as the decision to grant or remove the confidence of a Government.

357. With regard to the deputies and their mandate, the Court has already stated that according to Article 74 of the Constitution, *"deputies are obliged to exercise their function in best interest of the Republic of Kosovo"*. (See case KO98 / 11, submitting the Government of the Republic of Kosovo, Judgment of 20 September 2011, paragraphs 58 and 59). What the deputies consider to be in the best interest of the Republic of Kosovo in political terms and in terms of public policy, is

entirely in the hands of the deputies of the Assembly. As long as the Constitution is respected, every solution of the elected representatives and at the same time the representatives of the people must be respected. Deputies are not subject to any binding mandate. The mandate of the deputy ends or becomes invalid only in the situations defined in article 70.3 of the Constitution. Among them, as a reason for the end of the mandate of the deputy, is foreseen the end of the mandate of the Assembly. The termination of the mandate of the Member of Parliament due to the dissolution of the Assembly, as a way of terminating the mandate of the Assembly, can only be done in correct application of Article 82 of the Constitution.

President in the constitutional system of the Republic of Kosovo

358. The President, as the head of state, inter alia, represents the unity of the people and is a guarantor of the democratic functioning of the institutions of the Republic of Kosovo. (See Articles 4 and 83 of the Constitution).

359. The President has a range of competencies which are specifically defined in the Constitution. The Court has already stated that, in addition to the powers of the President set out in Article 84 of the Constitution, *"there are a large number of references to the President in the Constitution" and that "power, functions, duties and competencies"* of the President are set out also in other articles of the Constitution, *"4, 18, 60, 66, 69, 79, 80, 82, 82, 93, 94, 95, 104, 109, 113, 114, 118, 126, 127, 129, 131, 136, 139, 144, 150 and 158."* (See, the case KO47 / 10, Applicant *Naim Rrustemi and 31 other members of the Assembly*, Judgment of 28 September 2010, paragraph 52).

360. Among the main competencies of the President, which are related to the circumstances of the present case, is the competence to propose to the Assembly the candidate for Prime Minister according to the procedure set out in Article 95 of the Constitution and the possibility to dissolve the Assembly in case of a motion no-confidence against the Government under Article 82.2 of the Constitution (see Articles 82, 84, 95 of the Constitution). Within the interaction of constitutional institutions in order to implement their responsibilities, the basic principle of interdependent exercise of constitutional competencies should always be taken into account. Therefore, from this point of view, not all the powers of the President defined by the Constitution are competencies that he can exercise as the sole decision-making actor. For the exercise of certain constitutional powers or authorizations, the President also depends on other constitutional institutions, in the manner prescribed by the Constitution.

361. For such interdependent constitutional authorizations, such as the competence of Article 82.2 of the Constitution, the President is required to act in coordination with the Assembly. Thus, in practice the President exercises his constitutional obligation to represent the unity of the people and to help ensure the democratic functioning of the institutions of the Republic of Kosovo.

362. According to the case law of this Court: *"some of the powers of the President touch very clearly upon the political life of the country."* (See Judgment of the Court KO103 / 14, paragraph 62). A concrete example is paragraph 2 of Article 82 of the Constitution. The competence that the Constitution gives to the President by this specific provision is a competence that the President cannot exercise against the will of the Assembly. The Constitution has provided for the inter-institutional cooperation between the President and the Assembly for the purposes of the completion of the mandate of the Assembly or not, as an unblocking mechanism within the competence of the President.

363. Having in mind Article 83 of the Constitution, according to which the President is the head of state and represents the unity of the people and the considerable powers given to the President of the Republic under the Constitution, the Court has also previously stated that *"it is reasonable for the public to assume that their President, who "represents the unity of the people" and "not group interests or political party interests, will represent them all."* (See paragraphs 63 and 94 of Judgment KO103 / 14 and the reference cited therein). Respecting the will of the people's elected representatives, in the circumstances of a situation following the motion of no confidence, is also done by acting according to the expressed will of the people's elected representatives regarding the termination or non-completion of the mandate of the Assembly.

364. In this respect, the Court has already emphasized that every citizen of the Republic *"has the right to be assured of the impartiality, integrity and independence of their President."* Such a thing becomes even more important in situations when "*the President of the Republic exercises political powers like when he chooses between competing candidates from possible coalitions to become Prime Minister."* Equally important is the exercise of the powers of the President, according to which he can dissolve the Assembly, which is composed of the elected representatives of the people for a four (4) year constitutional term. With respect to the formation of the Government, the Court has also pointed out that the President's duty to represent the state and the unity of the people means "the responsibility of the

President to maintain the stability of the country and to find prevailing criteria for the formation of the new government, in order to avoid elections." (See paragraphs 63 and 94 of CO103 / 14 and the reference cited therein).

General principles according to the Venice Commission

365. In the following, the Court will present the content of the six (6) Opinions of the Venice Commission in which are specifically analyzed issues relating to the competencies of a President's to dissolve the Assembly in a democratic parliamentary, presidential or semi-presidential system. Such opinions were given by the Venice Commission on the basis of specific requests of Azerbaijan (1 opinion), Romania (1 opinion), Moldova (3 opinions), Georgia (1 opinion) and Turkey (1 opinion). The Court in the following will present the main points of these Opinions, focusing also on the final recommendations of the Venice Commission regarding the case in question.

(a) Opinion of the Venice Commission no. CDL-AD(2016)029

366. In this Opinion, the Venice Commission analyzed the draft amendments to the Constitution of Azerbaijan. In the relevant part where "*The power of the President to dissolve the Assembly"* was discussed, the Venice Commission had stated the following:

"59. However, this power [of the President to dissolve the Assembly] *should be assessed not in abstracto but in the light of the other powers that the President has within a system. If a very strong President, in a super-presidential regime, has a wide discretion to dissolve the Assembly, such a thing may disturb the balance of power between the two branches. For example, in the period when the Republic of Korea was under an authoritarian regime, the President had the power to dissolve Parliament. However, that power of the President was abolished after the transition to democracy. In the context of Azerbaijan, the extraordinary power of dissolution of parliament adds to other powers accumulated in the hands of an already very powerful President. It weakens Parliament even further"* (See Opinion CDL-AD (2016) 029 of the Venice Commission, of 18 October 2016, for Azerbaijan regarding the Draft-Amendments to the Constitution submitted in the Referendum on 26 September 2016, adopted at the Plenary Session of 14-15 October 2016, Part C. The power of the President to dissolve the Assembly, paragraphs 56-69, in particular paragraph 59).

367. Consequently, in the conclusions of this Opinion, the Venice Commission, *inter alia*, had concluded that: "*The new power of the President to dissolve Parliament makes political dissent in Parliament largely ineffective." In this regard, "the Venice Commission invited the authorities to undertake a constitutional reform which would strengthen and not weaken parliament […]*". (See Opinion CDL-AD (2016) 029, cited above, paragraphs 87-88).

(b) Amicus Curiae Brief of the Venice Commission no. CDL-AD(2011)014

368. In this Opinion of the "*Amicus Curiae Brief*" character, the Venice Commission evaluated and answered three questions about Article 78 of the Constitution of the Republic of Moldova, which concerned the repeated dissolution of the Assembly as a consequence of failure to elect the President. In the relevant part of this Opinion, the Venice Commission stated the following:

"Constitutions generally provide for certain restrictions on dissolutions of Parliament. The aim of these is to prevent political instability and fight abuses linked to repeated dissolutions. The Moldovan Constitution is not an exception to this rule." (See CDL-AD Opinion (2011) 014 of the Venice Commission, of 4 July 2011 for the Republic of Moldova regarding three questions related to Article 78 of the Constitution, adopted in Venice, at the 87th Plenary Session, held on 17-18 June 2011, paragraph 23 and references in that paragraph; see also the other document cited here by the Venice Commission, CDL-AD (2007) 037add4 prepared by the Secretariat of the Venice Commission, respectively the so-called "Note on the Issue of the Dissolution of the Parliament", in which, among other things, are foreseen specific cases in which the Assembly cannot be dissolved.)

(c) Opinion of the Venice Commission no. CDL-AD(2017)005

369. In this Opinion of the Venice Commission evaluated some amendments to the Constitution of the Republic of Turkey were evaluated. In this case, the Venice Commission had emphasized that even in presidential republics, *"the power to dissolve the legislature is quite rare, as it would undermine the principle of the separation of powers as classically understood."* In explanations related to this finding, the Venice Commission had made it clear that in the United States, as a country with a classic presidential system, the President does not have the power to dissolve the legislature [Congress].

370. The Venice Commission further emphasized that with the constitutional amendments in Turkey, the President was given *"the power to dissolve the Parliament, on any grounds whatsoever, is symmetrical to the power of the Assembly to dissolve itself on any grounds but by 3/5 of vote"*; as well as that with these constitutional amendments "*The President is free to decide whether and when to dissolve parliament, which is undoubtedly a means of pressure on the Parliament."*

371. Consequently, in conclusion, the Venice Commission emphasized that amendments to the Constitution by which the President was allowed to dissolve the Assembly raise particular concern in terms of the separation of powers because *"the President would be given the power to dissolve the Assembly on any grounds, which is completely foreign/unknown in democratic parliamentary systems [...]."* (See the Opinion CDL-AD (2017) 005 of the Venice Commission for Turkey regarding the amendments to the Constitution adopted by the Assembly on 21 January 2017 and submitted in the National Referendum on 16 April 2017, of 13 March 2017, adopted in Venice at the 110th Session Plenary, held on 10-11 March 2017, Part e. the Power to dissolve parliament, paragraphs 84-88 and paragraph 127 of the Conclusions of this Opinion, and references cited in this Opinion; see also Opinion of the Venice Commission CDL-AD (2019) 022 on Peru regarding the linking of constitutional amendments to the question of confidence, of 14 October 2019, adopted in Venice at the 120th Plenary Session, on 11-12 October 2019, paragraph 42).

(d) Opinion of the Venice Commission no. CDL-AD(2012)026

372. In this Opinion, the Venice Commission, in the part where the need for inter-institutional cooperation between state public institutions in Romania was emphasized, had specifically stated the following:

"The Commission is of the opinion that the respect for a Constitution cannot be limited to the literal execution of its operational provisions. The very nature of a Constitution is that, in addition to guaranteeing human rights, it provides a framework for the state institutions, sets out their powers and their obligations. The purpose of these provisions is to enable a smooth functioning of the institutions based on their loyal co-operation. The Head of State, Parliament, Government, the Judiciary, all serve the common purpose of furthering the interests of the country as a whole, not the narrow interests of a single institution or the political party having nominated the office holder. Even if an institution is in a situation of power, when it is able to influence other state institutions, it has to do

so with the interest of the State as a whole in mind, including, as a consequence, the interests of the other institutions and those of the parliamentary minority."

373. Finally, the Venice Commission also emphasized that "*the Romanian state institutions should engage in loyal co-operation between themselves and it is pleased about the statements from both sides expressing their intention to respect their obligations" Romanian state institutions should be involved in faithful cooperation with each other and that it is pleased with the statements of both parties expressing their intention to respect their obligations."* (See the Opinion of the Venice Commission CDL-AD (2012) 026 for Romania regarding the compatibility with principles and the rule of law actions taken by the Government and the Parliament with respect to other institutions, of 17 December 2012, paragraphs 87-88).

(e) Opinion of the Venice Commission no. CDL-AD(2012)026 – Moldova 2017

374. In this Opinion, the Venice Commission responded upon the request of the President of the Republic of Moldova for an opinion on the proposal to add some additional powers to the President for the dissolution of the Assembly. The Venice Commission had deemed it inadvisable to increase additional powers for the President for non-discretionary distribution of the Assembly. In the following, the Court will cite exactly all the relevant parts of this Opinion which reflect the disagreement of the Venice Commission on the addition of additional powers for the President regarding the distribution of the Assembly:

"20. In the majority of parliamentary regimes, the Head of State plays a role of arbiter, or pouvoir neutre, detached from party politics. These are not empty words: while no one can prevent the Head of State from having his or her own political views and sympathies, his or her mandate is limited. The main functions of the Head of State within this model are to represent the State in external relations, to participate in the appointment of certain key State officials, to guarantee the functioning of the state institutions, but not to define the actual political direction of the country – this is the role of Parliament and of the Executive. The President is an important element of the political system, but is not partisan. The dissolution powers of the President in a parliamentary regime are defined by the President's neutral position: in times of institutional crisis, the President assumes the important function of dissolving Parliament in order to overcome the stalemate by appealing to the people and to reinstate the smooth functioning of the constitutional machinery.

21. Dissolution of Parliament can be found in virtually all European parliamentary constitutions. The concrete constitutional designs, however, differ in function of who the holder of the dissolution powers is (the head of state, the head of the government, Parliament itself, the people, etc.) and how much discretion is granted to this holder. From the viewpoint of the legislative technique, there are two options: the Constitution may contain either a general dissolution clause (for example, Article 88 of the Constitution of Italy) or a list of specific cases (amounting to a crisis in the functioning of the democratic institutions) in which dissolution is possible in order to prevent a political stalemate: a prolonged absence of a Government, nonadoption of a budget, lasting absence of quorum in Parliament, etc.[...]

23. By contrast, by virtue of new § 2 point (a) of Article 85, the President of the Republic of Moldova would be empowered to dissolve Parliament "following the consultations of parliamentary factions". This provision would thus grant the President, in addition to the existing specific powers of dissolution, a general dissolution power, limited only by the procedural obligation to consult parliamentary factions.

24. The President's proposal thus combines two legislative techniques which are otherwise virtually never used cumulatively, those of the discretionary dissolution power (new § 2-1 point (a)) and the right to dissolve in specific cases (existing Article 85 of the Constitution and proposed subsequent points of new § 2-1, plus new Article 85-1). The provision that grants the President a discretionary dissolution power makes the other grounds listed in the proposal entirely superfluous. It could be even taken to mean that the general power of dissolution is not linked to the times of institutional crisis (which are covered by the specific cases of dissolution) but adds the possibility for the President to dissolve Parliament for purely political reasons, for example if s/he disagrees with a policy choice made by Parliament and wants new elections. Such interpretation of the President's power to dissolve Parliament changes the neutral role of the President and turns him into a political player. This is not compatible with the logic of a parliamentary regime.

25. Even outside the case of combination of general clause and specific cases of dissolution, the Venice Commission is of the view that discretional dissolution powers in the hands of the Head of State may be dangerous in countries lacking an established democratic

tradition and where it has not been part of the traditional legal order (as is the case in several constitutional monarchies such as Liechtenstein, Luxembourg, Monaco or the Netherlands) and where it is not subject to certain restrictions (as is the case in Denmark or Ireland), precisely because it risks being interpreted as a tool of party politics. The Venice Commission has expressed criticism of broad discretionary dissolution powers even in relation to a semi-presidential regime: "as the deputies of the Verkhovna Rada [Assembly in Romania] get their mandate directly from the voters for a certain period of time, there should be compelling reasons for a pre-term termination. The suggested Article 95 (1) [which was similar to the draft article 85 § 2 (a)] would lead to dissolutions also in situations where dissolution could be avoided."

26. Regarding the argument that popular mandate necessarily calls for broader dissolution powers, the Venice Commission notes that the election of the President by popular vote does not require turning the President into a political counter-player of Parliament. It is true that election by popular vote tends to enhance the position of the President, but there are multiple examples of constitutional regimes where a popularly elected President still plays the role of a pouvoir neutre and does not enjoy wide powers, and where the necessary checks and balances are provided by parliamentarism. These include Austria, Ireland or Finland, for example. (Reference to French example in the information note 15 is misdirected: the French president indeed enjoys discretionary dissolution powers, but the French system is semipresidential and not parliamentary.)

27. Even more relevant in the context of the Republic of Moldova are those new parliamentary democracies which have more recently joined the EU and have a directly elected President with limited executive prerogatives16 and some additional ones in moments of a parliamentary crisis, namely Bulgaria, Czech Republic, Lithuania, Poland, Romania, Slovakia and Slovenia. In all the above countries the President's dissolution powers are limited to a number of specific situations and are thus not discretionary but semi-automatic. All above constitutions have a closed list of specific situations for dissolution; these situations relate to the inability of Parliament to form a Government, to a vote of non-confidence in the Government (or nonadoption of a law to which the Government attached confidence or a program of the Government), or to the inability of Parliament to exercise law-making functions (absence of quorum, long adjournments, failure to adopt a budget). See, in particular, the Constitution of Bulgaria, Article 99; the Constitution of the Czech Republic, Article 35 § 1; the Constitution of Lithuania, Article 58; the

Constitution of Poland, Article 98 § 4, Article 155 § 2; the Constitution of Romania, Article 89; the Constitution of Slovakia, Article 102 and Article 106 (the latter concerns the failure to recall the President at the plebiscite – on this see below); the Constitution of Slovenia, Article 111 and 117. This is a constitutional pattern that has been adopted by more and more (first four, and now by seven altogether) of the countries that in the past quarter of a century had [re]established democratic governments, which gives additional grounds to consider it a recommendable practice. In sum, popular mandate alone does not transform a Head of State into a head of the executive, and does not require conferring on him discretionary dissolution powers.

28. In sum, the Venice Commission is of the opinion that adding a broad discretionary power of the President to dissolve Parliament (Article 85, new § 2-1 point (a)) is ill-advised and should be reconsidered. The proposed discretionary power of dissolution threatens to pose Parliament and the President against each other and provoke unnecessary constitutional and political conflicts."

(f) Opinion of the Venice Commission no. CDL-AD(2019)012 - Moldova 2019

375. In another Opinion for the Republic of Moldova of 2019, the Venice Commission had analyzed Article 85.1 of the Constitution of Moldova on the possibility of the President to dissolve the Assembly and consultations prior to dissolution. The said provision contained the verb "***may*** (in Albanian ***mund***)" or in English "***may***" and in this respect the Venice Commission had stated the following

"This provision sets out expressly that the President "may" ("may" in English language) dissolve parliament, not that he shall" do so. […] In any case, the wording of Article 85 (1) implies a high threshold for dissolution of the parliament. Moreover, article 85 (1) also requires that parliamentary factions shall be consulted before dissolution, which clearly indicates that dissolution is a discretionary power for the President.(See the Opinion of the Venice Commission CDL-AD (2019) 012 for the Republic of Moldova regarding the Constitutional situation with particular reference to the President's Possibility to Dissolve the Assembly, of 24 June 2019, adopted in Venice at the 119th Plenary Session, Part B. Consultations prior to dissolution of parliament by the President, paragraphs 37-43).

376. Further, in the same Opinion, the Venice Commission emphasized as follows:

"40. That case however, differing from the present situation, concerned the formation of a new government after a vote of no-confidence. It should also be noted that the Court linked the right of dissolution to the President's task "to help overcome the political crisis and the conflict between the powers and not to perpetuate the crisis for an indefinite period, which would not be in the general interests of citizens, holders of national sovereignty". Moreover, the Court related the right to ensuring the functioning of the constitutional bodies and avoiding obstruction of the activity of one of the state powers. From the 2013 ruling, it is clear that dissolution of the Parliament is a last resort in case repeated attempts to form a government have failed. The Constitutional Court limited the President's obligation to dissolve parliament to the repeated failure to form a government in the investiture phase of government formation, and not in the preceding phase of negotiations as in the present case. This approach is logical: unless more than one formal vote of confidence has been made in the Parliament, there is no way of objectively deciding on whether or not it is impossible to form a government. As for the phase of negotiations preceding the investiture, the Constitutional Court emphasised in para. 73 that Article 85 has the function of a balancing mechanism to avoid or overcome an institutional crisis. This purpose of Article 85 explains why the President's powers to dissolve the Parliament are discretionary as this discretion is intended to prevent deadlock and to prevent institutional crisis by political negotiation.

377. The Venice Commission also emphasized the following:

"41. On the other hand, as concerns the wording of Article 85 § that the President "may" and not "shall" dissolve parliament, the Commission stresses that the distinction between "may" and "shall is well-established in law and is undoubtedly intended to provide the President with leeway to exercise his own judgment and discretion taking into account the circumstances of a particular situation in the interest of the country as a whole. Clearly the dissolution of Parliament, elected in a fair and free election in expression of the will of the people, is not something that should be tackled in an arithmetical way but in line with the spirit and wording of the Constitution which provides the Head of State with the necessary discretion to exercise good and wise judgment. Therefore, in the light of the purpose of Art. 85 of the Constitution, the duty of the President to have consultations with parliamentary factions should be seen as a means to exhaust all the possibilities to form the Government or

unblock the procedure of adopting the laws after the expiration of the 3 months term, before deciding on the dissolution of the Parliament."

378. At the end of the analysis of this Opinion, the Venice Commission emphasized the following:

"42. The right of dissolution is an ultima ratio means to solve a constitutional crisis, caused by the impossibility of forming a government or blockage of legislation. If no other means exists, dissolving the Parliament can even be considered a constitutional obligation of the President. On the other hand, if other means do exist, if, for instance, parties representing a parliamentary majority have come to an agreement of forming a government, no such obligation can exist. Dissolving the Parliament in such a situation and deepening the constitutional crisis or even creating a new crisis might even be considered a violation of the constitutional duties of the President as a pouvoir neutre. As subsequent events have shown, in the present case, the dissolution of the Parliament by the President would have contradicted the ratio of Art. 85(1), such as it was summarised in the Constitutional Court's 2013 ruling."

379. In the conclusion remarks of this Opinion, the Venice Commission concluded, inter alia, that:

"51. The Venice Commission stresses that an essential role of the Constitutional Court is to maintain equal distance from all branches of power and to act as an impartial arbiter in case of collision between them. One of the aims of any Constitution is to maintain the constitutional order and one of the main functions of any Constitutional Court is, by upholding the principles of the Law, to keep the constitutional system functioning. This function of arbitration presupposes by definition the use of economy as well as equity, and requires respect for the solutions reached by democratically legitimate institutions.

54. The dissolution of parliament elected in a fair and free election in expression of the will of the people is a measure of last resort which may not be tackled lightly but only in line with the spirit and wording of the Constitution. The Constitution of the Republic of Moldova provides the Head of State, as any constitution should, with the necessary discretion to exercise his good and wise judgment on the dissolution of parliament following consultation with the parliamentary factions. The conditions for the dissolution of parliament clearly did not exist on 7 or 8 June."

Application of general principles in the circumstances of the present case

380. Initially, the Court recalls Article 82 of the Constitution, the meaning of which, in relation to the President's competence to dissolve the Assembly, will be interpreted below:

Article 82
[Dissolution of the Assembly]

1. The Assembly shall be dissolved in the following case:

(1) If the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister;
(2) If the two thirds (2/3) of all deputies vote in favor of dissolution, the Assembly shall be dissolved by a decree of the President of the Republic of Kosovo;
(3) if the President of the Republic of Kosovo is not elected within sixty (6) days from the date of beginning of the president's election procedure.

2. The Assembly may be dissolved by the President of the Republic of Kosovo following a successful vote of no confidence against the Government.

381. Paragraph 1 of Article 82 of the Constitution presents three specific situations, provided for in points (1), (2) and (3), when the Assembly is compulsorily dissolved. The first situation is when the Assembly fails to elect the Government within sixty (60) days from the day of the appointment of the mandate holder by the President. If such a situation occurs, the Assembly must be dissolved.

382. The second situation is when the elected representatives of the people decide themselves, by two thirds (2/3) of the votes of all deputies, for the Assembly to be dissolved. The Court recalls that the two-thirds (2/3) of votes of all members of the Assembly, except for the request for amendment of the Constitution, which requires also the two-thirds (2/3) of all deputies holding seats guaranteed to community representatives which are not a majority in Kosovo, is the highest threshold required for a successful vote in the Assembly determined by the Constitution, only for decisions of great importance, among other things, equal to the number of deputies required to give consent to the transfer of sovereignty (see Article 20.2 of the Constitution). The number of votes required for the dissolution of the Assembly, by the

elected representatives of the people, reflects the weight of the respective decision. After such a vote, the Assembly must be compulsorily dissolved. The President's decree only formally seals the will of two-thirds (2/3) of the Assembly. (See Article 82.1 (2) of the Constitution).

383. The third situation is when the Assembly fails to elect the President within sixty (60) days from the day of the beginning of the election procedure. If such a situation occurs, the Assembly must be compulsorily dissolved. (See Article 82.1 (3) of the Constitution).

384. The common of the first and third situation, clarified above, is the inability of the Assembly to fulfill its constitutional obligations to form the Government or to elect the President. In this regard, the Constitution stipulates that if the Assembly fails to fulfill the important constitutional obligations to form the Government and elect the President of the Republic – then the Assembly must be dissolved in order that a new Assembly that will be able to perform these important constitutional tasks, after the new and early elections, is created.

385. The second situation outlined above, unlike the first and third situations, represents the authorization that the Constitution gives to the elected people to dissolve the Assembly with their will declared through the vote. The reason or reasons for the dissolution of the Assembly on this basis are entirely in the will of two thirds (2/3) of all deputies of the Assembly, who decide *when* and *why* they will dissolve the Assembly with their vote and consequently *when* and *why* they want to cut their mandate.

386. The final common denominator of all three above-mentioned situations is that all three situations lead to mandatory dissolution of the Assembly and new elections, which would result in a new Assembly and with newly elected members of the people of the Republic.

387. On the other hand, and in contrast, paragraph 2 of Article 82 of the Constitution, clearly and deliberately separated from paragraph 1 of Article 82 of the Constitution, presents the situation when the Assembly may be dissolved by the President of the Republic, but not necessarily. This article provides for the possibility for the President to dissolve the Assembly, but in no way the obligation of the President to take such an action voluntarily and ignoring the declared will of the deputies of the Assembly. In fact, this competence of the President is closely related to the fact whether there is a will of the legislature which has overthrown a Government with a motion of no confidence to

continue with the election of a new Government. If there is a will and if such a will is expressed, the President cannot dissolve the Assembly. Such dissolution of the Assembly, contrary to the declaratively expressed will of the people's representatives, would be an arbitrary interference of the President with the legislative power.

388. A Government voted and legitimized by the governing trust of the Assembly loses the trust of the latter, as a result of the expression of no -confidence through the vote in the Assembly, according to Article 100 of the Constitution. Sixty-one (61) votes of the people's representatives are sufficient for the approval of no confidence in a Government, as much as it is enough to give the confidence of the Assembly to a Government to be considered elected. As in other systems with parliamentary characteristics, in the Republic of Kosovo, as reflected in the Comparative Analysis, the responses of the Forum of the Venice Commission and the reports of the Venice Commission that have examined this issue in different countries (see paragraphs 274-306 and 365-379 of this Judgment), it is the Assembly that gives confidence to a Government and the same one that takes it. The Assembly is also authorized to change its mind, even within the same legislature, through the no-confidence motion mechanism and to elect another Government by terminating the mandate of an existing Government, based on the free mandate of the people's elected representatives. Such a thing, despite the fact that it does not happen often in other parliamentary systems, nor in that of the Republic of Kosovo, is completely within the constitutional norm for such a situation to occur in a parliamentary democracy, where the votes of the people's elected representatives in the Assembly determine the journey and duration of a Government and the confidence that the people's elected representatives have in that Government.

389. The Court notes that the view and allegation that the exercise of the right of the Assembly to vote on the motion of no confidence in a Government, as a will to create a new governing majority, results in the automatic termination of the constitutional mandate of the Assembly itself, contradicts the principles and the spirit of the parliamentary system of government. This would mean that the Assembly, in the event of a vote of no confidence in a Government, effectively dissolves the Assembly itself. If this were the case and if this were the solution provided by the Constitution, paragraph 2 of Article 82 would be meaningless and without any constitutional effect. In this case, if this were the solution provided by the Constitution, item (2) of paragraph 1 of Article 82, according to which deputies can dissolve the Assembly, would not make sense, because despite their will, the President could dissolve the Assembly, after a successful motion of no

confidence. Effectively, the President, after each no-confidence motion, would have the power equal to two-thirds (2/3) of the votes of the people's representatives. Furthermore, the mandatory dissolution of the Assembly by the President after a successful no-confidence motion for which sixty-one (61) votes are sufficient based on paragraph 4 of Article 100 of the Constitution, would reduce the number of necessary votes of the deputies by two thirds (2/3) of all the deputies to dissolve the Assembly, in only half of the deputies of the Assembly, contrary to item (2) of paragraph 1 of Article 82 of the Constitution. Such an allegation and interpretation is ungrounded.

390. The Court emphasizes that in the constitutional system of the Republic of Kosovo, the President has no constitutional competences to dissolve the highest legislative body in the country and, consequently, the power from which the will of the people derives. The President, even after a no-confidence motion, is not endowed with the authority or power to cut the mandate of the Assembly, without the consent of the required majority of parties and coalitions represented in the Assembly and the exhaustion of the opportunity to elect a new government. On the contrary, the President must respect their will to continue the constitutional mandate of the Assembly even after a successful no-confidence motion if the election of a new Government is possible, where the failure of a successful vote based on Article 95 of the Constitution results in a mandatory dissolution of the Assembly according to the procedure set out in paragraph 4 of Article 95 and item 1 of paragraph 1 of Article 82 of the Constitution.

391. As the Opinions of the Venice Commission show, as well as the responses received by the Forum of the Venice Commission (see paragraphs 291-306 and 365-379 of this Judgment), Presidents in parliamentary systems, but neither in the presidential nor semi-presidential ones are endowed with the automatic power to terminate the mandate of a legitimate Assembly elected by the people, under any circumstances, nor after a successful motion of no confidence, without consultation and consent of parties and coalitions represented in the respective Assemblies. In fact, such a power for the President is considered a power that weakens, conditions and puts the Assembly under undesirable pressure. In all cases where such powers for the dissolution of the Assembly have been attempted to be given to the Presidents of various countries through constitutional amendments, the Venice Commission has considered such elections *"not advisable."*

392. The Court recalls that what the Applicants claim is that the Constitution has vested the President with the competence, namely the obligation, to dissolve the Assembly after any successful motion of

no confidence in a Government. Such an obligation, according to the Applicants, the President must fulfill despite the fact that the majority of the deputies of the Assembly have expressed their will to continue the existing legislature and to elect a new Government. Such an obligation, according to the Applicants, the President must perform despite the fact that the current legislature is in its first year, and despite the fact that the regular term of the Assembly ends in 2023.

393. The allegation of the Applicants that in the constitutional system of the Republic of Kosovo, the President has a *"ceremonial"* role and a role of a *"public notary"*, goes against their key allegation that the President in the constitutional system of the Republic of Kosovo has the right to dissolve the Assembly, despite the expressed will of the deputies of the Assembly. A President who has the constitutional power to dissolve the Assembly, despite the will of the Assembly, is a very powerful President. As can be seen from the Comparative Analysis, the contribution of the Venice Commission Forum and the aforementioned Opinions of the Venice Commission, in democratic states with parliamentary systems, the President is not vested with this power. Such characteristics of presidential power are rarely found even in the most classical presidential systems of democratic states. As the Venice Commission itself points out in the above-mentioned Opinion, the Republic of Korea had removed this competence of the President from the Constitution, as the latter passed from the authoritarian regime to democracy.

394. The Republic of Kosovo, as a state with constitutional and parliamentary democracy, has not empowered the President with such competencies for automatic dissolution of the Assembly in case of a motion of no confidence in a Government. On the contrary, the Republic of Kosovo has empowered the Assembly as a exerciser of the sovereignty derived from the people, which has the final say on issues related to the dissolution of the Assembly after a motion of no confidence in the Government. The President may, as a result, exercise the right to dissolve the Assembly after a no-confidence motion against the Government, only on the basis of the will of the parties or coalitions represented in the Assembly and after acting in coordination with their expressed will regarding the purpose of the formation of a new Government or the dissolution of the Assembly and the announcement of elections.

395. According to this Court, it would be in full contradiction with the Constitution if the President himself decides, on the basis of Article 82.2 of the Constitution, to dissolve the Assembly against the will of the Assembly. The Constitution clearly does not provide for such a

competence for the President. Moreover, in the circumstances of the present case, it is two thirds (2/3) of the deputies of the Assembly who have voted the motion of no confidence. The latter do not need the President's help to dissolve the Assembly. Based on item 2 of paragraph 1 of Article 82 of the Constitution, they may dissolve the Assembly themselves.

396. Furthermore, the Court considers that Article 82.2 has a clear constitutional logic. As a kind of competence of an unblocking nature, it is also foreseen in other democratic countries with a parliamentary system. This article is necessary to unblock possible political stalemates and crises, in cases where after a successful motion of no confidence voted by at least sixty-one (61) votes, as much as they are necessary for the successful voting of the no-confidence motion based on paragraph 4 of Article 100 of the Constitution, the Assembly does not have a sufficient majority to vote for a new Government, but also does not have eighty (80) votes, namely two thirds (2/3), as much as it is required for the Assembly to dissolve itself based on item (2) of paragraph 1 of Article 82 of the Constitution. Thus, this article covers the circumstances when the Assembly cannot implement Article 82.1 (2) to be self-dissolved because it does not have two thirds (2/3) of the votes needed for this purpose; but not even sixty-one (61) votes required to form a new Government. This article, on the one hand, presents an additional chance to form the Government within the existing legislature and a chance to avoid elections. On the other hand, this article also presents an opportunity for unblocking in cases when there is neither the will nor the necessary majority to form a new Government by the Assembly, after a motion of no confidence.

397. Another important difference between paragraphs 1 and 2 of Article 82 of the Constitution lies in the choice of words that the drafters of the Constitution have used to indicate the ways and situations of the dissolution of the Assembly. While paragraph 1 of Article 82 begins with the words *"The Assembly shall be dissolved"*; paragraph 2 of Article 82 begins with the words: *"The Assembly may be dissolved"*. The only difference in this respect is the use of the verb "*may*" in paragraph 2 of Article 82. Applicants claim that the use of the verb "*may*" obliges the President to dissolve the Assembly. This choice of words and sentence structure is neither accidental nor insignificant, but for opposing reasons which reflect the claims of the Applicants. Modal verb "*may*", in the present case also, expresses precisely the alternatives, the possible paths and not the only path. The only way becomes so, namely the possibility of dissolving the Assembly and announcing the elections, only when there is no other alternative. The meaning of the verb "*may*" in terms of the discretion of a President,

has also been clearly clarified by the Venice Commission Reports cited above. In this context, there is no dilemma.

398. The verb "*may*" used in paragraph 2 of Article 82 of the Constitution means "*providing*" the possibility for the President to dissolve the Assembly and not the "*obligation*" of the President to dissolve the Assembly after each motion of co-confidence. The President has the right to exercise this "opportunity", but that the same is conditional for the President himself. This means that even the President does not have full and unlimited discretion in how he exercises this conditional constitutional competence. The competence of the President to dissolve the Assembly is directly dependent on the will of the Assembly.

399. Moreover, and importantly, the Venice Commission has already resolved this dilemma. In the Venice Commission Report, cited above (See Opinion of the Venice Commission No. CDL-AD(2019)012 Moldavia 2019), the Venice Commission had precisely analyzed the use of the word "*may*" in the context of the competence for the dissolution of the Assembly. Regarding the use of this word, in the context of the dissolution of the Assembly by the President, he had emphasized that (i) the difference between "*may*" and "*shall*" is well-established in law and undoubtedly aims to give the President a freedom of action to exercise his judgment and discretion, taking into account the circumstances of a particular situation in the interest of the country as a whole; (ii) the dissolution of the Assembly, elected in fair and free elections in the expression of the will of the people, is not something to be treated in an arithmetic way, but in accordance with the spirit and formulation of the Constitution which provides the Head of State with the necessary discretion to exercise good and wise judgment; (iii) the duty of the President to have consultations with parliamentary factions should be seen as a means of exhausting all possibilities of forming the Government, before deciding on the dissolution of Parliament; and (iv) if there are other ways, if, for example, the parties representing a parliamentary majority have agreed to form the Government, no such obligation can exist. The dissolution of the Parliament in such a situation and the deepening of the constitutional crisis or even the creation of a new crisis, can even be considered a violation of the constitutional duties of the President.

400. In support of this finding and only to reflect the purpose of the drafters of the Constitution, the Court also notes the fact that the preparatory documents for drafting the Constitution reflect the purpose of its drafters, so that the successful motion of no confidence does not result in mandatory dissolution of the Assembly. As presented in paragraphs

309-317 of this Judgment, the dissolution of the Assembly in the event of a successful vote of no confidence was part of a single paragraph of Article 80 of the draft Constitution, along with three other cases in which the dissolution of mandatory of the Assembly. "*Questionnaire on Constitutional Issues*", also reflects that the alternatives regarding the dissolution of the Assembly have been discussed especially in the Constitutional Commission, and based on the minutes that are part of the preparatory documents in the then Unity Team, in which the main institutions, the main political forces and the civil society were represented. The draft constitutions included in the preparatory documents also reflect that between 22 December 2007 and 2 February 2008, the already article 82 of the Constitution is divided, into two paragraphs. The first determines the cases in which the Assembly is compulsorily dissolved, and the second, the case where the dissolution of the Assembly by the President is possible in the event of a successful vote of no confidence, as interpreted above, based on the President's consultations with the parties and coalitions represented in the Assembly, it is not possible to elect a new Government.

401. Such a constitutional solution is fully in line with the constitutional solutions of other states, including those referred by the Applicants themselves and the Prime Minister. As reflected in the comparative analysis of other Constitutions and the responses of the Forum of the Venice Commission, reflected in paragraphs 274-290 and 291-306 of this Judgment: (i) no Constitution stipulates the mandatory dissolution of the Assembly in the event of a successful vote of no confidence in a Government; (ii) the Constitutions that determine the constructive motion stipulate that the latter can be submitted and voted only if another candidate for Prime Minister is proposed at the same time, the failure of whose election, then results in the dissolution of the Assembly; while (iii) in cases, namely majority of the analyzed cases, when this condition is not defined, the successful vote of no confidence results in the dismissal/resignation of the respective Prime Minister and the fall of the Government as a whole, and at the beginning of the procedures for the election of the new Government, following the relevant constitutional procedures. Only when all constitutional possibilities for the election of a new Government have been exhausted, the Assembly dissolved and the early elections are announced.

402. Furthermore, the Assembly cannot be limited to maintaining the trust given to a Government until the end of the legislature, because otherwise, it is not allowed to create a new Government within the same legislature, resulting in the termination of the mandate of the

deputies. The mandate of the deputy is not conditioned and is not subject to the mandate of the Government, which he himself elects or takes away the confidence. Such an obligation for the Assembly would be clearly contrary to the Constitution and the principle of non-submission of the mandate of the deputy to any binding mandate. Deputies, as representatives of the people, have the right to change their positions so as to take confidence to one Government and give it to another Government. Such a thing is quite normal in a parliamentary democracy. The opposite would mean conditioning the mandate of the deputy that either to keep a Government that does not enjoy the confidence of the Assembly or the mandate of the Assembly will be cut. This is clearly not the constitutional regulation provided by the Constitution for the institutional relationship between the Assembly and the Government, because only the latter responds to the former and not the other way around. Consequently, such a practice, which would condition the mandate of the Assembly with the mandate of a Government, would be in open contradiction with Articles 2 (1), 4 (4), 65 (8 and 9), 70 (1) and 74.

403. In the end, the Court also notes that, on the one hand, the Applicants claim that after each no-confidence motion, the President has automatically dissolved the Assembly and the country has gone to early elections, while on the other hand, the responding party claims that the circumstances of past dissolutions have been different from the circumstances of the present case as, in essence, the expressed will of the people's elect has never before existed to create a new Government after a successful motion of no-confidence.

404. In this regard, the Court recalls the facts of the dissolution of all previous legislatures since the entry into force of the Constitution. (See paragraphs 221-250 of this Judgment, which in details reflect the parliamentary history of the Assembly of 2007-2020). There are three different types of situations and circumstances of the dissolution of the Assembly that have occurred so far, namely: (i) the situation when the Assembly is self-dissolved with two thirds (2/3) of the votes of all deputies of the Assembly (see the fourth and sixth legislatures) and the President has only formally decreed this self-dissolution of the Assembly based on Article 82.1.2 of the Constitution; (ii) the situations when the Assembly requested to be dissolved by the President after a no-confidence motion in the Government voted in the third year of the relevant legislature, due to the fact that all political parties were interested in early elections (see the third and fifth legislatures) ; and (iii) the current situation of the seventh legislature, when the Assembly requested the President to continue the procedures for the creation of a new Government after the successful motion of no

confidence in the Government, with the reasoning and explicit request that there is a clear political will not to cut the mandate of this legislature and to avoid early elections. In fact, the motion of no confidence itself voted in the Assembly on 25 March 2020, by two-thirds (2/3) of all deputies of the Assembly, in its content, among other things, explicitly shows the purpose of the Assembly to create a new Government.

405. More specifically, the Court notes that the previous legislature of the Assembly, the sixth one of 2017-2019, was not dissolved by the President under Article 82.2 of the Constitution; however, it was dissolved by the Assembly itself by two thirds (2/3) of the votes of all deputies of the Assembly, in accordance with Article 82.1 (2) of the Constitution. The Decree of the President had only confirmed the self-dissolution of the Assembly, and in that respect the President had no discretion other than to seal the will of the people's elected representatives and to announce early parliamentary elections. Therefore, the Court finds that the sixth legislature and the circumstances which have led to its dissolution have nothing in common with the circumstances of the present case. The same is the case with the fourth legislature, which was self-dissolved based on item (2) of paragraph 1 of Article 82 of the Constitution, by two-thirds (2/3) of the votes of all deputies and the President had only decreed this dissolution of the Assembly based on the same provision.

406. Furthermore, the Court notes that the common denominator of the other two legislatures, namely the third (2008 - 2010) and the fifth (2015 - 2017), is that the Assembly voted on the respective no-confidence motion about three years after the relevant parliamentary elections, and specifically requested the President to dissolve these legislatures and announce early elections. These legislatures ended after the motion of no confidence in the Government, and in neither case there was a will to create a new Government, nor was there any disagreement over what the President should do in those circumstances. Based on the will of the parties and coalitions represented in the Assembly, the Presidents had dissolved the legislatures in question using the opportunity provided by Article 82.2 of the Constitution. Consequently, the Court finds that the facts and circumstances of the dissolution of the third, fourth and fifth legislatures are not the same as the circumstances of the present case.

407. The circumstances of the current, seventh legislature, which began in 2019, are different from all of the abovementioned situations. The difference of the present circumstances is that, for the first time, a motion of no confidence: (i) less than two months after the vote of the

respective Government; (ii) it was voted with the votes of two thirds (2/3) of all deputies; and (iii) most of the political parties and coalitions represented in the Assembly, namely the majority of the people's elected representatives, have declared for the creation of a new Government after expressing no confidence in the Government in the Assembly. As explained above, the current legislature, based on item (2) of paragraph 1 of Article 82 of the Constitution, could self-dissolve by two-thirds (2/3) of the votes cast in the no-confidence motion. Such a will clearly does not exist. Therefore, the President in such circumstances cannot dissolve the Assembly, against the will of the people's representatives. This, as explained above, would be contrary to the Constitution.

408. The Court recalls that the last Government in which the Assembly expressed its no-confidence was established on 3 February 2020. The Assembly's confidence in the Government lasted until 25 March 2020, while the Assembly itself continued to have a constitutional mandate until the end of 2023. From the practice so far, no Government fell by two-thirds (2/3) of the votes of all deputies of the Assembly and, never before has it been explicitly requested by the institution of the President to initiate procedures for the creation of a new Government. The fact that such a thing has not happened so far does not make this request of the Assembly unconstitutional. On the contrary, such a request, as long as it is in the will of the Assembly and in the will of the majority of the people's elected representatives, is a legitimate request based on the Constitution, which the President is obliged to respect in terms of implementing his discretion under Article. 82.2 of the Constitution.

409. The Court finds that paragraph 1 of Article 82 of the Constitution presents the conditions and circumstances when the Assembly is mandatorily dissolved. The Court also finds that paragraph 2 of Article 82 of the Constitution presents the condition and circumstance when the President has the opportunity, but is not obliged to dissolve the Assembly. This opportunity cannot be exercised independently and contrary to the will of the Assembly. Practically, a typical situation of the possible exercise of this discretionary authorization by the President, would find its expression in a situation conditioned by two factors: (i) when a new majority needed to form a government cannot be formed after the vote of no confidence; and, (ii) when no political consensus can be reached within the parties represented in the Assembly to dissolve the Assembly on the basis of Article 82.1 (2). In these circumstances, the dissolution of the Assembly remains the only possibility to overcome the constitutional crisis, therefore, the President, in order to unblock a parliamentary crisis, where the

Assembly would not be able to exercise its constitutional functions, may exercise its discretion laid down in Article 82.2 of the Constitution, always in consultation and based on the consent of the required majority of parties and coalitions represented in the Assembly.

410. Therefore, the Court concludes that the challenged Decree of the President [No. 24/2020 of 30 April 2020] is in compliance with Article 82.2 of the Constitution.

IV. REGARDING ARTICLES 95 [ELECTION OF THE GOVERNMENT] AND 100 [MOTION OF NO CONFIDENCE] OF THE CONSTITUTION

411. The Court recalls that the constitutional issue regarding Articles 95 and 100 of the Constitution relates to the final interpretation of whether after a successful vote of no confidence, as defined in Article 100 of the Constitution and in the absence of the will of a sufficient majority of political parties and coalitions represented in the Assembly for the dissolution of the Assembly after this motion, preventing the President from dissolving the Assembly, as established in paragraph 2 of Article 82 of the Constitution, Article 95 of the Constitution regarding the election of the new Government may be activated.

412. For the purposes of handling this case, and as explained above, the Court will present: the following (1) The essence of the Applicants' allegations and the supporting comments accepted by the interested parties (see paragraphs 62-92, 122-167 and 192-205 of this Judgment for a detailed reflection of these claims and supporting comments); (2) The essence of the arguments of the responding party and other interested parties that have supported the responding party (see paragraphs 93-121, 168-191 and 206-216 of this Judgment for a detailed reflection of the objections and comments in favor of such objection); and (3) the Court's response to matters relating to these allegations.

The essence of Applicants' allegations

413. The Applicants, namely thirty (30) deputies, in essence, allege that the Constitution obliges the President to dissolve the Assembly after a successful motion of no confidence in the Government, and that the latter has no competence to activate Article 95 of the Constitution. after the successful vote of a no-confidence motion, because between Article 100 and Article 95 of the Constitution, the "*connecting bridge*" is missing, namely the Constitution does not explicitly stipulate that

after the successful vote of a no-confidence motion, the new Government may be elected through the procedures set out in Article 95 of the Constitution, thus leaving as the only option the dissolution of the Assembly under the procedure laid down in paragraph 2 of Article 82 of the Constitution.

414. According to the Applicants: (i) the activation of Article 95 of the Constitution, in particular its paragraph 4, by Decree of the President, is unconstitutional due to the fact that the procedure to be followed after the vote of no confidence in the Government is not defined by constitutional norm in expressed form, and that consequently, "*lack of this connecting bridge*" between Article 95 and then Article 95.4 through paragraph 4 of Article 84 of the Constitution, after the application of Article 100, makes the decree of the President unconstitutional. In support of the argument that the Constitution is characterized by a "*vacuum*" in this respect, the Applicants refer to a number of constitutions, including the Constitutional Framework, and claim that in the absence of a specific provision in the Constitution regarding the procedure to be followed after a motion of no confidence, the only solutions are elections after the dissolution of the Assembly based on paragraph 2 of Article 82 of the Constitution; (ii) paragraph 6 of Article 100 may not activate paragraph 5 of Article 95 of the Constitution, because "*The Prime Minister has not resigned*", and that these two provisions produce different constitutional situations, namely the first defines the situation in which one Government is dismissed through a no-confidence motion, while the second, in addition to resignation, referring to "*other reasons*" due to which "*his/her post becomes vacant*," implies "*death, or permanent inability to exercise the function of Prime Minister*" and not "*the no-confidence motion*"; and (iii) that the President did not have the right to appoint a candidate for Prime Minister for the formation of the Government based on paragraph 4 of Article 95 of the Constitution, because paragraph 1 and 2 of the same article were not respected, namely the mandate was not given "*to the political party or coalition that has won the required majority in the Assembly to form the Government*", despite the fact that the latter has not rejected this mandate. (Specific allegations of the Applicant regarding "*lack of constitutional deadline*" for obtaining the mandate for Prime Minister and "*lack of rejection*" by the latter in the circumstances of the present case, will be elaborated in detail in the next section of this Judgment).

415. The same allegations are made by the Prime Minister, who through the comments submitted to the Court, also emphasizes the fact that: (i) the Constitution has deliberately changed the system of motion of confidence provided by the Constitutional Framework, which

stipulated that "*The Assembly may express its lack of confidence in the Government only if, by a majority of its members, it elects simultaneously a new Prime Minister together with a list of Ministers proposed by him*", by not determining any other procedure after the successful voting of the no-confidence motion, consequently providing only "*destructive motion of no confidence*", unlike "*constructive motion of no confidence*", and in the event of which, according to the allegation, the Assembly is not dissolved, but continues to function until the end of the term of office provided for in the Constitution. In this context, the Prime Minister refers to a number of Constitutions, which are included in the Comparative Analysis of this Judgment (see paragraphs 274-290 of the Judgment) and have been applied during the constitutional review of the challenged Decree; and (ii) the President, based on the Constitution and the Judgment of the Court in case KO103/14, is obliged to consult "*only the political party or coalition that is the relative or absolute winner of the elections, not the political parties or other coalitions*", and that the latter, should wait "*until the candidate's name is sent*" by the political party or coalition that has won the required majority in the Assembly to form the Government, and that "*there is no set deadline for proposing the name of the candidate*". The LVV deputy and Deputy President of the Assembly, Mrs. Arbërie Nagavci also supports this position, emphasizing, among other things, that the Constitution does not explicitly provides alternative action to the President of the Republic after the successful vote of no confidence except the dissolution of the Assembly, as defined in paragraph 2 of Article 82 of the Constitution. The President of the Assembly, despite the fact that she submitted comments to the Court in support of the allegations of unconstitutionality of the challenged Decree, in the content of the latter, did not present arguments related to the issue under consideration in this part of the Judgment.

The essence of the arguments of the responding party

416. The responding party, the President, in essence, alleges that the Constitution does not oblige the President to dissolve the Assembly after a successful motion of no confidence in the Government, and that such competence is discretionary and is exercised in consultation with political parties or coalitions represented in the Assembly. If the latter, in the required majority of them, do not agree with the dissolution of the Assembly, the President is obliged to activate Article 95 of the Constitution regarding the initiation of the procedure for the election of the new Government. Arguments in favor of the constitutionality of the challenged Decree of the President have also been submitted by the LDK Parliamentary Group, AKR deputies supported by NISMA

deputies, and LDK deputy, Mr. Arban Abrashi, for the specific reasons mentioned by each interested party in their submissions submitted to the Court and which are reflected in detail in paragraphs 93-121, 168-191 and 206-216 of this Judgment.

417. According to the President: (i) paragraph 6 of Article 100, paragraph 2 of Article 82 and paragraph 5 of Article 95 of the Constitution, must be read together; (ii) Article 95 of the Constitution defines the manner of electing the Government as after the "*elections*" also "*following the successful vote of the no-confidence motion in the Government*"; (iii) the reference regarding "*the resignation of the Prime Minister*" in paragraph 5 of Article 95 of the Constitution and that with regard to the consideration of "*the resigned Government*" in paragraph 6 of Article 100 of the Constitution, are interconnected because in both cases "*the Government falls*". In this context, the President argues that the Prime Minister and the Government are interconnected and that based on the Constitution, the post of Prime Minister cannot be considered separate from the Government, because based on Article 92 of the Constitution "*The Government consists of the Prime Minister, deputy prime minister(s) and ministers*". The President also challenges the references of the Applicants to the provisions of other Constitutions, referring to a number of other Constitutions and in which, similarly as in the Republic of Kosovo, the relevant constitutions do not explicitly define the steps to be taken after the successful vote of a no-confidence motion, including the Constitution of North Macedonia, Montenegro and Austria.

418. In the same line of argument are the LDK Parliamentary Group and its deputy, Mr. Arban Abrashi. The former, contrary to the arguments of the Applicants and the caretaker Prime Minister, allege that: (i) there is "*substantial and functional*" connection between paragraph 6 of Article 100, paragraph 2 of Article 82 and paragraphs 4 and 5 of Article 95 of the Constitution; (ii) the situations set out in paragraph 6 of Article 100 and paragraph 5 of Article 95 of the Constitution, in which "*the Government falls*", as a result of the resignation of the Prime Minister or even the successful voting of the no-confidence motion, have the same effect, namely the fall of the Government, and that taking into account paragraph 2 of Article 82 of the Constitution, on the basis of which the President "*may*", but is not obliged to dissolve the Assembly, enables the latter, namely the President to activate Article 95 of the Constitution, starting the procedures for the election of the new Government. Whereas, the second, namely the deputy Abrashi, regarding the Applicants' allegation pertaining to "*lack of connecting provisions*", also refers to paragraph 5 of Article 95 of the Constitution emphasizing that "*the resignation of the Prime*

Minister and the resignation of the Government are compatible", and that the situation set out in paragraph 6 of Article 100 of the Constitution is included in paragraph 5 of Article 95 thereof, and that in both cases "*President immediately conducts the procedures for the election of the new Government*". AKR deputies, supported by the Social Democratic NISMA, also emphasize the connection between paragraph 6 of Article 100 and paragraph 5 of Article 95 of the Constitution.

RESPONSE OF THE COURT – with respect to Articles 95 and 100 of the Constitution

General constitutional principles regarding the election of the Government and the Motion of no confidence/vote of confidence

419. In the context of the essence of the allegations and objections regarding the constitutionality of the challenged Decree and summarized above, and recalling that the Court has already found that the successful vote of no confidence motion, according to the procedure set out in Article 100 of the Constitution does not oblige but enables the President of the Republic to dissolve the Assembly based on paragraph 2 of Article 82 of the Constitution, this possibility conditioned by the will of the people's representatives, namely the possibility/impossibility of the necessary majority of parties or coalitions represented in the Assembly to form a new Government.

420. More precisely, the Court has already clarified that even after the successful vote of a no-confidence motion in the Assembly, if the required majority of political parties and coalitions represented in the Assembly have the will and the majority necessary to attempt the formation of a new Government, the President may not dissolve the Assembly pursuant to paragraph 2 of Article 82 of the Constitution, and is obliged to initiate proceedings for the formation of a new Government based on the provisions of Article 95 of the Constitution. Such a position is fully compatible with the Comparative Analysis, the Opinions cited by the Venice Commission and the contribution submitted to the Court by the members of the Forum of the Venice Commission.

421. The Court also emphasizes the fact that (i) based on Article 66 of the Constitution, the Assembly is elected for a four-year term, a term beginning on the day of the constitutive session, held within thirty (30) days from the day of the official announcement of the election results;

and (ii) this mandate can be shortened only in case of mandatory dissolution of the Assembly in the cases defined in paragraph 1 of Article 82 of the Constitution and the possibility of dissolution of the Assembly by the President, if based on the will of the parties and coalitions represented in the Assembly, the formation of a new Government is not possible, as established in paragraph 2 of Article 82 of the Constitution. Consequently, the competence of the President, defined through paragraph 3 of Article 84 of the Constitution, regarding the announcement of elections for the Assembly of Kosovo, can be exercised only if the abovementioned requirements are met, namely the regular completion of the mandate of the Assembly, and the announcement of regular elections, as established in paragraph 2 of Article 66 of the Constitution, or even the announcement of early elections, by fair application of the provisions of Article 82 of the Constitution regarding the dissolution of the Assembly. Consequently, it is not disputed that in the event of a successful vote of no confidence and the respective consequence of the resignation of the Government, as defined in paragraph 6 of Article 100 of the Constitution, and the impossibility of dissolving the Assembly based on paragraph 2 of Article 82 of the Constitution, the procedures for the formation of the new Government, as established in Article 95 of the Constitution, begin.

422. In light of this finding, the following Court will further clarify: (i) the interconnection of Article 100 with Article 95 of the Constitution; and then, (ii) the procedure to be followed for the formation of a new Government after a successful vote of no confidence motion in a Government in the Assembly of the Republic.

423. The Court initially emphasizes that these two articles, Articles 95 and 100 of the Constitution, implement one of the most essential tasks of the Assembly of the Republic, namely that of exercising parliamentary control over the Government, as established in paragraph 4 of Article 4 of the Constitution, through exercise of the competence defined in paragraph 8 of Article 65 of the Constitution, based on which, the Assembly elects but also expresses no confidence in the Government.

424. The election and expression of no confidence by the legislative power against the holder of executive power is one of the essential premises of the separation and balance of powers, as defined in Article 4 of the Constitution and among the fundamental values of the Republic of Kosovo, as established in Article 7 of Constitution. Consequently, pursuant to paragraph 8 of Article 65 of the Constitution, Articles 95 and 100 of the Constitution must be read together, especially given the fact that it has already been found that paragraph 2 of Article 82 of the

Constitution does not necessarily result in the dissolution of the Assembly, and that a successful vote of no confidence motion before it results in the dissolution of the Assembly enables the election of a new Government.

425. In order for the Government itself to have the opportunity to ensure that beyond its election, as established in Article 95 of the Constitution, to maintain and confirm the confidence of the Assembly in it, the Constitution has enabled a Prime Minister to seek the vote of confidence of the Government in the Assembly, based on paragraph 2 of Article 100 of the Constitution. On the other hand, it also authorized one third (1/3) of the deputies of the Assembly to challenge this confidence, proceeding in the Assembly with a no-confidence motion against the Government, as defined in paragraph 1 of Article 100 of the Constitution. At the same time, it has set the necessary guarantees for the Government, stating that a no-confidence motion is considered to have been accepted only if a majority of all deputies of the Assembly have voted for it, while on the contrary another no-confidence motion cannot to be re-submitted over the next ninety (90) days.

426. The Court recalls that the Assembly, as an institution directly elected by the people, as provided by Article 62 of the Constitution, exercises the sovereignty of the Republic of Kosovo, which derives from the people, as established in Article 2 of the Constitution. The democratic legitimacy of a Government elected by an Assembly which is the only institution of the Republic directly elected by the people stems from the confidence that the representatives of the people vest on the occasion of its election. A Government elected by the Assembly does not continue to have the same legitimacy, from the moment when the people's representatives take their confidence by voting for a successful motion of no confidence. The Government must always have at least the confidence of the necessary majority in the Assembly. This confidence ceases at the moment when the majority of all deputies of the Assembly of Kosovo have voted against it, namely and based on paragraph 4 of Article 100 of the Constitution, at least sixty-one (61) deputies. With the approval of the no-confidence motion against the Government, the latter loses the confidence of the people's representatives, and consequently the constitutional authority to exercise the relevant powers. Therefore, the Constitution stipulates that the latter is the resigned Government, because it loses the governing mandate, just as, without exception, the same principle is determined by all the Constitutions analyzed in the Comparative Analysis and in all the states that have contributed through the Forum of the Venice Commission.

427. The consequence of a resigned Government as a result of the successful vote of no confidence motion based on paragraph 6 of Article 100 of the Constitution and the impossibility of dissolving the Assembly based on paragraph 2 of Article 82 of the Constitution, activates Article 95 of the Constitution regarding the election of the Government.

428. Article 95 of the Constitution is organized in 6 paragraphs, which establish the manner of electing the Government within an election cycle, taking into account that it also determines the manner of electing a Government after the elections but also after the fall of a Government. More precisely, its first paragraph stipulates that the President proposes to the Assembly the candidate for Prime Minister, in consultation with the political party or coalition that has won the necessary majority in the Assembly to form the Government. Its second and third paragraphs stipulate that this candidate, no later than fifteen (15) days after the appointment, submits the composition of the Government to the Assembly of Kosovo and requests the approval of the Assembly and that the Government is considered elected if it receives a majority of the votes of all deputies of the Assembly of Kosovo, namely the vote of sixty one (61) deputies. Its fourth paragraph defines two additional elements, (i) the term of ten (10) days, within which the President appoints the other candidate for Prime Minister, according to the same procedure, if the proposed composition of the Government according to paragraph 1 of Article 95 of the Constitution does not receive the required majority of votes; and (ii) the obligation of the President to announce the elections, if the Government is not elected for the second time, which must be held no later than forty (40) days from the day of their announcement. The fifth paragraph sets out the procedure for the nomination of a new candidate for Prime Minister, in consultation with political parties or the coalition that has won the majority in the Assembly, if the Government falls, as a result of the resignation of the Prime Minister or if "*for other reasons, his/her post remains vacant*". And finally, its paragraph 6 stipulates that the members of the Government after the election, take the oath before the Assembly, which text is regulated by law.

429. The Court has interpreted paragraph 14 of Article 84 of the Constitution in conjunction with paragraphs 1 and 4 of Article 95 of the Constitution in Judgment KO103/14. In this Judgment, the Court dealt with three aspects related to the above-mentioned articles (i) the function and role of the President of the Republic (see paragraphs 59 to 65 of this Judgment); (ii) the interpretation of paragraph 14 of Article 84 of the Constitution in conjunction with paragraphs 1, 2 and

3 of Article 95 of the Constitution (see paragraphs 66 to 88 of this Judgment); and (iii) the interpretation of paragraph 4 of Article 95 of the Constitution (see paragraphs 89 to 95 of this Judgment).

430. In this case, the Court decided that: (i) Articles 84 (14) and 95 of the Constitution are in compatible with each other; (ii) the use of the terms "*political party or coalition*" when referred to in conjunction with Article 84 (14) and Article 95, paragraphs 1 and 4 of the Constitution, means the political party or coalition registered under the Law on General Elections, participates as an electoral entity, is included in the ballot paper, passes the threshold and, consequently, wins seats in the Assembly; (iii) the party or coalition that has won the majority in the Assembly, as established in Article 95, paragraph 1, of the Constitution, means the party or coalition that has the majority of seats in the Assembly, whether absolute or relative; (iv) the President of the Republic, pursuant to Article 95, paragraph 1, of the Constitution, proposes to the Assembly the candidate for Prime Minister nominated by the political party or by the coalition that has the largest number of seats in the Assembly; (v) the President of the Republic has no discretion to refuse the appointment of the proposed candidate for Prime Minister; (vi) in case the candidate nominated for Prime Minister does not receive the necessary votes, the President of the Republic, at his/her discretion, in accordance with Article 95, paragraph 4, of the Constitution, appoints the other candidate for Prime Minister, after consulting with the parties or the coalitions (registered in accordance with the Law on General Elections) that have met the abovementioned criteria, thus, with a party or coalition that is registered as an electoral entity in accordance with the Law on General Elections, has its name on the ballot paper, participated in the elections and passed the threshold; and (vii) it is not excluded that the President of the Republic decides to give the party or the first coalition, in accordance with Article 95, paragraph 1, of the Constitution, the possibility to propose the other candidate for Prime Minister (see the Enacting Clause of the Judgment KO103/14).

431. More precisely, and insofar as it is relevant to the circumstances of the present case, this Judgment on the interpretation of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 1 of Article 95 of the Constitution, stipulated that: (i) the President proposes to the Assembly the candidate for Prime Minister, in consultation with the political party or coalition that has won the necessary majority in the Assembly to form the Government, namely the relative majority based on the election result and the largest number of seats in the Assembly, and that if the same has "*necessary*" votes or not for the formation of the Government, is determined by the

vote in the Assembly (see paragraphs 81 to 86 of this Judgment); (ii) the President of the Republic has no discretion in approving or disapproving the nomination of the candidate for Prime Minister by the party or the coalition, but must ensure his/her appointment (see paragraph 88 of this Judgment); and (iii) the possibility of the party or coalition in question to refuse to accept the mandate is not excluded (see paragraph 87 of this Judgment).

432. Whereas, in the interpretation of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution, it was determined that: (i) it is at the discretion of the President of the Republic, that after consultations with parties and coalitions, to decide that what party or coalition will be given the mandate to propose the next candidate for Prime Minister, and that the latter, should assess which is more likely for a political party or coalition to propose the candidate for Prime Minister, who will receive the necessary votes in the Assembly for the formation of the new Government (see paragraphs 90 and 92 of this Judgment); and (ii) that it is the responsibility of the President to maintain the stability of the country and to find prevailing criteria for the formation of the new government, in order to avoid elections (see paragraph 94 of this Judgment).

433. The Court reiterates that the principles established in Judgment KO103/14 are applicable and will not engage in further discussion of the paragraphs of Article 95 of the Constitution, which have already been interpreted through the abovementioned Judgment. Having said that, this Judgment has not interpreted the manner of election of a Government: (i) based on paragraph 5 of Article 95 of the Constitution; and (ii) in accordance with paragraph 6 of Article 100 of the Constitution, in the event and after the successful voting of a no-confidence motion. However, the principles set out in Judgment KO103/14 are also applicable to the application of these paragraphs and procedures to be followed for the establishment of a new Government.

434. In this context, the Court initially notes that in order to activate paragraph 5 of Article 95, the Prime Minister: (i) must have resigned; or, (ii) "*for other reasons, his/her post remains vacant*". This article refers to the Prime Minister as an individual and his/her position, and for whatever other reasons, on the basis of which, this post remains vacant. These reasons may include illness, death, inability to perform the duty, or other reasons which are not expressly defined in the Constitution. Having said that, based on this paragraph, the effect of the resignation of the Prime Minister or the remainder of his/her free

post vacant also includes the effect of "*the fall of the Government*". The same effect follows if the no-confidence motion is successfully voted for "*the Government as a whole*", after which "*the Government is considered resigned*", as established in paragraph 6 of Article 100 of the Constitution.

435. More precisely, the legal effect of the resignation of the Prime Minister is the fall of the Government, and consequently, the resigned Government. The legal effect of a successful vote of no confidence in "*the Government as a whole*" in the Assembly, the Government is also the resigned Government. This finding is further based on (i) Article 92 of the Constitution, according to which the Government of Kosovo consists of the Prime Minister, Deputy Prime Ministers and Ministers, while the latter, namely the Government exercises executive power in accordance with the Constitution and law; and in (ii) Article 94 of the Constitution, according to which the Prime Minister represents and leads the Government. Therefore, the legal consequences for "*the Government as a whole*" are the same as in the circumstances of paragraph 5 of Article 95 of the Constitution, when the Prime Minister has resigned or when for other reason his/her position has remained vacant, as well as in the circumstances of paragraph 6 of Article 100 of the Constitution when "*the motion of no confidence in the Government as a whole*" was voted. The Court notes that the reference to "*the motion of no confidence in the Government as a whole*", implies that the Constitution also allows for a no-confidence vote for only one individual member of the governing Cabinet, however, given that such a case is not before the Court, the latter will not analyze the constitutional possibilities and legal effects of a successful vote of no confidence which does not include "*the Government as a whole*".

436. The finding that the legal effects of the resignation of the Prime Minister and the successful vote of no confidence in the "Government as a whole" are the same, namely the resigned Government, is also supported by the Comparative Analysis reflected in paragraphs 274-290 of this Judgment and from responses of all members of the Venice Commission Forum. In all these cases, emphasis is placed on the fact that: (i) if a no-confidence vote is taken against the Prime Minister or the whole Government, the Prime Minister and the Government will resign; (ii) the mandate of the Government ceases when the Prime Minister resigns or on the occasion of the loss of confidence by the Assembly; and (iii) that except in cases which have specifically provided for a "*constructive motion*" in their Constitutions, on the basis of which the successful vote of no confidence automatically results in the election of a new Prime Minister, in all other cases, as a result of the resignation of the Prime Minister or the successful vote of

no confidence, the respective article is activated regarding the election of the new Government, in the manner prescribed by the relevant Constitutions.

437. Similarly, the Constitution of Kosovo, in case of resignation of a Government as a result of: (i) resignation of the Prime Minister; (ii) the remaining of this post vacant "*for other reasons*", or (iii) successful vote of no confidence in it, activates paragraph 5 of Article 95 of the Constitution, and which, within the same election cycle, enables the election of a new Government. Based on this article, the new candidate, to form the Government, is mandated by the President, "*in consultation with political parties or the coalition that has won the majority in the Assembly*".

438. The application of this provision is directly related to paragraphs 2 and 3 of Article 95 of the Constitution because: (i) the President in accordance with paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of the Constitution, as well as pursuant to paragraph 1 of Article 95 of the Constitution, is obliged to appoint the candidate for Prime Minister only in consultation with "*the political party or coalition that has won the majority in the Assembly*", consequently the party or coalition that has won the majority in the Assembly has the first right to propose a candidate for Prime Minister both after the elections and after the resignation of the Government [Note: The Court notes the difference between the singular and the plural of the word political party in paragraph 1 and 5 of Article 95 of the Constitution. Having said that, while paragraph 5 of Article 95 refers to the party in the plural, it also refers to the coalition in the singular, moreover that the reference to "*has won*", is in singular. Paragraph 5 of Article 95 of the Constitution in Serbian is also in the singular. Therefore, the Court finds that paragraphs 1 and 5 of Article 95 of the Constitution have the same meaning as "*the political party or coalition that has won the required majority in the Assembly to form the Government*"]; and (ii) the implementation of the procedure after the mandate of the candidate for Prime Minister as a result of the situation defined in paragraph 5 or 1 of Article 95 of the Constitution, is conditional, namely it is applied only in conjunction with paragraphs 2 and 3 of Article 95 of the Constitution, according to which this candidate is obliged, no later than fifteen (15) days after the appointment, to submit the composition of the Government to the Assembly of Kosovo and to request the approval of the Assembly and that the proposed Government is considered elected if it receives a majority of votes of all deputies of the Assembly of Kosovo, namely of sixty-one (61) deputies, as established in paragraph 3 of Article 95 of the Constitution.

439. The Court also notes that in implementing this procedure, and as interpreted in the Judgment of the Court KO103/14, the President has no discretion in selecting the name of the candidate for Prime Minister, but is obliged to mandate the candidate for Prime Minister who has been proposed by "*the political party or coalition that has won the required majority in the Assembly to form the Government*" (see paragraph 68 of the Judgment in case KO103/14).

440. In the event that the proposed Government does not receive the required majority of votes in the Assembly, or even if, "*the political party or coalition that has won the majority in the Assembly*" does not propose the candidate for the Prime Minister and, consequently, refuses to accept the relevant mandate, as defined in Judgment KO103/14 (see paragraph 87 of this Judgment), the procedure set out in paragraph 4 of Article 95 of the Constitution is followed. Unlike the procedure set out in paragraphs 1 and 5 of Article 95 of the Constitution, pursuant to paragraph 4 of Article 95 of the Constitution, as specified in Judgment of the Court KO103/14, the appointment of a candidate for Prime Minister is at the discretion of the President. This discretion, however, is conditional, as clarified in Judgment KO103/14, by the President's obligation to assess which political party or coalition is "*most likely*" to propose the candidate for Prime Minister, who will receive the necessary votes in the Assembly for the formation of the new Government, "*in order to avoid elections*". Consequently, the candidate for Prime Minister in the case of application of paragraph 4 of Article 95 of the Constitution, may be from any party or coalition represented in the Assembly, including "*the political party or coalition that has won the required majority in the Assembly to form the Government*", provided there is the highest probability of ensuring the necessary votes for the successful voting of the Government, in order to avoid early elections.

441. However, the elections will be inevitable in case of failure of the election of the Government in the second attempt, either after the elections or after the resignation of the Prime Minister/Government, in which case, based on paragraph 4 of Article 95 of the Constitution, the President announces the elections, which must be held no later than forty (40) days from the day of their announcement.

442. The Court notes that "*the political party or coalition that has won the majority in the Assembly*", namely the party or coalition that has won the relative majority in the parliamentary elections has the first right but not the exclusive right to propose the candidate for Prime Minister. Neither the Constitution, nor the Judgment in case

KO103/14, stipulate that the Government can only be established on the basis of the proposal of the party or coalition that has won the majority in the Assembly. This party or coalition enjoys the first right to: (i) the proposal of the candidate for Prime Minister after the elections based on paragraph 1 of Article 95 of the Constitution; (ii) the proposal of the candidate for Prime Minister even in the event of the first failure, provided that in the President's assessment this party is more likely to form the Government and to avoid elections based on paragraph 4 of Article 95 of the Constitution, and as it has been interpreted by the Court in case KO103/14; and (iii) the right to the first proposal of the candidate for Prime Minister even after the resignation of the Government, as a result of the resignation of the Prime Minister or even the resignation of the Government as a result of the successful voting of the no-confidence motion. Having said that, in case of failure to receive sufficient votes in the Assembly or even the refusal to accept the mandate, the Constitution enables another party or coalition to propose the candidate to the Prime Minister, provided that it is most likely to form the Government and to avoid early elections, as interpreted in Judgment KO103/14.

443. Consequently, the Court notes that the joint reading of: (i) paragraph 8 of Article 65 of the Constitution regarding the competence of the Assembly to elect and express no confidence in the Government; (ii) paragraph 2 of Article 82 of the Constitution, which excludes the possibility of the dissolution of the Assembly, if there is the will and the sufficient majority of political parties or coalitions represented in the Assembly for the purpose of forming a new Government; (iii) paragraph 6 of Article 100 and paragraph 5 of Article 95 of the Constitution, which result in a resigned Government, results in the activation of Article 95 of the Constitution regarding the election of the Government, which enables two attempts to elect a Government before the announcement of the early elections, in the manner prescribed by the Constitution and according to the explanations of Judgment KO103/14 and this Judgment.

444. In this context, the Court also notes that the preparatory documents of the drafting of the Constitution reflect the purpose of the drafters of the Constitution in relation to the respective articles on the Election of the Government (see paragraphs 318-325 of the Judgment for detailed description of the evolution of this article). The evolution of Article 104, 96, 93 and finally, 95 in the drafts of the Constitution included in the preparatory documents related to the Election of the Government, reflects that the latter: (i) determining the situations of the formation of the Government, after the elections, after the resignation of the Prime Minister/Government, and after the post of Prime Minister

remains vacant, has always included an election cycle in its entirety; (ii) has always determined two attempts to form the Government, the first within a period of fifteen (15) days, and the second, after the appointment of another candidate by the President within ten (10) days, according to the same procedure; (iii) has consistently stipulated that when the Government is not elected for the second time, then the early elections shall be announced; and (iv) has emphasized that with the fall of the Prime Minister, the Government also falls. The Court also notes that the current language of the Constitution reflected in paragraphs 1 and 5 of Article 95 of the Constitution, as regards the party or coalition to be consulted by the President on the appointment of the first candidate for Prime Minister, after elections or after the resignation of the Prime Minister/Government, respectively "*in consultation with the political party or coalition that has won the majority in the Assembly*" has become part of the drafts of the Constitutions in the versions of 22 December 2007 and 2 February 2008. Until these changes, in order to appoint the candidate for Prime Minister for the formation of the Government, the draft Constitution was referred to "*consultations with political parties or the coalition that has the necessary majority in the Assembly to form the Government*".

445. On the other hand, the evolution of Articles 105, 97, 98 and finally, 100 in the drafts of the Constitution included in the preparatory documents related to the Motion of No Confidence/Confidence, reflects that it has not undergone major changes during its drafting, but which, and importantly, is considered whether or not to maintain the system of no-confidence motion established through the then Constitutional Framework, and has deliberately ruled out such a solution (see paragraphs 307-332 of the Judgment for a detailed description of the evolution of this article). The Court recalls that the Constitutional Framework in its point 9 regarding the Motion of Confidence provided that the Assembly "*may express its lack of confidence in the Government only if, by a majority of its members, it elects simultaneously a new Prime Minister together with a list of Ministers proposed by him*".

446. That this issue was specifically addressed is reflected in the document entitled "*Questionnaire on Constitutional Issues*" of 20 June 2007 which is an integral part of the preparatory documents. The same issue was raised and reflected in the draft titled "*Public comments on the Draft Constitution of the Republic of Kosovo*", where it was specifically recommended to change the vote of confidence in the so-called "*constructive*". The drafts of the Constitution had not undergone these recommended changes by electing the No-confidence

Motion as reflected in Article 100 of the Constitution and not the solution set out through the Constitutional Framework. Such an attitude of the drafters of the Constitution, read together with the changes that have been made in the current Article 82 of the Constitution at the end of 2007, enabling but not forcing the dissolution of the Assembly in case of a successful vote of no confidence, reflect the purpose of the drafters of the Constitution, to enable the formation of a new Government according to the procedures set out in Article 95 of the Constitution, a solution which is reflected in many Constitutions of other countries, as reflected in the Comparative Analysis and in the responses of the members of the Forum of the Venice Commission in paragraphs 274-306, of this Judgment.

447. In this context, the Court emphasizes that based on the Comparative Analysis of the relevant Constitutions (see paragraphs 274-290 of this Judgment), it follows: (i) all determine the competence of the President to nominate a candidate for Prime Minister, according to the procedures set out in them, including those cases in which in later stages of the procedure, and after the failure of a certain number of candidates, the right of candidacy of the Prime Minister passes to the respective Assemblies; (ii) all, with the exception of Montenegro and North Macedonia, which do not specify the procedure in the event of the failure of the election of the Prime Minister for the first time, determine from two to four attempts through the nomination of different candidates for Prime Minister, including cases in which simultaneously more than one candidate for Prime Minister for voting in the Assembly, before the procedures for the dissolution of the respective Assemblies begin and the announcement of early elections. The Court recalls the fact that based on the response of North Macedonia through the Venice Commission, the latter stated that despite the fact that its Constitution does not explicitly stipulate that after the vote of no confidence motion in the current Government a new Government can be elected, the mandate to form a new Government is given to the party or other coalition; (iii) all have in mind the procedures for the no-confidence motion against the Government, the successful vote of which, in none of the cases, results in the immediate and binding dissolution of the Assembly, but in the exhaustion of all constitutional possibilities for the formation of a new Government, in order to avoid early elections; and (iv) in all these Constitutions, it is provided that the successful vote of no confidence motion results in the resignation of the relevant Prime Minister and his/her Government.

448. The Court further states that the Comparative Analysis of these Constitutions and the responses of the Forum of the Venice Commission result in four types of no-confidence motion systems, always based on their specific characteristics as explained in the Comparative Analysis and the contribution of the Forum of the Venice Commission, reflected in paragraphs 274-306 of this Judgment. In this regard, the Court notes that: (i) the constructive motion of no confidence, namely the conditioning of the proposal and voting of a no-confidence motion on the proposal of a new candidate for Prime Minister, is provided for in the Constitutions of Germany, Slovenia, Hungary, Georgia and Armenia. In these cases, the relevant Assembly shall be dissolved if the proposed candidate for Prime Minister is not elected through the relevant motion; (ii) the motion of no confidence after which, only one attempt to elect a new Prime Minister is explicitly defined, before the dissolution of the relevant Assembly, which is provided for in the Constitutions of Croatia, Albania, Lithuania and Austria; (iii) exceptionally, a motion of no confidence, after the successful voting of which, the dismissed Government continues to play a role, in relation to the dissolution of the Assembly. The latter is not necessarily dissolved, but may occur on the recommendation of the Government. This is the case in Estonia, Lithuania but also in Sweden, based on the Constitution of which, but also in the response sent through the Forum of the Venice Commission, the dissolution of the Assembly is not mandatory, but nevertheless the Government plays a role in the dissolution or not of the latter. That said, the response of Sweden through the Forum of the Venice Commission specifically states that if the Assembly has a sufficient majority to elect a new Government, the dissolution of the Assembly is not mandatory; and finally, (iv) most states define a no-confidence motion system, the successful passage of which results in the resignation of the Government and the return of the procedure to the competence of the President, explicitly or implicitly said, to initiate the procedure for electing the new Government, through the appointment of the candidate for Prime Minister, according to the relevant constitutional provisions, including the obligation to exhaust all possibilities, for the election of the Prime Minister, before the Assembly is dissolved. This solution is reflected in the Constitutions of Montenegro, North Macedonia, Greece, Bulgaria, the Czech Republic, Slovakia, and Liechtenstein. The same solution is reflected in the Constitution of the Republic of Kosovo.

449. Consequently, the Constitution of Kosovo, despite the Applicants' allegations: (i) there is no "*vacuum*" or "*lack of connecting bridge*" between its provisions regarding the possibility of electing a new Government after the successful vote of no confidence in the

Government, as established in Article 100 of the Constitution; (ii) the constructive motion is the solution of some Constitutions as explained above and is not the solution of many others; (iii) the successful voting of a no-confidence motion does not in any way result in the mandatory dissolution of the Assembly, but rather enables the election of a new Government, based on the relevant constitutional provisions, in the case of the Constitution of Kosovo, those defined by Article 95 thereof.

450. The Court, as explained above, also emphasizes the fact that: (i) the allegation of the Applicants that the formation of a Government that "*excludes the winner of the elections*" is contrary to Judgment KO103/14, is ungrounded, because this Judgment has never ascertained such a thing, but has only emphasized the right of "*the winner of the elections*" to be the first to propose the name of the candidate for Prime Minister, namely the right to the first attempt to form the Government; (ii) the allegation of the Applicants that after the successful vote of no confidence in the Assembly, only one attempt to form the Government is allowed, also does not stand. As explained above, except in cases where "*constructive motion*" is foreseen or even those cases when after a successful motion of no confidence, the Constitution explicitly defines only one possibility for the formation of the Government, such as the case of Albania, all other cases allow the exhaustion of all constitutional possibilities, and in certain cases even up to four attempts or even the possibility of voting for more than one candidate for Prime Minister at the same time, to form the Government and avoid early elections. Such a finding is clear from the Comparative Analysis and the responses of the Venice Commission Forum, even in the cases of the Constitutions referred to by the Applicants; and (iii) the allegation of the caretaker Prime Minister regarding the superiority of the Comprehensive Proposal for the Settlement of the Final Status of Kosovo in relation to the Constitution of Kosovo and the superiority of the English language as the authentic source of the Constitution in relation to "*translated versions*", is also ungrounded. The Court recalls that under Article 5 of the Constitution, the official languages in the Republic of Kosovo are Albanian and Serbian; and that with the amendment of the Constitution of the Republic of Kosovo regarding the completion of the International Supervision of Kosovo's Independence in 2012, the Comprehensive Proposal for the Settlement of the Final Status of Kosovo has no legal effect in the constitutional order of the Republic of Kosovo.

451. The Court finally states that by this Judgment it has already been established that: (i) the challenged Decree is in accordance with paragraph 2 of Article 82 of the Constitution; (ii) the successful voting of the no-confidence motion pursuant to paragraph 6 of Article 100

shall result in the effect of the resignation of the Government; (iii) in case of existence of the necessary majority in the Assembly for the election of the new Government after the resignation of the previous Government, including the circumstances of paragraph 6 of Article 100 of the Constitution, paragraph 5 of Article 95 of the Constitution is activated, through which the President proposes the candidate to the Assembly for Prime Minister, in consultation with the political party or coalition that has won the required majority in the Assembly to form the Government; (iv) in case of failure of the election of the proposed Government, either due to lack of majority of the necessary votes of all deputies of the Assembly or even due to the rejection of the proposal of the candidate for Prime Minister by "*the political party or coalition that has the necessary majority in the Assembly to form the Government*", as explained in Judgment KO103/14, paragraph 4 of Article 95 of the Constitution is activated, on the basis of which the challenged Decree is issued.

452. On this basis, to assess the compatibility of the challenged Decree with paragraph 4 of Article 95 of the Constitution, and taking into account that the candidate for Prime Minister was not voted or failed in the Assembly, as established in paragraph 3 of Article 95 of the Constitution, but was not been proposed by the political party or coalition that has won the required majority in the Assembly to form the Government, the Court must first assess whether in the circumstances of the present case, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV, has refused to accept the mandate for Prime Minister, or more precisely, refused to propose the candidate for Prime Minister for the formation of the Government, as defined in paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution. Therefore, the assessment of the constitutionality of this Decree with Article 95 of the Constitution will be addressed in the following analysis.

V. REGARDING THE IMPLEMENTATION OF THE CONSTITUTIONAL PROCEDURE THAT HAS RESULTED IN THE CHALLENGED DECREE

453. The Court recalls that the remaining constitutional issue related to the assessment of the constitutionality of the challenged and issued Decree pursuant to paragraph 14 of Article 84 in conjunction with paragraph 4 of Article 95 of the Constitution relates to the assessment of the procedure followed in the application of paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution. More precisely, the Court must assess whether the issuance of the

challenged Decree under paragraph 4 of Article 95 of the Constitution has followed the exhaustion of the right of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", in the circumstances of the present case LVV, for: (i) to propose the candidate for the Prime Minister based on paragraph 5 of Article 95 of the Constitution; and (ii) to present the composition of his/her Government before the Assembly and to request his/her approval by a majority vote of all deputies, as established in paragraphs 2 and 3 of Article 95 of the Constitution.

454. In the circumstances of the present case, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV, has not proposed the candidate for the Prime Minister for the formation of the Government, as established in paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution, and consequently the procedure set out in paragraphs 2 and 3 of Article 95 of the Constitution was not followed. Therefore, the Court must assess whether, as provided in Judgment KO103/14, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", has refused to accept mandate for Prime Minister (see paragraph 87 of the Judgment KO103/14).

455. In this respect, there are two issues that need to be interpreted by the Court. The first issue has to do with the deadline within which "*the political party or coalition that has won the required majority in the Assembly to form the Government*", must propose the candidate for Prime Minister to the President, who is mandated by the latter, as established in paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution. Whereas, the second issue has to do with the assessment if, in the circumstances of the present case, the acceptance of the mandate has been rejected, as a result of not proposing the name, namely the candidate for Prime Minister by "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV.

456. For the purposes of dealing with these cases, the Court will then present: (1) The essence of the Applicants' allegations and the supporting comments accepted by the interested parties (see paragraphs 62-92, 122-167 and 192-205 of this Judgment for a detailed reflection of these allegations and supporting comments); (2) The essence of the arguments of the responding party and other interested parties that have supported the responding party (see paragraphs 93-121, 168-191 and 206-216 of this Judgment for a detailed reflection of the objections and comments in favor of such

objection); (3) the Court's response to issues relating to these allegations.

The essence of the Applicants' allegations

457. The Applicants, namely thirty (30) Applicants deputies, in essence, allege that: (i) The Constitution does not provide a deadline within which the candidate for Prime Minister must be proposed by the political party or coalition that has won the elections; and that (ii) the waiver of the right to declare the proposal of the candidate for Prime Minister to the President can only be made expressly. The Applicants' allegations of the unconstitutionality of the challenged Decree of the President have been supported by the Prime Minister, the President of the Assembly and the Deputy President of the Assembly, always for specific reasons stated by each interested party in their submissions submitted to the Court and reflected in detail in paragraphs 62 -92, 122-167 and 192-205 of this Judgment. In the following, the Court will present the crux of the allegations regarding the time limit and (non) refusal to propose the candidate for the Prime Minister.

The essence of the allegations regarding the (lack of) time limit(s)

458. According to the Applicants: (i) the President has arbitrarily interpreted Article 95, presuming (concluding) that the winning party has refused to propose the candidate for Prime Minister within a period of twenty (20) days determined by the President himself; (ii) the Constitution or any decision of the Court does not provide for a time limit for proposing the candidate for Prime Minister by the winning party; (iii) the purpose of not determining the deadline by the winning party is that, under the Constitution, the winning party has the exclusive right to send the candidate's name at the most appropriate time when it deems that all political, administrative and technical conditions for sending a name to the President have been met; (iv) the twenty (20) day time limit used by the President or any other time limit is arbitrary and unconstitutional; (v) in principle you may not request a time limit from the other as long as that time limit is not provided for in the Constitution or applicable law; (vi) the time limit cannot be consumed by the exchange of letters but the time limit is consumed by the period determined by the Constitution, and the term which is not provided by the Constitution cannot be respected; (vii) the exclusivity of sending the name remains at the discretion of the winning party, and this discretion is without time limit; (viii) the history of the creation of the constitutional institutions of 2014 clearly proves that the formation of the Government has lasted over six (6) months, only and exclusively as a result of not sending the name of the

candidate for Prime Minister from the winning party to the President; (ix) lack of deadlines is in the same logic as with the constitutions of European states; (x) non-setting the deadlines by the constitutions is intentional because the political forces cannot be obliged to form the post-election coalitions easily, especially when there are major discrepancies in their programs; (xi) the constitutional deadlines in relation to the formation of the Government begin to run only at the moment when the President is proposed a candidate for Prime Minister; (xii) by setting deadlines arbitrarily, the President is endangering the constitutional functioning of institutions; (xiii) lack of deadline implies the intention to leave the winning party space for negotiations to form a Government; (xiv) in case KO119/14, although the winning party had delayed the name of the President of the Assembly for six (6) months, the Court nevertheless did not limit any time limit; (xv) in cases where the limitation of the time limit was the purpose of the drafters of the Constitution, they have done so in an expressive manner and this is noted e.g. the term of fifteen (15) days determined after giving the name of the candidate for Prime Minister for the first time and 10 days for the second time; and (xvi) that the Constitution has set expressive deadlines in other articles of the Constitution, namely articles 66.1; 66.2; 70.2; 82.1 (1) and (3); 86.2; 86.6; 95.2; 95.4; 100.3; 100.5; 113.5; 131.5; 131.6; 145.1; 145.2; 161.

459. According to the Prime Minister: (i) the Constitution does not provide deadlines for the political party or the winning coalition to propose a name for a candidate for Prime Minister; (ii) the Constitution by Article 95 has determined the running of deadlines only after the candidate for Prime Minister has been appointed, by not defining deadlines at any moment earlier; (iii) the practices of 2014 and 2017 show that there have been some cases when the election of the Government has lasted more than six (6) months after the elections and the constitution of the Assembly, but the Presidents in those cases did not interfere by pressuring the political forces to send the name; (iv) the President should not impose himself, but should wait for the proposal from the winning party; (v) the Constitution suspends the self- initiative of the President and obliges him to wait for the proposal from the winning political party or coalition.

460. According to the President of the Assembly: (i) the President by the Constitution is not recognized in any way the competence of the constitution-maker, nor in terms of setting deadlines regarding the mandate of the candidate for Prime Minister, as long as such a constitutional norm does not exist; (ii) by setting a deadline, the President has created a new constitutional norm, for issues on which the Constitution remains silent; (iii) the Constitution does not set

deadlines regarding the time available to the winning entity of the elections to send the name of the candidate for Prime Minister; (iv) the only constitutional deadlines that begin to be consumed are those after the formal mandating of the candidate for Prime Minister by the President; (v) by setting deadlines, the President has interfered with the competencies of the Assembly as the only institution that has the competence to amend the Constitution; (vi) the President has exceeded his powers at the moment when he set deadlines and this has been done in violation of the principle of separation of powers; (vii) if the purpose of the drafters was to set a deadline, the drafters could express it explicitly; and (viii) in case KO119/14, the Court did not set deadlines but left such a thing to political life despite the fact that the first party for months did not send a name for the President of the Assembly.

461. According to the Deputy President of the Assembly: (i) the President has no constitutional authorization to arbitrarily set deadlines which the Constitution does not provide for until when he must submit a proposal for a candidate for Prime Minister; (ii) when it comes to the procedure for electing the Government, the Constitution has set only two deadlines, namely the 15-day deadline after the appointment of the candidate and the 10-day deadline for the appointment of another candidate for Prime Minister if the proposed Government composition does not receive the confidence of the Assembly; (iii) the exclusivity of sending the name remains at the discretion of the winning party and this discretion is without deadline; (iv) Article 95.1 and 95.5 lack the time limit as well as the time limit between the procedure of Article 95.1 and 95.4, because the same question was after the elections, how much the candidate for Prime Minister should be waited from the party that won the elections to secure numbers in the Assembly; and (v) Article 95 does not contain any word on the deadline for nominating a candidate by the winning party.

The essence of allegations regarding (non) refusal

462. According to the Applicants: (i) the LVV has never, in any form, rejected the proposal to present a new candidate for Prime Minister; (ii) the President has requested in writing the candidate for Prime Minister and rejected without any constitutional basis the proposal which, according to the Constitution, had to be made by the LVV; (iii) only the winning party has the constitutional right to explicit approval or rejection; (iv) the President has usurped the competences of the President of the LVV to expressly reject, in writing, the proposal for the candidate for Prime Minister; (v) according to Judgment

KO103/14, paragraph 87, only the party that won the elections has the exclusive right to refuse the mandate; (vi) the President has acted unconstitutionally by finding that the winning party by its actions has not exercised the right to propose a new candidate to form the Government; (vii) the President has a passive role in the formation of the Government and is not recognized as having an active role in the realization of his political will; (viii) the refusal to exercise a right is expressly made and therefore the holder of the right must expressly waive its use; (ix) Judgment KO103/14 also speaks about the ability of the party to refuse to send a name for a candidate for Prime Minister; and (x) in the present case the refusal has been made neither explicitly nor implicitly, on the contrary, the winning party has informed the President that it does not reject this right and that it will exercise this right as soon as possible.

463. According to the Prime Minister: (i) the President of the LVV never refused and did not waive his party's right to propose the candidate for Prime Minister; (ii) the Court stated that the President may bypass the winner of the elections only if he expressly waives his right but in no other circumstance; (iii) the winner of the elections has never waived its constitutional right to propose the candidate for Prime Minister; (iv) the President has arbitrarily interpreted the questions for clarification of the provision which he invokes and thus has interpreted these questions as a refusal to propose the candidate for Prime Minister; (v) the Constitution does not recognize the President's right not to consider non-sending the candidate's name as a refusal; (vi) the non-refusal of the LVV President to propose the candidate for Prime Minister has been clear to both parties; and (vii) non-refusal was communicated by official letter from the Office of the Prime Minister and did not create any ambiguity or legal uncertainty.

464. According to the President of the Assembly: (i) until the moment the name is sent to the President by the political entity, the Constitution has not given the President any competence or active role; (ii) the President has exceeded his constitutional powers when he has ascertained that the right to propose the candidate for Prime Minister has not been exercised, without an express statement by the winning entity of the elections; and (iii) the Constitution does not provide for an active role of the President in cases where the Constitution remains silent, namely legal situations without formal expression of the will of the political party to which this right and obligation has been recognized by the Constitution.

465. According to the Deputy President of the Assembly: (i) the President has no discretion to appoint or reject the candidate for Prime Minister,

just as there is no discretion for self-initiative to appoint the candidate for Prime Minister; (ii) the President has no right to assert or arbitrarily interpret that, as long as there is no constitutional deadline, the political party has not submitted the name of the candidate and thus waived the right to propose a candidate for Prime Minister; (iii) as the Constitution does not provide for a twenty-day (20) day deadline, and since neither the Prime Minister nor the President of the LVV have in any case refused to send the name, it cannot be considered that the proposal of the candidate for Prime Minister has been waived; (iv) the President has no authority to ascertain that an entity has abdicated a right as long as he has not expressly rejected or formally waived the proposal of the candidate for Prime Minister; and (v) the President has concluded outside his authorizations that the LVV has not exercised its right to propose the new candidate for the formation of the Government.

The essence of the allegations of the responding party

466. The responding party, the President, in essence, claims that in order to ensure the democratic functioning of the institutions, the President cannot wait indefinitely for the winning party to propose the name of the candidate for Prime Minister and that the winning party has not exercised its right to do send the name. The arguments in favor of the constitutionality of the challenged Decree of the President have been submitted by the LDK Parliamentary Group, AKR deputies supported by NISMA deputies, and the LDK deputy, Mr. Arban Abrashi, for the specific reasons mentioned by each interested party in their submissions submitted to the Court and presented in detail in paragraphs 93-121, 168-191 and 206-216 of this Judgment.

The essence of objections regarding (the lack) of deadline

467. According to the President: (i) the lack of accurate deadlines in the Constitution does not justify the behavior of the party that has won the relative majority to delay indefinitely the proposal of the candidate for Prime Minister because the delay in infinity would jeopardize the functioning of institutions; (ii) the lack of a deadline does not imply that the winning party is given room for negotiation to form the Government, but quite the opposite, namely the lack of a deadline means that the winning party rejects the mandate in cases where this party notices that after the successful voting of the motion of no-confidence by two-thirds (2/3) does not have such a majority; (iii) the hypothetical situation according to which the winning party would endlessly abuse the right to propose the candidate would disable the normal functioning of the Government and the parliamentary

majority; (iv) it is up to the President as a representative of the unity of the people to prevent the situation when a political party would endanger the functioning of the institutions indefinitely; (v) the delay would lead to the blocking of the Assembly, where on the one hand the winning party of the relative majority would not send the proposal of the candidate for Prime Minister and on the other hand would continue with a resigned Government and a parliamentary majority that does not agree with it; (vi) such a situation would jeopardize the functioning of the Assembly, which would jeopardize the blocking of all constitutional institutions or a deep crisis of the constitutional system; (vii) since the President has to guarantee the democratic functioning of the institutions, he has was not able to endlessly wait for the party that has won the relative majority to make the expressive proposal of the candidate for Prime Minister; (viii) the President, in the midst of the will of the relative winning party that insisted on the dissolution of the Assembly and the expressed will of all other parties represented in the Assembly seeking the establishment of a new Government, had to act without delay so as not to jeopardize the democratic functioning of institutions.

468. According to the LDK Parliamentary Group: (i) the Constitution has not explicitly set a deadline for the proposal of the candidate for Prime Minister but has set a deadline of fifteen (15) days after the President's mandate to submit the composition of the Government; (ii) the drafters of the Constitution have left this deadline open because they have considered that it is in the interest of the political entities and the public for the Government to be established as soon as possible; (iii) it is now being established that failure to set a reasonable deadline for sending the name of the candidate for Prime Minister may be misused to the point of abuse by the relative winner of the election; (iv) according to the spirit of the Constitution, it remains the obligation of the President to exhaust all possibilities within an optimal timeframe; (v) at the moment when the President assesses that the relative winner of the elections does not have the will to propose the candidate and that at any cost he is trying to block the establishment of the new Government, the President should consult the political entities represented in the Assembly and then ascertain that it is not possible for the relative winner to create a parliamentary majority; (vi) in case it is proved to the President the creation of a new parliamentary majority, he/she is obliged to decree the candidate for Prime Minister from the new parliamentary majority; (vii) the Applicants' interpretation regarding the time limit that the winning party may send the name of the candidate for Prime Minister at the most appropriate time and when "*political, administrative and technical conditions*" are completed for sending the name, is completely wrong,

because it is not clear what is meant by political, administrative and technical conditions and who will assess whether such conditions have been met or not; and (viii) such an interpretation of the deadline would lead to political stalemates and to the obstruction of the democratic functioning of the institutions.

469. According to the AKR deputies supported by NISMA deputies: (i) although the right to propose the candidate for Prime Minister belongs to the winning party, this does not mean that the winning party can abuse its right to propose the candidate for Prime Minister in the sense of delaying the proposal indefinitely; and (ii) the Court must take into account the situation when the winning party may continue to abuse the right to nominate a candidate and balance this with the obligation of the President to create circumstances that enable the democratic functioning of the institutions.

470. According to the deputy Arban Abrashi from the LDK: (i) according to the Applicants' allegation that they may not respond and not send their name to the President until the maturity of political, administrative, technical conditions, it follows that they can endlessly hold the process of Government formation a hostage; (ii) notwithstanding the priority of the first entity, this right is not absolute and unlimited in time; (iii) the issue of proposing a candidate by the first entity may also remain unlimited, but if the deadlines given after the proposal of the candidate are taken into account then it is noticed that these deadlines are too short and intentionally left as such by the drafters given the immanent need for the country to have a Government as soon as possible; (iv) the non-limit of the time for the proposal of the candidate for Prime Minister cannot be understood as an intention to give the first entity time to form eventual coalitions because the eventual talks on the formation of the Government must be initiated and developed by the officially appointed candidate for Prime Minister through the Decree of the President; (v) after the non-proposal of the candidate for Prime Minister by the first entity within a reasonable time and when we consider that this issue is simple and completely technical, the President has proposed the candidate who is most likely to form the Government; (vi) if the President did not act but allowed the Government not to be formed for a long time, the President would violate the Constitution by not acting in accordance with the explicit request to guarantee the democratic functioning of the institutions; and (vii) the President is obliged to find solutions within his constitutional powers to avoid elections by forming a new Government.

The essence of objections regarding (non) refusal

471. According to the President: (i) the President sent five (5) letters to the President of the LVV (on 2, 10, 15, 17 and 22 April 2020), as a political entity with the right to propose a candidate for Prime Minister; (ii) the LVV has not responded to any of the letters for the appointment of the candidate for Prime Minister because all the answers have been received by the caretaker Prime Minister; (iii) the President, in a letter dated 22 April 2020, informed the President of the LVV that, given that he had not exercised his right to propose a new candidate, the President, in accordance with Article 95 and Judgment KO103/14, shall proceed further with joint consultations with all leaders of political parties represented in the Assembly; (iv) when the right to propose a new candidate is not exercised or abused, the President is authorized to find a solution to overcome the situation; (v) the non-declaration or non-sending of the name by the President of the LVV and his public statements to avoid sending the name and repeating the request for the dissolution of the Assembly and the holding of elections, have been sufficient arguments to show that LVV has waived its right to propose the candidate for Prime Minister; (vi) the LVV tried at all costs to impose the dissolution of the Assembly and the announcement of early elections; (vii) the situation of non-use of the right to obtain a mandate was foreseen by the Court in Judgment KO103/14; (viii) the possibility that the first winning party will reject the mandate is related to the argument that if the latter, after consulting with other parties, considers that it does not have a majority to form a Government then it must reject the proposal of the candidate for Prime Minister; (ix) the vote of no confidence motion in the previous Government by eighty two (82) votes of the deputies of the Assembly showed the change of the parliamentary majority in relation to the party that has won; (x) the President made efforts to consult with the LVV and has given him the opportunity to propose the candidate for the Prime Minister from among their ranks.; (xi) the President, after constant consultation, had to find a way to form the Government in order to materialize the will of the political parties and the representatives of the people; (xii) all political parties represented in the Assembly, unanimously, except the LVV have declared for the new Government and that the country does not go to the elections; (xiii) the President in the consultative meeting of 22 April 2020 informed the participants that since the expressed will of the political parties (representing 91 deputies) is for the country to have a new Government without going to the elections then the mandate will be given to each party or coalition that proves to have a majority in the Assembly to form the new Government; (xiv) the President issued the Decree with the aim of avoiding early elections, after the consent of the absolute majority of the political parties represented in the Assembly

to form a new Government; and (xv) Articles 4.3 and 84.2 of the Constitution give to the President an active role in guaranteeing the democratic and constitutional functioning of institutions.

472. According to the LDK Parliamentary Group: (i) only after five (5) letters sent to LVV, the President stated that it refuses to send the candidate for Prime Minister and then the political parties represented in the Assembly were invited to be asked if they are ready for elections or for the formation of the new Government; (ii) all parties have declared to avoid the elections, and the LDK, with the agreement of several other parties, has undertaken the establishment of a parliamentary majority; (iii) the President, by 22 April 2020, forwarded four requests to the LVV but was never sent the proposal of the candidate for Prime Minister, and this clearly shows that LVV did not want or refused to propose its candidate; (iv) the LVV has never expressed readiness to form a new Government and has not taken any action within party forums and has not held any meetings with other entities to try to create a new parliamentary majority; (v) these circumstances clearly indicate that the LVV has refused to appoint a candidate for Prime Minister and has attempted to block the establishment of the new Government; and (vi) no relative winner of the elections has a monopoly on democratic legitimacy, much less in cases where he abstains/refuses to exercise constitutional rights.

473. According to the AKR deputies, supported by NISMA deputies: (i) the right to propose a candidate from the winning party is not an absolute right and the same is even more relativized in the post-motion situation of no confidence where clearly the parliamentary majority or the attitude of the deputies has changed; (ii) if the winning party of the relative majority insists on the right to propose the candidate for Prime Minister, then it should not be consistently stated in communications with the President that he wants to go to the elections and dissolve the Assembly; and (iii) the President acted correctly when he acted towards the creation of the new Government because the President is required to find prevailing criteria to enable the creation of the Government and to avoid elections.

474. According to LDK deputy Arban Abrashi: (i) the President has taken a series of actions aimed at fulfilling his constitutional responsibility to appoint a candidate for Prime Minister after consulting with the party or coalition that constitutes the majority in the Assembly; (ii) the relative winner of the elections has acted irresponsibly in relation to the responsibility for the formation of the Government, recognized by the Constitution; (iii) in the present case, we are not dealing with unconstitutional actions of the President but with inaction, the

intentional non-proposal of the candidate by LVV; (iv) the priority that the Constitution gives to the first entity must be seen not only as a privilege but also as the responsibility of the winner towards the country and the citizens; and (v) the President has acted correctly after five (5) letters and two (2) meetings in a period of about twenty (20) days, proposed the candidate from the ranks of the second entity, as the relative winner had not submitted a name but had publicly stated that we are for elections.

RESPONSE OF THE COURT – regarding the implementation of the constitutional procedure that resulted in the challenged Decree

475. The Court reiterates that the Constitution of the Republic of Kosovo consists of a unique set of constitutional principles and values on the basis of which the state of the Republic of Kosovo is built and should function. The norms provided by the Constitution should be read in relation to each other and not isolated from each other. Only in this way is the correct understanding of certain constitutional norms is derived and it is possible for the Court to interpret ambiguities regarding the application of constitutional competencies in accordance with the purpose and spirit of the Constitution.

476. The Court also emphasizes that the structure of constitutional norms, and in particular the one relating to the establishment of state institutions deriving from the people's vote, must be interpreted in such a way as to implement and not block the effective establishment and exercise of their functions, because only that way the principle of separation of powers and control of the balance between them can be applied correctly, as defined by this Constitution.

477. The Court reiterates that the interpretation of the Constitution in support of the effective functioning of state institutions is especially important with regard to the establishment of post-election institutions, the results of which are determined by the elected representatives of the people for a four (4) year term in the Assembly of the Republic, and then, their Government, elected by the Assembly, according to the procedures set out in the Constitution, for a term of the same duration, or as long as a Government, has the confidence of the elected representatives of people represented in the Assembly.

478. Furthermore, the Court emphasizes that the democratic functioning of institutions is the primary responsibility of every person who is vested with public authorizations. All actions taken by persons vested with power or public authorization must be in accordance with the

Constitution and its spirit and contribute to the progress and coordination of works of public interest for the state of the Republic of Kosovo, so that the latter develops and implements the values and principles on which it is built. Any obstruction or lack of cooperation in fulfilling the constitutional obligations and authorizations is contrary to the spirit of the Constitution.

Regarding the time limit within which the candidate for Prime Minister is proposed

479. The Court recalls that the essence of the dispute regarding the constitutionality of the challenged Decree is related to the lack of clarification of a time limit in the Constitution, regarding the appointment of a candidate for Prime Minister. The Court recalls that: (i) paragraph 14 of Article 84 of the Constitution; and (ii) paragraphs 1 and 5 of Article 95 of the Constitution define the duty of the President to appoint a candidate for Prime Minister for the formation of the Government from among the "*the political party or coalition that has won the required majority in the Assembly to form the Government*", "*after the proposal*" of the latter "*in consultation*" with it.

480. In this regard, the Court emphasizes that the lack of such specification in the abovementioned provisions of the Constitution should be analyzed in terms of: (i) the constitutional deadlines set by the Constitution for the establishment of post-election institutions, with particular emphasis on those are set for the purposes of establishing the Government; and, (ii) the content of expressions "*proposal*" and "*consultations*" for the purpose of appointing a candidate for Prime Minister.

481. Initially, in terms of the deadlines set out in the Constitution, regarding the establishment of the Government, the Court emphasizes that the Constitution defines a structure of accurate deadlines that indicate the purpose: (i) for the quick establishment of the Government; and (ii) the consequence of the dissolution of the Assembly, if the same deadlines are not met.

482. More precisely, the formation of institutions after the elections, the Constitution based on paragraph 1 of Article 66 of the Constitution, relates to the official announcement of the election results. Based on the same article, it is determined that the mandate of the elected Assembly starts from the day of the constitutive session, which is held within thirty (30) days from the day of the official announcement of the elections. The Court recalls that by Judgment KO119/14, it has assessed the constitutionality of Decision no. 05-V-001 of 17 July 2014

for the election of the President of the Assembly, through which, has interpreted the meaning of "*the largest parliamentary group*", as referred to in paragraph 2 of Article 67 of the Constitution (see paragraph 116 of Judgment KO119/14) and found in items a) and b) of the Enacting Clause as it follows: (i) the meeting and procedure followed after the suspension of the constitutive session, on 17 July 2014, by the Chairperson, due to lack of quorum, have violated Article 67 (2), in conjunction with Article 64 (1) of the Constitution and Chapter III of the Rules of Procedure applicable to these articles; and (ii) Decision No.05-V-001, of 17 July, is unconstitutional, both in terms of the procedure followed and in terms of content, as it was not the largest parliamentary group that proposed the President of the Assembly, and consequently, invalid (see the Enacting Clause of Judgment KO119/14).

483. In this regard, the Court recalls that the allegation of the Applicants that the history of the establishment of constitutional institutions in 2014 clearly proves that the formation of the Government lasted over six (6) months, "*as a consequence of not sending the name of the candidate for Prime Minister by the winning party to the President*", is not accurate. The referred delays are related to the non-constitution of the Assembly, and the Court has never assessed issues related to the deadlines regarding the constitution of the Assembly, as defined in paragraph 1 of Article 66 of the Constitution.

484. Immediately after the constitution of the Assembly, as established in paragraph 1 of Article 66 of the Constitution, the obligation of the President to initiate the procedure for the formation of the Government follows, applying paragraph 4 of Article 84 of the Constitution in conjunction with paragraph 1 of Article 95 of Constitution. This obligation also follows immediately after the resignation of the Prime Minister/Government, including cases of successful vote of no confidence motion, based on paragraph 4 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of the Constitution. The commencement of the procedure for the formation of the Government means the obligation of the President to appoint the candidate for Prime Minister, "*after the proposal*" and "*in consultation*" with "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the winner of the elections.

485. The appointment of a candidate for Prime Minister results in running of two types of parallel deadlines: (i) the one set out in item 1 of paragraph 1 of Article 82 of the Constitution; and (ii) those set out in Article 95 of the Constitution. The first deadline, namely that of Article

82 of the Constitution, stipulates sixty (60) days of time for the formation of a Government, the failure of which results in the consequence of the dissolution of the Assembly and the announcement of early elections. Such a provision reflects the importance that the Constitution has placed on the quick establishment of the Government, and on the contrary, the respective consequence of the dissolution of the Assembly. Furthermore, within this period of sixty (60) days, by Article 95 of the Constitution, the accurate deadlines have been set, regarding two possibilities for the formation of the Government, after the elections or after the resignation of the Prime Minister/Government, including the case of successful voting of the no-confidence motion by the Assembly. Article 95 of the Constitution stipulates: (i) fifteen (15) day deadline within which the candidate for Prime Minister from "*the political party or coalition that has won the required majority in the Assembly to form the Government*", presents the composition of the Government before the Assembly and requests the approval of the Assembly, as defined in paragraph 2 of Article 95 of the Constitution; (ii) the ten (10) day deadline within which the President nominates the other candidate for Prime Minister, in case the first candidate for Prime Minister fails to secure the necessary votes in the Assembly or even rejects the respective mandate; and (iii) referring to "*the same procedure*", in paragraph 4 of Article 95 of the Constitution, the period of fifteen (15) days, within which the other candidate for Prime Minister, represents the composition of the Government before the Assembly and requires its approval.

486. The Court reiterates that the above-mentioned deadlines reflect the importance that the Constitution has given to the quick establishment of the Government, setting the fifteen (15) day deadlines for the candidate for Prime Minister, to negotiate and reach the necessary agreements to ensure the necessary votes of deputies of the Assembly for voting the proposed Government. This deadline applies to the proposal of the relevant Government in the Assembly. As long as it does not specify the deadline within which the Assembly approves the Government or not, the action of the Assembly must be prompt and within a total (60) sixty-day period within which both possibilities for the formation of the Government are foreseen. On the contrary, and as explained above, the Constitution has determined the consequence of the dissolution of the Assembly and early elections, as defined in item (1) of paragraph 1 of Article 82 of the Constitution.

487. The Court found that a deadline regarding the appointment of a candidate for Prime Minister was not specified in the Constitution only pertaining to: (i) the first candidate for Prime Minister, namely

the candidate for Prime Minister proposed by "*the political party or coalition that has won the required majority in the Assembly to form the Government*", after elections based on paragraph 1 of Article 95 of the Constitution; and (ii) the first candidate for Prime Minister, namely the candidate proposed by "*the political party or coalition that has won the required majority in the Assembly to form the Government*", after the resignation of the Prime Minister/Government, including the situation after the successful vote of a no-confidence motion, based on paragraph 5 of Article 95 of the Constitution.

488. However, the Court also notes that this deadline is not specified only in relation to the proposal of the candidate for Prime Minister by "*the political party or coalition that has won the required majority in the Assembly to form the Government*"; but also in relation to the mandating of the same by the President and the forwarding of the proposed candidate for Prime Minister to the Assembly. The same does not apply to the second candidate for Prime Minister, in case of failure of the first, as defined in paragraph 4 of Article 95 of the Constitution, a case in which the Constitution has specified exactly ten (10) days available to the President for his appointment based on the proposal of the party or coalition, which, as explained in Judgment KO103/14, in the assessment of the President that there is a higher probability of forming the Government and consequently to avoid elections.

489. This difference in the way of specifying the deadlines in case of application of: (i) paragraph 14 of Article 84 of the Constitution in conjunction with paragraphs 1 and 5 of Article 95 of the Constitution, both after the elections and after the resignation of the Prime Minister/Government, regarding with the first candidate for Prime Minister; and (ii) paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution, both after the elections and after the resignation of the Prime Minister/Government, regarding the second candidate for Prime Minister, in case of failure of the first, is important in the light of meaning and differences that the expressions "*after the proposal*" and in "*consultation with*" the political party or the respective coalition, when they apply in case of the appointment of the first and second candidate for Prime Minister.

490. In this regard, the Court recalls that in Judgment KO103/14, it emphasized the distinction between the manner of appointing these two candidates for Prime Minister and the meaning of the expressions in "*in consultation with*" and "*after the proposal*" in the

implementation of relevant procedures. More precisely, these expressions in the case of the appointment of the first candidate for Prime Minister, and in the complete absence of the discretion of the President regarding the political party or coalition to be consulted, imply a process of completely formal and technical "*consultation*". More precisely, in any case, both after the elections or after the resignation of the Prime Minister/Government it is completely clear: (i) what is "*the political party or coalition that has won the required majority in the Assembly to form the Government*"; (ii) that this is the only political party or coalition with which the President can consult for the purpose of appointing a candidate for Prime Minister; and (iii) that the President should only mandate the name proposed by this political party or coalition. Therefore, "*consultation*" for the purposes of applying paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 1 and 5 of Article 95 of the Constitution, means only the mutual obligation, namely the obligation of "*the political party or coalition that has won the required majority in the Assembly to form the Government*" to propose the name of the candidate for Prime Minister and, the obligation of the President to mandate this name.

491. In contrast, in the application of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution, in the light of Judgment KO103/14, the expression "*in consultation with*" the political party or relevant coalition has a broader meaning. In the context of paragraph 4 of Article 95 of the Constitution: (i) the President is not obliged to "*consult*" only with "*the political party or coalition that has won the required majority in the Assembly to form the Government*", but with all political parties or coalitions represented in the Assembly; (ii) on the basis of these consultations, the President should assess what political party or coalition is most likely to form the Government in order to avoid elections; and (iii) Based on this condition, the President determines the political party or coalition, which proposed candidate he will mandate for Prime Minister, certainly without having any discretion in determining the name of the proposed candidate. In exercising this discretion and completing the whole process of "*consultation*" between the President and the relevant political party or coalition, the Constitution has set only ten (10) days.

492. Therefore, emphasizing the difference that the "*consultation*" of the President with the respective party or coalition in the application of paragraph 14 of Article 84 in conjunction with: (i) paragraphs 1 and 5 of Article 95 of the Constitution, without any discretion; and (ii) paragraph 4 of Article 95, with discretion, the Court notes that the time

limit for determining the first candidate for Prime Minister has not been specified, in which the "*consultation*" involves a fully formal and technical process, while a ten (10) day deadline has been set, in the determination of the second candidate, in which the "*consultation*" involves a much more complex process.

493. In this context, Article 95 of the Constitution read in its entirety cannot be construed to imply that this article provides for an indefinite period in the appointment of the first candidate for Prime Minister based on paragraphs 1 and 5 of Article 95 of the Constitution, as for the political party or coalition with the right to propose to the President, in the light of a "*consultation*" process completely formal and technical, without any discretion or ambiguity; whereas, the same article has precisely limited the period to ten (10) days within which the second candidate for Prime Minister is proposed and determined, based on paragraph 4 of Article 95 of the Constitution, which includes a much more complicated "*consultation*" process regarding the determination of the candidate for Prime Minister. The setting of this ten (10) day deadline in the Constitution regarding the second mandate also reflects its purpose for concluding the "*consultation*" process for the purposes of appointing a candidate for Prime Minister in the short term.

494. Moreover, the allegation that the political party or the winning coalition can propose the candidate for Prime Minister "*only when the political, administrative and technical conditions are met*" in its assessment, it would be contrary to (i) the purpose of the Constitution for the quick establishment of institutions, and in particular the Government, as the bearer of executive power, reflected through the precise constitutional deadlines set out above; (ii) the immediate need to form a Government, in the event of the resignation of the Prime Minister/Government, including cases of successful no-confidence vote, a process through which the existing Government loses the confidence of the people's representatives and democratic legitimacy to run the executive branch; (iii) paragraphs 2 and 4 of Article 95 of the Constitution, which set a fifteen (15) day deadlines, available to the candidate for Prime Minister to reach the necessary agreements and to propose to the Assembly the Government; and (iv) the purpose of item (1) of paragraph 1 of Article 82 of the Constitution based on which the consequence of the dissolution of the Assembly is foreseen in case of impossibility of forming the Government within sixty (60) days from the appointment of the first candidate for Prime Minister. If the deadline for the proposal of the candidate for Prime Minister by the political party or the winning coalition is at the full discretion of the latter, but also the President, for an indefinite period, then the

abovementioned deadlines and the respective consequences would have no meaning or value.

495. Moreover, and especially considering the fact that the Constitution recognizes to "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the winner of the elections, the right to first start the process of forming the Government, the latter, referring to the unlimited time available to propose the name of the candidate for Prime Minister, could block the necessary dynamics for quick establishment of the Government for an unlimited period of time. The same, and even more important, given the fact that the Constitution recognizes the first right to propose a candidate for the Prime Minister, the political party or coalition that, under certain circumstances may have led or may have been represented in the Government, to which the confidence was taken by the people's representatives in the Assembly through the successful vote of a no-confidence motion, the reference to the unlimited time available to propose the name of the new candidate for Prime Minister, would enable the political party or winning coalition of the elections, blocking the creation of the new Government, despite the fact that the same political party or coalition has lost confidence of the Assembly of the Republic to lead the executive branch. Moreover, such an approach would also enable the President not to decree the proposal for the first candidate for the Prime Minister for an indefinite period of time and thus to hold the entire process of forming the Government a hostage. Such an interpretation is not only contrary to the Constitution, but also contradicts the fundamental values of a democratic society.

496. Consequently, the Court emphasizes that failure to specify a time limit in Article 95 of the Constitution regarding a quite technical and formal "*consultation*" process of the proposal of the first candidate for Prime Minister by "*the political party or coalition that has won the required majority in the Assembly to form the Government*" and the obligation of the President to appoint and propose the later to the Assembly, in contrast to setting deadlines, not only accurate but also short, in relation to any other step related to the procedure of forming the Government, means that this deadline actually includes in itself the demand for rapid dynamic interaction between the respective political party and the President. Based on all the explanations above, this constitutional purpose is clear and self-evident.

497. In fact, the Constitution did not specify this deadline based on the clear and implicit premise that: (i) the President, as the guarantor of the constitutional functioning of the institutions stipulated by the

Constitution, immediately after the constitution of the Assembly must begin the process of forming the Government through the appointment of a candidate for Prime Minister, so that the Assembly can exercise the fundamental constitutional responsibility of electing the Government; and (ii) the primary goal of the election winner is to immediately start the process of forming a new Government and gain the confidence of the Assembly. The holder of the right to propose, in addition to the right given by the Constitution for the formation of the Government, at the same time has the obligation to exercise this right in good faith and to show the clear intention that it is taking all necessary actions to create as quick as possible the executive body, and to start the implementation of the governing plan.

498. The Court also notes that a number of constitutions included in the Comparative Analysis of this Judgment also do not specify this deadline, despite the fact that majority have set precise and short deadlines for all the steps to be followed for the formation of a Government from the moment when the first candidate for Prime Minister is appointed, including the deadlines within which, each subsequent candidate for Prime Minister is mandated. Failure to specify the deadline only regarding the first step, that of the mandate of the first candidate for Prime Minister, the political party or coalition from which the same is proposed is also accurately identifiable in most Constitutions, means that the mandating of the first candidate for Prime Minister, should be done as soon as possible. Such an intention is specified, for example, by Bulgaria's response through the Venice Commission Forum, which states that despite the fact that the Bulgarian Constitution does not specify the deadline for the candidacy of the first candidate for Prime Minister, this deadline is "*as soon as possible*". The rapid dynamics of the start of the process for the formation of Governments is also reflected in those Constitutions, which, in fact, have set this deadline. The Constitutions of Montenegro and North Macedonia, for example, determine the mandate of a candidate for Prime Minister within thirty (30) and ten (10) days, respectively, from the moment of the constitution of the Assembly. Whereas, in cases of formation of Governments, after the resignation of the Prime Minister/Government, even shorter deadlines are set, such as in the case of the Constitution of Estonia and Lithuania, in which the new Government is proposed to the Assembly, within fourteen (14) and fifteen (15) days, respectively.

499. If the Court were to accept the proposal of the Applicant deputies, the Court would effectively have to find that since the Constitution has not explicitly specified a deadline for sending the name of the candidate for Prime Minister to the President, the winning political party or

coalition, has discretion to send the name within 1 month, 1 year, 2 years, 3 years, depending on when the winning party or coalition considers that the necessary conditions qualified as *"political, administrative and technical"* s conditions have been matured to propose the name of the candidate for the Prime Minister. The same would apply to the President. The latter could keep and not decree the proposal of the candidate for Prime Minister until according to his/her assessment the necessary conditions would be met, all this in the absence of specification of the deadline to decree/send the name to the Assembly. Had this interpretation been adopted, nothing could have limited the discretion of the winning political party or coalition and of the President, now or in the future, to exercise these rights and obligations in an unlimited manner and time, including blocking of the election of the Government after the elections, but also by holding in office the Government which has lost the trust of the people's representatives, by not proposing/not decreeing not sending the name of the candidate for Prime Minister, preventing the other candidate for Prime Minister who comes from the ranks of a political party or coalition and who may have the necessary majority in the Assembly to form the new Government, and more important, making it impossible for the Assembly to exercise its functions to elect a Government. Such an interpretation would be clearly contrary to the Constitution.

500. Consequently, the Court notes that taking into account that the process of "*consultation*" in determining the first candidate for Prime Minister, in the absence of discretion of the President and with full clarity as to what political party or coalition is entitled to this proposal, is quite formal and technical. It encompasses only the reciprocal obligation between the President and the winning political party or coalition in the elections to appoint a candidate for Prime Minister, after the proposal of the winning political party or coalition. This "*consultation*" should be concluded as soon as possible through a quick dynamic interaction, taking into account: (i) the completely formal and technical nature of this "*consultation*"; (ii) the system and structure of constitutional deadlines regarding the formation of the Government; (iii) the limitation of ten (10) days set by the Constitution in the event of the appointment of a second candidate for Prime Minister based on paragraph 4 of Article 95 of the Constitution, and in which in contrast, the "*consultation*" is much more complex; and (iv) the fact that the Constitution has set the exact fifteen (15) day deadlines available to candidates for Prime Minister to reach the necessary political agreements and to propose the Government to the Assembly.

Regarding the lack of a proposal for a candidate for Prime Minister

501. In addition, the Court must assess whether, in the circumstances of the present case, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV, has proposed or refused to propose, the candidate for Prime Minister. In this regard, in the following, the Court will first recall the procedure followed by the President of the Republic and the winning political party, namely the LVV, after the successful vote of no confidence against the Government led by the latter, in the Assembly of Kosovo.

502. The Court recalls that the no-confidence motion against the Government was voted on 25 March 2020, by two-thirds (2/3) of all deputies of the Assembly. The text voted by this parliamentary majority also reflects their willingness to prove the possibility "*for the formation of a stability government*".

503. Based on the case file, on 1 April 2020, the President met with all representatives of political parties and coalitions represented in the Assembly, regarding "*further steps*" after the successful vote of no confidence motion. In accordance with the will expressed through the no-confidence motion of 25 March 2020, the majority of parties and coalitions represented in the Assembly have stated their opposition to the dissolution of the Assembly and in support of the possibility of forming a new Government.

504. On the same day, the President also met with the caretaker Prime Minister and at the same time the President of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV. After this meeting, the latter addressed the President through two letters, bearing the same date, namely that of 1 April 2020, through which he emphasized, among others: (i) "*your duty* [of the President] *to dissolve the Assembly of the Republic of Kosovo after the motion of no confidence*"; and (ii) that "*The Constitution of the Republic of Kosovo, as well as your previous practice in 2017, makes it clear that, after the successful motion of no confidence, the only way forward is to dissolve the Assembly of the Republic of Kosovo, in accordance with Article 82.2 of the Constitution, and the announcement of the early elections*", also stating that "*with regard to erroneous interpretations of Article 95.5 of the Constitution, this topic of secondary or tertiary importance may be left for another day.*".

505. The next day, namely on 2 April 2020, the President addressed two letters to the President of the LVV. In the first, he emphasized that the

meeting of the previous day, namely that of 1 April 2020, was a consultative meeting with the President of LVV, namely, "*the leader of the first party according to the final results of the Early Elections for the Assembly of the Republic. Kosovo, held on 6 October 2019*", and consequently a meeting "*of a formal, legal and procedural nature, for consultation to assess whether it is in the interest of the political party that you represent the formation of the new Government or the dissolution of the Assembly*". While in the second, the President emphasized that: (i) the LVV, it is the political entity that "*has won the required majority in the Assembly to form the Government*", and based on Article 95 of the Constitution has the right to propose a new candidate to form the Government; and (ii) requested that the LVV propose the new candidate, who would be mandated to form the Government.

506. The latter did not respond to the letter of 2 April 2020, through which the President requested the proposal of the candidate for Prime Minister by the President of LVV. Consequently, based on the case file, on 10 April 2020, the President addressed another letter to the President of the LVV. Through this letter, and recalling the letter of 2 April 2020, the President, among others, had: (i) reminded that he is waiting for the proposal of the candidate for Prime Minister from the LVV, as the political entity that has won the majority in the Assembly to form the Government and has the right to propose the new candidate for Prime Minister to form the Government; and (ii) once again requested the President of the LVV to propose a candidate for Prime Minister, who would be mandated by the President to form the Government.

507. To this letter of the President, the President of LVV, responded on 13 April 2020, not proposing the candidate for Prime Minister from among its ranks, but emphasizing, among other things, that: (i) the President has only the duty to dissolve the Assembly after the successful motion of no confidence; (ii) the assessment of "*of the interests of the political parties*" is not within the competence of the President; (iii) that the meeting of 1 April 2020 with the President took place in the capacity of the caretaker Prime Minister, and not the President of the LVV; (iv) after the successful motion of no confidence, the President is entitled "*to fulfill only one action determined by the constitution-maker. Thus, the dissolution of the Assembly in accordance with Article 82.2 of the Constitution of the Republic of Kosovo*"; (v) that the elections are the only option after the successful vote of a no-confidence motion, citing the practice followed in 2010 and 2017, respectively; (vi) that the President is obstructing the work of the Government "*in the midst of an emergency state of public*

health", through requests for the proposal of a candidate for Prime Minister; and finally, (vii) also pointed out that "*this letter is not a refusal to give you a name of the candidate for Prime Minister*".

508. On 15 April 2020, the President responded to the letter of 13 April 2020 of the President of the LVV, and who recalled the letters of 2 and 10 April 2020, and stated: (i) that he is still waiting "*the proposal of the candidate for Prime Minister to form the Government of the Republic of Kosovo, after the motion of no confidence in the Government*"; (ii) that he is obliged by the Constitution to guarantee the democratic functioning of the institutions of the Republic of Kosovo, including the provision of the name of the candidate for Prime Minister to form the Government and that the "*citizens of the Republic of Kosovo and the political parties represented in the Assembly of the Republic of Kosovo, rightly expect the functioning of the new Government, as well as expect the President to appoint a candidate for Prime Minister for the formation of the Government*"; (iii) no one has the right to deprive the elected representatives of people in the Assembly of the Republic of having the candidate for Prime Minister and to exercise the competence to elect the Government, as established in Article 65 (8) of the Constitution; (iv) your delay in proposing a candidate for Prime Minister makes it impossible for the Assembly to elect the Government, and consequently makes it impossible for the democratic functioning of the institutions, which, according to the Constitution, the President must guarantee; (v) based on Judgment KO103/14, "*it is not excluded that the party or coalition concerned will refuse to receive the mandate*"; and (vi) asked once again for the proposal of the candidate for Prime Minister for the formation of the Government.

509. The President of the LVV responded to the above-mentioned letter of the President, on 17 April 2020, emphasizing that: (i) "*we do not reject your request*" for the proposal of the candidate for the Prime Minister; but (ii) qualifying it as "*secondary and tertiary issue*" the request for the proposal of the candidate for Prime Minister, requested clarifications from the President regarding his obligation to dissolve the Assembly and the legal basis of Article 95 of the Constitution regarding the Election of the Government, to which the President refers.

510. The President responded to this letter on the same day, namely on 17 April 2020, by reminding the President of the LVV of his letters sent on 2 April, 10 April and 15 April 2020, and requesting once again the relevant proposal of the candidate for Prime Minister from the ranks of the political party he represents. Through this letter, the President

emphasized that: (i) "*you have not proposed a candidate for Prime Minister, but you have stated that you are not refusing to propose a candidate for Prime Minister*"; and (ii) "*that your non-refusal means that you send the name of the candidate for Prime Minister*". The President of LVV did not respond to this letter.

511. On 22 April 2020, the President addressed a letter to the President of LVV, through which: (i) he emphasized that despite the letters of 2, 10, 15, and 17 April 2020, a candidate for Prime Minister was not proposed to the President; and (ii) stated that the President of the LVV had not "*not exercised the right to propose a new candidate to form the Government*"; and (iii) that based on Article 95 of the Constitution and Judgment KO103/14, he will "*hold joint consultations with all leaders of parliamentary political entities about further steps*". On the same date, the President of LVV responded to the President's letter stating that: (i) the President had ascertained "*outside the constitutional powers as President, that I have not exercised the right to propose a new candidate to form the Government*"; (ii) The Constitution does not provide for such a competence of the President to "*assess or ascertain the use or non-use of the right to propose the candidate for Prime Minister*"; (iii) the Constitution and Judgment KO103/14, "*have not even set a deadline for such a thing*"; and (iv) the Constitution foresees "*the appointment of the candidate for Prime Minister only after the proposal by the party or coalition that has won the absolute or relative majority, as defined in item 84 of the Judgment of the Constitutional Court*".

512. On 22 April, 2020, the President invited to a joint consultative meeting the leaders of the parliamentary parties, including the President of the LVV. After this meeting and on the same date, he addressed a letter to the President of LDK, namely the political party ranked after LVV with the most deputies according to the elections of 6 October 2019, requesting him the proposal for the candidate for Prime Minister for the formation of the Government. The President repeated the same request to the President of the LDK on 29 April 2020. On the same date, the President of the LDK responded to the President, emphasizing that the candidate for Prime Minister will be proposed soon. After that, Mr. Avdullah Hoti, was proposed as a candidate for Prime Minister, the next day on 30 April 2020. On the same date, the President decreed his mandate for Prime Minister.

513. In light of the abovementioned clarifications regarding the exchange of letters between the President and "*the political party or coalition that has won the required majority in the Assembly to form the Government*", in the elections of 6 October 2019, namely the LVV, the

Court, as explained above, should further assess whether the possibility established through paragraphs 5, 2 and 3 of Article 95 of the Constitution has been exhausted, regarding the appointment of the first candidate for Prime Minister to form the Government after the resignation of the latter as a result of the successful vote of no confidence in the Assembly, so that it may have been possible for the President to nominate another candidate for Prime Minister, based on paragraph 4 of Article 95 of the Constitution. In the circumstances of the present case, it is already clear that the first attempt to form the Government did not fail in the Assembly as a result of the failure to obtain the required majority of votes, but the latter has allegedly failed due to lack of proposal of the name of the candidate for Prime Minister from "*the political party or coalition that has won the required majority in the Assembly to form the Government"*, and consequently, according to the President's allegation, the taking of relevant mandate was refused, as set out in Judgment KO103/ 4. Such a claim of the President is opposed by the Applicants and the caretaker Prime Minister, namely and for the purposes of this review, the President of the LVV. Therefore, the Court must assess whether, based on the circumstances of this case, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", has refused to take the relevant mandate.

514. This assessment depends on: (i) the role of the President in determining the candidate for the Prime Minister, as defined in paragraph 14 of Article 84 in conjunction with Article 95 of the Constitution; (ii) the interdependence and mutual obligations of the President and "*the political party or coalition that has won the required majority in the Assembly to form the Government*", as established in paragraph 14 of Article 84 in conjunction with Article 95 of the Constitution; and (iii) the circumstances of the formation of a new Government, after the successful vote of a no-confidence motion in the Assembly.

515. First, and regarding the role of the President in appointing the Prime Minister, the Court notes that: (i) the President exercises all his powers on the basis of Article 83 of the Constitution, according to which he/she is the head of state and represents the unity of the people of the Republic of Kosovo. Furthermore, his/her competence defined in paragraph 14 of Article 84 of the Constitution, regarding the appointment of a candidate for Prime Minister for the formation of the Government in relation to the relevant paragraphs of Article 95 of the Constitution, must always be exercised together with the competence of the President, established in paragraph 2 of Article 84 of the Constitution, according to which the President guarantees the

constitutional functioning of the institutions set forth by this Constitution. This is because the determination of the candidate for Prime Minister includes not only the relationship between the President and "*the political party or coalition that has won the required majority in the Assembly to form the Government*", but also the relationship between the President and the Assembly of the Republic, regarding the exercise of the competence of the latter for the election and expression of no confidence in the Government, as set out in paragraph 8 of Article 65 of the Constitution.

516. More precisely, the exercise of the competence of the Assembly regarding the election of the Government is dependent on the exercise of the competence of the President established through paragraph 14 of Article 84 of the Constitution for the appointment of the candidate for Prime Minister. The President is obliged to exercise this competence in the light of his obligation to guarantee the constitutional functioning of the institutions defined by the Constitution, starting the procedures of "*consultations*" with the political party or the relevant coalition for the formation of the Government, immediately after the constitution of the Assembly after the elections or immediately after the resignation of the Prime Minister/Government, including cases of successful vote of no confidence in the Government in the Assembly. Otherwise, the President would prevent the Assembly from exercising its right to elect the Government effectively. Therefore, the President in exercising the competence established through paragraph 14 of Article 84 of the Constitution, is also in the role of mediator between the political party or coalition that has the necessary majority to form the Government and the Assembly. The appointment of the candidate for Prime Minister begins the constitutional procedures for the formation of a new Government, which is submitted to the Assembly for voting, enabling him to exercise one of his most essential competencies, that of electing the Government.

517. Second, regarding the interdependence and mutual obligations of the President and "*the political party or coalition that has won the required majority in the Assembly to form the Government*", the Court recalls that the competence of the President set out in paragraph 14 of Article 84 of the Constitution is exercised "*in consultation*" with the political party or coalition having the necessary majority to form the Government. Thus, this paragraph, read together with Article 95 of the Constitution, includes not only the obligation of the President to appoint a candidate for Prime Minister, but also the obligation of "*the political party or coalition that has won the required majority in the Assembly to form the Government*" to propose the candidate for

Prime Minister. In the absence of such a reciprocal obligation, the constitutional norm could not be realized, and would remain at the full discretion of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", which, by not proposing the candidate for the Prime Minister, would make it impossible not only to exercise the powers of the President, but also the right of the Assembly to elect the Government.

518. The right to propose a candidate for Prime Minister is also a responsibility and a privilege. The proposal of this name encompasses the highest point of success of a political party or coalition towards and within an election cycle. The first right to propose a candidate for Prime Minister is guaranteed to the winning party or coalition by the Constitution of Kosovo. The exercise of this right is not vested with the authority to block the formation of a Government within an election cycle. Such an attitude would hold the entire most essential state institutions a hostage to the winning political party or coalition. On the contrary, and for this reason, the Constitution has provided for the unblocking mechanism, through which it is passed to another candidate for Prime Minister, whose eventual failure would result in the announcement of early elections.

519. In the end, the need to form a new Government after a successful vote of no confidence motion is immediate. This is because, as explained above, a Government elected by the Assembly does not continue to have the same legitimacy, at a time when the people's representatives are taking away their confidence by voting for a successful motion of no confidence.

520. Moreover, based on the Comparative Analysis and the contribution of the Venice Forum, in the vast majority of cases, after the successful vote of a no-confidence motion, the resigned Government has no role in the election of the new Government. Relevant presidents begin constitutional proceedings for the election of another Prime Minister who has the required majority in the Assembly to form the Government and gain its confidence. This is except in cases when the dismissed Government is assigned a certain role regarding the dissolution of the Assembly after voting on a successful motion of no confidence. This is the case with: (i) Article 104 of the Constitution of Croatia, which stipulates that the President may, on the proposal of the Government, with the signature of the Prime Minister and after consultations with representatives of parliamentary parties, dissolve the Croatian Parliament if the latter, among other things, passes a no-confidence vote in the Government ; (ii) Article 94 of the Constitution of Estonia which stipulates that if a vote of no confidence in the

Government or the Prime Minister is expressed, the President of the Republic may, on the proposal of the Government and within three days, declare early elections for Riigikogu; (iii) Article 58 of the Constitution of Lithuania, which stipulates that early elections for Seimas may also be announced by the President, *inter alia*, on the proposal of the Government, if Seimas expresses a no-confidence in the Government; and (iv) under the Swedish Constitution, and based on Sweden's response to the Court through the Venice Commission Forum, the dissolution of the Assembly can only take place if the Government calls early elections. Such elections may be the result of a no-confidence motion against the Government, as mentioned above.

521. In contrast, the Constitution of Kosovo, like most other Constitutions, does not stipulate any competence for the Government dismissed through the successful voting of a no-confidence motion, regarding the dissolution or not of the Assembly. Political parties or coalitions that have led/composed the latter, for the purposes of dissolving the Assembly, are reduced to the political power they have through their representation in the Assembly of the Republic. That said, the Constitution of Kosovo recognizes to "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the winner of the elections, the first right to propose a candidate for Prime Minister even when the Government that has led it, has lost the confidence by the Assembly through a successful vote of a no-confidence motion.

522. This constitutional right can in no way be transformed into a mechanism through which the political party or the winning coalition can prevent the formation of a new Government, by not proposing the name of the new candidate for Prime Minister, nor by expressly rejecting the mandate, and holding a Government led by the same political party or winning coalition, which has already lost the confidence of the Assembly. On the contrary, the task of a winning political party or coalition whose government has lost confidence in the Assembly through a successful vote of no confidence is to exercise the right to nominate a candidate for Prime Minister in order to form a government, taking back the confidence of the Assembly, or in order to allow the space for the formation of a Government by political parties or other coalitions, which have the necessary numbers in the Assembly to form the Government.

523. In the circumstances of the present case, "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the LVV, which Government was dismissed by the no-confidence motion of 25 March 2020, by the two thirds (2/3)

of votes of all representatives of the people, and who, again, was given the first opportunity to form a new Government based on paragraph 5 of Article 95 of the Constitution, did not propose a candidate for Prime Minister, despite four (4) requests of the President of the Republic, for the formation of the new Government.

524. More precisely, to the requests of the President dated 2, 10, 15 and 17 April 2020, for the proposal of the candidate for Prime Minister, the President of LVV responded by (i) emphasizing that the issue of proposing the candidate for the Prime Minister is "*secondary or tertiary issue*"; (ii) requiring the President to dissolve the Assembly of the Republic pursuant to paragraph 2 of Article 82 of the Constitution; (iii) requesting the announcement of early elections; and at the same time emphasizing that (iv) it is not rejecting the mandate, but in fact, also (v) by not proposing any name for the same purpose.

525. The Court has already clarified that the appointment of the candidate for Prime Minister, as a result of the "*consultations*" between the President and "*the political party or coalition that has won the required majority in the Assembly to form the Government*", includes a completely technical and formal "*consultation*", namely the request of the President for the proposal of a name for the candidate for Prime Minister and the proposal of a name by "*the political party or coalition that has won the required majority in the Assembly to form the Government*". This "*consultation*" for the purposes of applying paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of the Constitution, may not include a discussion regarding the dissolution of the Assembly or even the announcement of elections. This is because these two issues are neither in the exclusive competence of the President nor of "*the political party or coalition that has won the required majority in the Assembly to form the Government*".

526. On the contrary, the announcement of early elections, as a result of the dissolution of the Assembly is determined precisely by the Constitution, namely in its Article 82, and as explained throughout this Judgment, is realized based on the Constitution and is mandatory in cases of paragraph 1 of Article 82 of the Constitution, while it is at the discretion of the President in case of a successful vote of no confidence in the Assembly, a discretion that cannot be exercised in consultation only with "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the winning political party or coalition in the elections, but with all the political parties and coalitions represented in the Assembly. Furthermore, when Article 95 of the Constitution on the

election of the new Government is activated, it is implied that: (i) the consultations with political parties and coalitions represented in the Assembly regarding the dissolution of the Assembly after a successful vote of no confidence have already been concluded, making it impossible to dissolve the Assembly based on paragraph 2 of Article 82 of the Constitution; and (ii) that there is a sufficient majority of political parties and coalitions represented in the Assembly to form a new Government.

527. Consequently, and as explained above, for the purposes of "*consultation*s" pursuant to paragraph 14 of Article 84 in conjunction with paragraph 5 of Article 95 of the Constitution, it is only necessary to propose a candidate for Prime Minister and a mandate of the latter. In the circumstances of the present case, the political party with the right to propose, neither proposed the candidate for the Prime Minister nor explicitly refused to accept the mandate for the Prime Minister.

528. Regarding the possibility of refusing to take office, the Court recalls that in Judgment KO103/14, it found that "*it is not excluded that the party or coalition concerned will refuse to receive the mandate*". This Judgment did not specify the manner in which the refusal of the respective mandate could be made.

529. The Court recalls that in assessing the constitutional issue in Judgment KO103/14, the case before the Court was in no way related to the possible refusal to accept the mandate for Prime Minister by "*the political party or coalition that has won the required majority in the Assembly to form the Government*". However, the Court provided for the possibility of rejection, always keeping in mind that the future circumstances may contain the possibility that the political party or the winning coalition may not secure the required majority in the Assembly to vote on the proposed Government or other reasons, and consequently refuses to accept the mandate for Prime Minister, enabling the continuation of procedures for the election of a Government, based on paragraph 4 of Article 95 of the Constitution.

530. The Court, in Judgment [KO103/14], did not specify how this refusal is made. Therefore, the Applicants' allegation that "*The Court stated that the President can bypass the winner of the election, only if he expressly waives his right but under no other circumstances",* is not accurate. The Court, in fact, has never stated before about the modality of non-exercise of the right that the political party or the winning coalition can make. In all parliamentary practices so far in the Republic of Kosovo, there has been no case when the political party or

the winning coalition that had the right to propose, refused to propose a candidate for Prime Minister. The present case, therefore, is the first case that deals with the aspect of non-exercise of the right to propose a candidate, namely *de facto* refusal to propose a name.

531. In this regard, the Court emphasizes that the interpretation that the right to propose a candidate for the Prime Minister should be explicitly rejected is not acceptable. This is because the possibility of a refusal on the condition that it is made only explicitly, combined with the circumstances related to the allegations of uncertainty about the deadline within which the proposal of the candidate for Prime Minister should be made by "*the political party or coalition that has won the required majority in the Assembly to form the Government*", as in the application of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 1 of Article 95 of the Constitution, after the elections; as well as the application of paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of the Constitution, after the resignation of the Prime Minister/Government, including the case of successful vote of no confidence motion, would result in full discretion of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", regarding the formation of the Government, either by not proposing a name for the candidate, or by not expressly rejecting this right.

532. Therefore, rejection does not necessarily mean that it has been explicitly done, The Court notes that according to the dictionary of the Albanian language: *"REFUSAL m. pl.* [means] *Action according to the meanings of the verbs REFUSE."* The verb REFUSE in the accusative: *"I refuse to do a job or an action that is required of me, I object."*

533. The right to propose the candidate for the Prime Minister is the right of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", namely the winning party or coalition, and also incorporates the responsibility and obligation to act, respectively to propose this candidate and to propose the Government to the Assembly. This right also includes the obligation and responsibility to reject the proposal and to unblock the constitutional procedure for the election of the Government, if the political party or the winning coalition considers that it does not have the necessary votes in the Assembly to form the Government. That said, (i) failure to take concrete action towards the proposal and lack of proposal of the name of the candidate for Prime Minister; e (ii) neither the refusal to accept this mandate, but at the same time requesting the (iii) dissolution of the Assembly and the announcement of early elections, can be conditioned only by the express declaration

of the political party or the winning coalition for the rejection of the mandate for Prime Minister, to be considered a rejection. On the contrary, in such circumstances, the conditioning of the refusal to make an express statement regarding the refusal of the political party or the respective coalition would hold the establishment of state institutions a hostage only to the absence of refusal formally expressed by the political party or the winning coalition.

534. From the exchange of official documents between the President and the President of LVV, in the capacity of "*the political party or coalition that has won the required majority in the Assembly to form the Government*", not a single action or intention is reflected, that the latter plans to propose a candidate for the Prime Minister. On the contrary, the request of these letter is the dissolution of the Assembly and the announcement of early elections. These requests are in complete contradiction and exclude the possibility of proposing a candidate for the Prime Minister. The Court has already clarified that the "*consultations*" for the purposes of proposing the first candidate for Prime Minister, includes the proposal of the candidate for Prime Minister and the decreeing of the latter. Neither the dissolution of the Assembly, nor the announcements of early elections are the exclusive decision of either the President or the political party or the winning coalition.

535. Lack of a proposal of a candidate for the Prime Minister, namely the inaction regarding the only necessary obligation and taking any concrete step in this direction, especially in the circumstances when against the Government that was led by "*the political party or coalition that has won the required majority in the Assembly to form the Government*", a motion of no confidence with two-thirds (2/3) of all deputies of the Assembly has been successfully voted, it is sufficient to ascertain this refusal. The very lack of performance of an action which is required to be performed, in spite of the right, possibility and intermediary invitations, consists *de facto* in the opposition or refusal to perform a certain action.

536. In these circumstances, and after a successful vote of a no-confidence motion by two-thirds (2/3) of all deputies of the Assembly, the President, (i) balancing his obligation to guarantee the democratic functioning of the institutions established in the Constitution, as set forth in paragraph 2 of Article 84 of the Constitution, including in this context the right of the Assembly to elect the Government, as established in paragraph 8 of Article 65 of the Constitution, on the one hand; and, on the other hand, by (ii) taking into account "*the political party or coalition that has won the required majority in the Assembly*

to form the Government", namely the LVV, did not take any single action towards the proposal of the candidate for the Prime Minister despite the President's right, opportunity and requests, but continued to request the dissolution of the Assembly and the announcement of early elections, despite the fact that most political parties or coalitions represented in the Assembly had already stated against this possibility, making impossible to the President to exercise the competence specified in paragraph 2 of Article 82 of the Constitution, has rightly concluded the exhaustion of the constitutional possibilities for proposing the candidate for Prime Minister set forth in paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 5 of Article 95 of Constitution, and has initiated the following procedure set out in paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution. The opposite, would make it impossible to implement the essential competencies of the Assembly to elect the Government of the Republic of Kosovo.

537. Therefore, the Court finds that the challenged Decree of the President was issued in compliance with paragraph 14 of Article 84 of the Constitution in conjunction with paragraph 4 of Article 95 of the Constitution.

VI. Request for holding a hearing

538. The Court recalls that the Applicants also requested that the Court holds a hearing, stating that *"It is in the public interest to hold this public hearing, because the content of this decree violates the constitutional order, as well as some essential constitutional provisions that pave the way for the creation of new legitimacy through early parliamentary elections"*.

539. In this regard, the Court recalls that pursuant to paragraph 1 of Rule 42 [Right to Hearing and Waiver] of the Rules of Procedure: *"Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by majority vote decides otherwise for good cause shown";* whereas, pursuant to paragraph 2 of the same rule: *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law"*.

540. The Court notes that the abovementioned Rule of the Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file are sufficient, beyond any doubt, to reach a

decision on merits in the case under consideration (See case of the Constitutional Court, KO43/19, Applicants: *Albulena Haxhiu, Driton Selmanaj and thirty other deputies of the Assembly of the Republic of Kosovo*, Judgment of 13 June 2019, paragraph 116; see also case KI34/17, Applicant *Valdete Daka*, Judgment of 1 June 2017, paragraphs 108-110).

541. In the circumstances of the present case, this is not the case, because the Court does not consider that there is any uncertainty regarding the "facts or law" and therefore does not consider it necessary to hold a hearing. The documents and letters that are a part of the case file KO72/20 are sufficient to decide the case.

542. Therefore, the Applicants' request to hold a hearing is rejected as ungrounded.

VII. Request for interim measure

543. On 30 April 2020, the Applicants submitted their Referral to the Court, which, *inter alia*, requested the imposition of an interim measure "*on the Decree in order to prevent irreparable damage to the party and the institution".*

544. On 1 May 2020, the Court approved the request for interim measure as grounded and suspended the implementation of the challenged Decree of the President, stating that the latter is suspended *"without any prejudice to the admissibility or merits of the referral."* The interim measure was imposed until 29 May 2020. (See Decision on Interim Measure in Case KO72/20, 1 May 2020, paragraph 51 and the enacting clause).

545. Given that today, on 28 May 2020, the Court declared the Referral admissible and decided on its merits by confirming the constitutionality of the challenged Decree of the President, it is no longer necessary to keep the interim measure in force.

VIII. CONCLUSIONS

546. In the assessment of the Decree [no. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, through which "Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo", the Court decided: (i) unanimously that the request of the Applicants is admissible; (ii) unanimously that the contested Decree of the President is in compliance with paragraph 2 of Article 82

[Dissolution of the Assembly] of the Constitution; whilst therefore declaring that the successful vote of a motion of no confidence by the Assembly against a Government does not result in the mandatory dissolution of the Assembly and thereby permits the election of a new Government in compliance with Article 95 [Election of the Government] of the Constitution; (iii) by majority that the contested Decree is in compliance with paragraph (14) of Article 84 [Competencies of the President] in conjunction with paragraph 4 of Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo; (iv) unanimously to repeal the interim measure which was set through the Decision of 1 May 2020; and (v) unanimously to reject the request for a public hearing.

547. The Court recalls that the constitutional matter involved in this Judgment is the compliance with the Constitution of the disputed Decree of the President of the Republic, through which Mr. Avdullah Hoti was proposed to the Assembly of Kosovo as a candidate for Prime Minister. In assessing the constitutionality of the aforementioned Decree, and based on the Applicants' allegations as well as the arguments and objections of other interested parties, the Court initially assessed whether after a successful vote of no confidence by the vote of two thirds (2/3) of all Deputies of the Assembly on 25 March 2020, the President of the Republic, was obliged to dissolve the Assembly of the Republic and to announce early elections, based on paragraph 2 of Article 82 of the Constitution. Further, the Court clarified the procedure to be followed for the formation of a new Government, after a successful vote of no confidence in the Assembly and also gave its assessment, as to whether, in the circumstances of the concrete case, the procedure followed for the nomination of the candidate for Prime Minister pertaining to the formation of a new Government, resulted in a Decree that is constitutionally compliant.

548. In order to interpret the constitutional articles related to the circumstances of the concrete case, respectively Articles 82, 95 and 100 of the Constitution, the Court also took into account: (i) the constitutional principles on the role of the Assembly and the President; (ii) its case law, including Judgment KO103/14 and all cases cited by the parties to the proceedings; (iii) the relevant Opinions of the Venice Commission; (iv) the Comparative Analysis of the Constitutions, including those referred to by the Applicants; (v) responses received from the Constitutional/Supreme Courts, part of the Venice Commission Forum; and (vi) the preparatory documents for the drafting of the Constitution.

549. The Court initially recalled that the Constitution consists of a unique entirety of constitutional principles and values on the basis of which the Republic of Kosovo has been built and must function. The norms provided by the Constitution must be read in conjunction with each other, because that is the only manner through which their exact meaning derives. Constitutional norms cannot be taken out of context and interpreted mechanically and in isolation from the rest of the Constitution. This is due to the fact that the Constitution has an internal cohesion, according to which each part is connected to the other. The structure of the constitutional norms related to the establishment of state institutions that stems from the people's vote must be interpreted in such a way that they enable and not block the establishment and the effective exercise of the respective functions. Any ambiguity of norms must be interpreted in the spirit of the Constitution and its values. No constitutional norm can be interpreted in such a way as to block the effective establishment and functioning of the legislative and executive branches of government, nor the way in which they balance each other in terms of the separation of powers.

550. In addition, the Court also notes that every state power and holder of public functions without any exception, is under the obligation to undertake the respective public duties in service of the implementation of the values and principles based on which the Republic of Kosovo was built to function. The rights and obligations deriving from the Constitution must not be exercised in service of establishment and effective functioning of State Institutions.

551. Further and with regard to the constitutional provisions pertaining to the dissolution of the Assembly, the Court emphasized that the Constitution provides an obligation to dissolve the Assembly only in the circumstances of paragraph 1 of Article 82 of the Constitution, and the possibility to dissolve the Assembly in the circumstances of paragraph 2 of Article 82 of the Constitution, following a successful vote of a motion of no-confidence. More precisely, the Assembly is mandatorily dissolved only in three cases: (i) if the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister; (ii) if two thirds (2/3) of all deputies of the Assembly vote in favor of the dissolution of the Assembly; and (iii) if, within sixty (60) days from the date of the beginning of the President's election procedure, the latter is not elected. Whereas, in case of a successful vote of no confidence against Government, the President has the possibility but not the obligation to dissolve the Assembly.

552. The President's possibility to dissolve the Assembly cannot be exercised independently or contrary to the will of the Assembly, but it must be exercised in coordination and depends on the will of the necessary majority of the representatives of the people represented in the Assembly. The use of the verb "*may*" in the context of paragraph 2 of Article 82 of the Constitution, only reflects the possibility of the President to dissolve the Assembly, based on consultations with the political parties represented in the Assembly. Such a determination pertaining to the presidential competencies related to the verb "*may*" ["*mund*"/"*može*"] in the context of the dissolution of the Assembly, is also confirmed through the Opinions of the Venice Commission, referred to in this Judgment.

553. The Court emphasized that the Assembly is the only institution in the Republic of Kosovo that is directly elected by the people for a four (4) year term. Apart from the Constitution, the representatives of the people are not bound by any other power or obligatory mandate. Neither does the President who is elected by the Assembly have the power to dissolve the Assembly in contradiction with its will; nor can the exercise of the competence of the Assembly to express a vote of no confidence against a Government which was elected by Assembly itself, can result into the end of the mandate of the Assembly itself. The Assembly cannot be conditioned to self-dissolution if it chooses to express no confidence against a Government it has elected, because a motion of no confidence as a mechanism of constitutional control of the Government by the Assembly as a representative organ of the people, would not have any meaning. Such an approach is contrary to the constitutional principle of parliamentary control of the Government enshrined in paragraph 4 of Article 4, paragraph 8 of Article 65 and Article 97 of the Constitution and the basic democratic principles.

554. The high threshold of the vote required to dissolve the Assembly by the deputies themselves, reflects the weight and importance that the Constitution has set for this purpose. In addition to the highest threshold provided for the amendment of the Constitution, which requires the approval of two thirds (2/3) of all deputies of the Assembly, including two thirds (2/3) of all deputies of the Assembly holding guaranteed seats guaranteed for representatives of communities that are not in the majority in the Republic of Kosovo, the Constitution sets the next highest possible threshold for the dissolution of the Assembly, namely the vote of two thirds (2/3) of all its deputies, which equals, *inter alia*, to the necessary vote for the delegation of state sovereignty, as defined in Article 20 of the Constitution. In contrast, for a successful motion of no-confidence

against the Government, the Constitution has set a lower threshold of the required vote, namely sixty-one (61) deputies.

555. If the President could dissolve the Assembly on its own motion following a no-confidence motion, then the President would have the power which equals to the two-thirds (2/3) of the votes of the representatives of the people and which would result in an arbitrary reduction of the necessary will of two thirds (2/3) of the deputies for the dissolution of the Assembly, into only sixty one (61) votes, required for a motion of no confidence. Such a power, Presidents, based also on the Opinions of the Venice Commission, do not even have in the majority states with presidential regulation.

556. In fact, the Analysis of other Constitutions reflected in this Judgment, including those Constitutions used in the arguments of the Applicants, the relevant Opinions of the Venice Commission and the responses of the Venice Commission Forum, reflects that no Constitution requires the mandatory dissolution of the Assembly only due to the fact that a motion of no-confidence has been successfully voted. On the contrary, the successful vote of a motion of no-confidence results in three situations: (i) the automatic election of a new Prime Minister, in cases where the Constitutions provide for a "*constructive motion*"; (ii) an additional possibility for the election of a Prime Minister; and (iii) the return of the process to the President, to start and follow the procedures for the election of the Government, for the number of possibilities for prescribed in the Constitution. In all these countries, only when all the constitutional possibilities for the election of a new Government have been exhausted, the Assembly is dissolved and early elections are announced.

557. The competence of the President to dissolve the Assembly as set forth in paragraph 2 of Article 82 of the Constitution, is applied correctly, only when following a successful motion of no confidence voted by at least sixty-one (61) deputies: (i) there is sufficient majority of deputies to form a new Government, and at the same time (ii) there is no majority of two-thirds (2/3) of the deputies, necessary to self-dissolve. This competence, on one hand, represents an additional possibility to form the Government within the existing legislature and avoid elections; while on the other hand, it represents a possibility to enable the unblocking of situations in which there is neither will nor a necessary majority to form a new Government by the Assembly within the same legislature.

558. To this day, Article 82 of the Constitution has always been applied in this same way. More precisely: (i) the third and fifth legislatures were

dissolved by the President in the third year of their term, in 2010 and 2017, respectively, when in the Assembly there was no will or necessary majority to form a new Government; whereas, (ii) the fourth and sixth legislatures, in 2014 and 2019, respectively, were self-dissolved with two-thirds (2/3) of the votes of all deputies and this dissolution was only decreed by the respective Presidents.

559. The circumstances of the present case are clearly different from those of previous legislatures. In this case, (i) a no-confidence motion was passed by the votes of two-thirds (2/3) of all people's representatives and the same, do not need the President's help to self-dissolve; and (ii) the majority of political parties and coalitions represented in the Assembly, respectively the majority of the people's elected representatives, have declared their will in favor of the establishment of a new Government, after expressing no confidence against the caretaker/dismissed Government. The dissolution of the Assembly by the President against the will of the people's representatives would be arbitrary and clearly unconstitutional. On the contrary, the President was obliged to initiate proceedings which would provide for the opportunity to establish a new Government based on the provisions of Article 95 of the Constitution.

560. The manner of electing the Government in the Constitution of Kosovo is determined through Article 95. The procedure to be followed for the election of a Government is clarified in the Judgment of the Court in case KO103/14. The Court adheres to the principles set out in that Judgment. The latter clarified that for the establishment of a Government, the Constitution defines two possibilities. The first right to establish the Government belongs to the "*political party or coalition that has won the necessary majority in the Assembly to establish the Government*", respectively the political party or the coalition having won the elections. The President has no discretion regarding the right of this political party or coalition to nominate a candidate for Prime Minister and only mandates the same. In case of failure of the election of this Government in the Assembly, or rejection of this mandate by the winning political party or the coalition, the right to establish the Government passes to the political party or coalition represented in the Assembly, which at the discretion of the President is more likely to establish the Government and avoid elections. Whilst, the failure of these two possibilities, results in the obligation of the President to announce the elections, as defined in the Constitution.

561. Article 95 of the Constitution defines the procedure for electing a Government during an election cycle. The same, defines two options for electing a Government, after the elections and after the resignation

of the Prime Minister/Government. The Court has clarified that the effect of the resignation of a Prime Minister results in the resignation of a Government, just as the effect of the successful vote of a no-confidence motion on the "*Government as a whole*", results in the resignation of the same. Such a stand is also consistent with the Comparative Analysis, the cited Opinions of the Venice Commission and the contribution submitted to the Court by members of the Venice Commission Forum, according to which, after a successful motion of no-confidence, the Prime Minister/Government are resigned, and the respective constitutional article pertaining the election of the Government is activated, except for those cases that have provided for the "*constructive motion*", or have provided only one more possibility for the election of the Prime Minister/Government, after the relevant motion.

562. Therefore, all cases of resignation of the Prime Minister, or when the post becomes vacant for other reasons, result in the fall of the Government, including when the resignation of the Government is the result of a successful motion of no confidence, provided that after this motion there is no dissolution of the Assembly, based on the principles explained above, paragraph 5 of Article 95 of the Constitution is activated, obliging the President to mandate the new candidate for Prime Minister. The political party or coalition that has the first right to nominate the candidate for Prime Minister and establish the Government, is again the winning political party or coalition. For the establishment of this Government, the procedure defined through paragraphs 2 and 3 of Article 95 of the Constitution must be followed, while the failure to obtain the necessary votes in the Assembly or the rejection of this mandate, results into passing the right to establish the Government to a political party or a coalition that may have the necessary majority to establish the Government, as provided in paragraph 4 of Article 95 of the Constitution and in accordance with the principles set out in Judgment KO103/14. The Court clarifies that through Judgment KO103/14, it has never determined that the winning political party or coalition has the exclusive and sole right to nominate the candidate for Prime Minister and to establish the Government.

563. The Court also notes that the competence of the Assembly to elect and express no confidence against the Government is set out in paragraph 8 of Article 65 of the Constitution and is implemented through Articles 95 and 100 of the Constitution, on the Election of the Government and the Motion of No Confidence, respectively. The latter is one of the most essential mechanisms for exercising parliamentary control over the

Government and, consequently, for balancing the powers among the branches of government. The democratic legitimacy of a government elected by an Assembly stems from the confidence that the representatives of the people vest with it when electing it. This confidence ceases at the moment when the majority of all deputies of the Assembly have voted against it. As a result, it loses the confidence of the representatives of the people, and consequently the constitutional authority to exercise the relevant competences.

564. The Court reiterates that in the circumstances of the concrete case, on 25 March 2020, a motion of no-confidence was voted for by two-thirds (2/3) of the votes of all deputies of the Assembly, against the Government led by the winning political party in the elections of 6 October 2019. The same political party, unlike most of the Constitutions analyzed and reflected in the Judgment, after a successful vote on the motion of no confidence, based on the Constitution of Kosovo, still has the first right to propose a candidate for Prime Minister. Such a proposal has not been made by this political party even after (4) four requests by the President, starting from 2 April 2020 to 22 April 2020. The respective political party, namely VETËVENDDOSJE! Movement, in essence, claims that: (i) after a motion of no confidence, the President is obliged to dissolve the Assembly and announce early elections; and that (ii) there is no constitutional deadline for proposing of the candidate for Prime Minister, therefore, it is at the full and indefinite discretion of the winning political party to nominate the candidate for Prime Minister and that "*only when the political, administrative and technical conditions have been met*." Consequently, another matter relevant for this Judgment is: (i) the deadline within which the candidate for Prime Minister must be proposed; and (ii) if the lack of proposal of this candidate by the political party that has the first right to nominate, reflects the refusal to accept the mandate for the Prime Minister.

565. Regarding the deadline within which the proposal for the candidate for Prime Minister should be made, the Court has emphasized that this matter must be analyzed in terms of: (i) the system of constitutional deadlines that the Constitution has set for the purposes of forming the Government; and (ii) the nature of the "*consultation*" between the President and the political party or coalition with the right to nominate a candidate for Prime Minister, including mutual responsibilities and obligations between them, for the purpose of nominating the candidate for Prime Minister.

566. First, the Court noted that the nomination of a candidate for Prime Minister by the President results into the running of two types of

parallel constitutional deadlines: (i) that of the dissolution of the Assembly if the election of the Government is not made within sixty (60) days of taking the mandate; and (ii) those set out in Article 95 of the Constitution, which relate to the two possibilities for the formation of the Government, respectively the fifteen (15) day period within which the candidate for Prime Minister presents the composition of the Government and requires approval by the Assembly; (iii) the ten (10) day deadline within which the President nominates another candidate for Prime Minister, in case the first candidate for Prime Minister fails to secure the necessary votes in the Assembly or refuses the respective mandate; and (iv) referring to the "*same procedure*", the fifteen (15) day deadline, within which the other candidate for Prime Minister, presents the composition of the Government and requests its approval by the Assembly. These precise deadlines reflect the purpose and importance that the Constitution has assigned to the need for speedy establishment of the Government, setting the deadline of fifteen (15) days for the candidate for Prime Minister, to negotiate and reach the agreements to secure the necessary votes of deputies of the Assembly for the proposed Government; and also the sixty (60) day deadline for the formation of a Government, and the corresponding consequence of the dissolution of the representatives of the people, if this deadline is not met.

567. Secondly, the Court recalled that in Judgment KO103/14, it distinguished between the nature of "*consultation*" between the President and the political party or coalition with the right to nominate the first and second candidate for Prime Minister. In the first case, the President has no discretion and it is clear which is the political party or coalition that proposes the candidate for Prime Minister, consequently this "*consultation*" entails a completely formal and technical process between the President and the winning party or coalition, pertaining to the proposal of the candidate for Prime Minister and the appointment of the same. By contrast, in the second case, the President has the discretion and it is not clear at the outset which is the political party or coalition with the right to propose the candidate for Prime Minister, therefore, this process of "*consultation*" is more complex and entails the obligation of the President to consult with all the political parties and coalitions represented in the Assembly and his/her assessment, as to who has the highest probability to form the Government in order to avoid elections. In exercising this discretion, the Constitution has set a deadline of ten (10) days for the President.

568. Therefore, in the context of: (i) the undisputed importance of the effective functioning of a Government as one of the three branches of

government; (ii) the system of precise and short deadlines set out in the Constitution regarding the formation of a Government; (iii) the completely clear, technical and formal nature of the "*consultation*" between the President and the winning political party or coalition for the purposes of nominating the first candidate for Prime Minister; and (iv) the constitutional limit of ten (10) days for the purposes of nominating the second candidate for Prime Minister through a much more complex "*consultation*" process, the Court notes that the non-specification of deadlines by the Constitution pertaining to the proposal of the first candidate for Prime Minister from the winning political party or coalition, does not entail the right and the discretion of the latter not to act for an unlimited duration of time.

569. In this respect, the Court notes that a time limit for proposing the candidate for the Prime Minister is not specified in the Constitution not only with respect to the political party or coalition with the first right to propose a candidate, but it also does not specify a deadline within which the President is obliged to decree the proposed candidate, or to submit the same to the Assembly. The Court notes that the designation of the candidate for the Prime Minister, neither involve only the obligation of the President to decree the candidate, nor only the right of the winning political party to propose a candidate; but it also includes the duty of the latter to propose or refuse to propose the candidate for Prime Minister. More precisely, the designation of the candidate for Prime Minister involves the mutual obligation for the cooperation between the President and the winning political party in this process. Moreover and whilst having in mind the technical and formal nature of the "*consultation*" for the purpose of designating the first candidate for Prime Minister, a step that puts into motion the process Government formation and corresponding constitutional deadlines, it is clear and self-understanding that this "*consultation*" must be concluded as soon as possible and that it involves the requirement for a swift cooperation dynamic.

570. On the contrary, all of the above-mentioned constitutional norms regarding the deadlines and the purposes that they entail regarding the formation of the Government, would be without any meaningful effect and completely unnecessary. The election of the Government would remain hostage to the "*unlimited deadlines*" and at the full discretion of a winning political party or coalition or at the full discretion of the President. The former, would hold the formation of the Government pending, relying to the full and indefinite discretion to propose a candidate for Prime Minister, while the President would also refer to the full and indefinite discretion to decree the same. This

"*full and unlimited discretion in terms of time*", in the meantime, is related to the election of the Government, a competence which pertains to another branch of government, respectively the Assembly. Such an approach and interpretation would be arbitrary and clearly contrary to the structure of constitutional norms, its purpose and spirit, but also contrary to the basic principles of a parliamentary democracy. In this regard, the Court also emphasizes that, despite the allegations of the applicants regarding the delay of the procedures for establishing institutions after the elections, emphasizing the situation of 2014 in respect to the prolongation of the process for the establishment of the Assembly, the Court has never, including in the Judgment KO119/14, addressed the issue of deadlines related to the constitution of the Assembly, as the same were not the subject matter of the case before the Court.

571. Regarding the lack of a proposal of candidate for the Prime Minister by the winning political party in the elections, the Court, in this Judgment, has analyzed the exchange of letters between the Chairman of the winning political party, at the same time the caretaker Prime Minister, and the President. These letters reflect two characteristics: (i) the President's request for the nomination of a candidate for Prime Minister on the one hand; and (ii) the lack of a proposal and the request for the dissolution of the Assembly and the announcement of early elections by VETËVENDOSJE! Movement, on the other hand.

572. The Court, in this Judgment, has emphasized that: (i) for the purposes of "*consultation*" to nominate the candidate for Prime Minister between the President and the winning political party or coalition, only the nomination of the candidate for Prime Minister and the respective decreeing by the President is relevant; and (ii) this "*consultation*" process cannot include issues related to the dissolution of the Assembly or the announcement of early elections, because none of these issues is within exclusive competence of either the President or the winning party or Caretaker/resigned Government. This because it is clear that: (i) the cases of compulsory dissolution of the Assembly are precisely defined in the Constitution; (ii) the possibility of the Assembly to be dissolved by the President, as has already been clarified, is not a competence exercised by the President without coordination with all political parties and coalitions represented in the Assembly, and not only with the one that has won the elections; and (iii) the Government has no constitutional competence either with regard to the dissolution of the Assembly or the announcement of elections. On the contrary, in relation to these two issues, the role of political parties or coalitions represented in a Government is equivalent only to the power they have through their representation in

the Assembly. The will of the majority of the Assembly in the circumstances of the current case, has clearly made it impossible for the President to dissolve the Assembly and announce early elections.

573. The Court notes that in the circumstances of the present case, the political party that has led the Government against which a motion of no confidence has been voted, has not made a proposal for a new candidate for Prime Minister for the purpose of forming a new Government. However, the Applicants claim that they have never explicitly refused to accept this mandate.

574. Regarding the possibility of refusing to accept the mandate, the Court recalls that in Judgment KO103/14, it found that "*it is not excluded that the party or coalition in question will refuse to accept the mandate*". Despite the fact that it was not an issue before the Court in 2014, the Court had foreseen the possibility of refusal, precisely for the purpose of making it impossible to block the formation of the Government in the future. This Judgment did not specify the manner in which the refusal of the respective mandate can be made. Therefore, the claim of the applicants that "*the Court has stated that the President may bypass the winner of the election only if the latter expressly waives his right but under no other circumstances*" is incorrect. This is so because also the authorization of the winning political party or coalition to refuse the mandate only explicitly, namely the possibility to not propose a name for the candidate for Prime Minister, and at the same time, to hold this right by not refusing explicitly, would vest the winning political party or coalition with the undisputable right to block the process of nominating a candidate for Prime Minister by the President.

575. Such a possibility would make it impossible for the President to exercise his competence to appoint a candidate for Prime Minister, thus making it also impossible for the Assembly to exercise its competence for the election of Government. On the contrary, as it has already been clarified, the appointment of a candidate for Prime Minister requires immediate interaction in fulfilling the mutual obligations and responsibilities between the President and the winning political party or coalition. Therefore, the refusal in fact means the lack of action in order to fulfill this obligation, namely the lack of concrete action towards and through proposing the candidate for Prime Minister by the winning political party or coalition. The Constitution and its spirit foresees that this right and, at the same time, obligation, for both, the winning party and the President, cannot be abused by any of them and must be exercised in a good faith and in the function of forming of the Government.

576. From the exchange of official letters between the President and the winning political party in the present case, not only that there is no proposal of a candidate for Prime Minister, but even a single indication of the intention to propose a candidate for the Prime Minister, is reflected. They rather only contain the request to dissolve the Assembly and call early elections. These demands exclude the possibility of proposing a candidate for Prime Minister.

577. In circumstances where a no-confidence motion with two-thirds (2/3) of the representatives of the people is successfully voted and the possibility to form a new Government exists, if the claims about (i) the unlimited time and the full discretion of the winning political party, and (ii) the right to only expressly refuse the candidate for Prime Minister, were to be held, combined with the sole demand for the dissolution of the Assembly and the announcement of early elections, the formation of a Government would be blocked indefinitely, keeping in office a Government that has lost the confidence of the representatives of the people. This is not the spirit of the Constitution of the Republic of Kosovo.

578. The President, through balancing his obligation to guarantee the constitutional functioning of the institutions defined by the Constitution, as set forth in paragraph 2 of Article 84 of the Constitution, including in this context, the right of the Assembly to elect a Government, as defined in paragraph 8 of Article 65 of the Constitution, on the one hand; and on the other hand, given that the winning political party has not undertaken any single action towards proposing the candidate for Prime Minister despite the President's requests, but has continued to request the dissolution of the Assembly and the announcement of early elections, despite the fact that the majority of political parties or coalitions represented in the Assembly have already declared themselves against this possibility, whereby making it impossible for the President to exercise the competence set out in paragraph 2 of Article 82 of the Constitution, has rightly ascertained the constitutional possibilities to nominate a candidate for Prime Minister by the winning political party have been exhausted. As a result, the President initiated the procedures for the appointment of the new candidate for Prime Minister, in consultation with and after the proposal of the political party, which based on the relevant consultations, resulted to have the highest probability to form the Government and in order for the elections to be avoided. The opposite would make impossible the exercise of the essential powers of the Assembly of the Republic to elect the Government of the Republic of Kosovo.

579. The right to nominate a candidate for Prime Minister is a responsibility and a privilege. The proposal of this name represents the highest point of success of a political party or coalition for and within an election cycle. The first right to nominate a candidate for Prime Minister is guaranteed to the winning political party or coalition, through the Constitution. The exercise of this right is not vested with the authorization to block the formation of a Government within an election cycle. Such an attitude would submit the most important state institutions to the sole will of the winning political party or coalition.

580. Finally, the Court concludes that the democratic functioning of institutions is the primary responsibility of every person who is vested with public authority. All actions taken by persons vested with public power or authorizations must be in accordance with the Constitution and its spirit and contribute to the orderly conduct and coordination of affairs of public interest for the state of the Republic of Kosovo, so that the latter would develop and implement the values and principles on which it has been built and aspires through its Preamble.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 113 (2) (1) and 116.2 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, on 28 May 2020,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that Decree [No. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, by which *"Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo a candidate for Prime Minister to form the Government of the Republic of Kosovo*", **is in compliance** with paragraph 2 of Article 82 [Dissolution of the Assembly] of the Constitution of the Republic of Kosovo;

III. TO HOLD, by majority, that Decree [No. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, by which *"Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo a candidate for Prime Minister to form the Government of the Republic of Kosovo*", **is in compliance** with paragraph (14) of Article 84 [Competencies of the President] in conjunction

with Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo;

IV. TO REPEAL, unanimously, the interim measure imposed on 1 May 2020;

V. TO REJECT, unanimously, the request for holding a hearing;

VI. TO NOTIFY this Judgment to the Parties;

VII. TO PUBLISH this Judgment in the Official Gazette, in accordance with Article 20.4 of the Law; and

VIII. TO DECLARE this Judgment effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama- Hajrizi

KO 116/19, Applicant Ismet Kryeziu as the alleged representative of the Ministry of Environment and Spatial Planning of the Republic, Request for legal interpretation of the Decision AC-I-13-0125-0001 and 0002 of the Appellate Panel of the SCSC, of 22 July 2015

KO 116/19, Decision to reject the referral of 13 May 2020, published on 9 June 2020

Keywords: *Referral submitted in accordance with paragraph 10 of Article 93 [Competencies of the Government], and in conjunction with Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo, request for legal interpretation of decisions of regular courts, request does not meet procedural requirements, rejected referral.*

The Referral is based on paragraph 10 of Article 93 [Competencies of the Government], and in conjunction with Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

The alleged Applicant addresses the Court with a request for legal interpretation as to whether they should enforce the final judgment of the Municipal Court confirmed by the District Court in Prishtina, and decision of the Special Chamber of the Supreme Court of Kosovo rejecting the PAK's claim, or suspend the proceedings under the Judgment PAKR. no. 158/15 of the Court of Appeals , of 05.04.2016, in order to decide on the party's request for registration of ownership rights in her name under the above legal acts.

The Court has in several cases contacted the Ministry of Environment and Spatial Planning of the Republic of Kosovo regarding the supplementation of the referral, which was necessary for further decision-making on this referral. However, the Court did not receive the requested clarifications from the Ministry of Environment and Spatial Planning of the Republic of Kosovo regarding the referral.

Consequently, the Court finds that the referral in question is incomplete, because the Ministry of Environment and Spatial Planning of the Republic of Kosovo has failed to submit the supporting documents requested by the Court to prove the grounds of the request.

Accordingly, the Court concludes that the referral does not meet the procedural requirements for further examination as provided for in Rules 32 and 35 of the Rules of Procedure.

DECISION TO REJECT THE REFERRAL

in

Case No. KO116/19

Applicant

Ismet Kryeziu as the alleged representative of the Ministry of Environment and Spatial Planning

Request for legal interpretation of Decision AC-I-13-0125-0001 and 0002 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

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 Ismet Kryeziu who claims to be the representative of the Ministry of Environment and Spatial Planning of the Republic of Kosovo (hereinafter: the Applicant).

Subject Matter

2. The subject matter of the Referral is the legal interpretation of Decision AC-I-13-0125-0001 and 0002 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel) of 22 July 2015. In conjunction with the Judgment PAKR 158/15 of the Court of Appeals of Kosovo, of 5 April 2015.

3. The alleged representative submitted a question before the Constitutional Court(hereinafter: the Constitutional Court):

> *"we request from the Constitutional Court of Kosovo to provide us with a legal interpretation whether we should execute the final judgment of the Municipal Court confirmed by the District Court in Pristina, and the decision of the Special Chamber of the Supreme Court of Kosovo, rejecting the PAK's claim or suspend the proceedings concerning the judgment of the Court of Appeals PAKR. no. 158/15, of 05.04.2016, in order toto decide on the party's request for registration of property rights in her name according to the aforementioned acts."*

Legal Basis

4. The Referral is based on paragraph 10 of Article 93 [Competencies of the Government], and in conjunction with Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Proceedings before the Constitutional Court

5. On 8 July 2019, the alleged representative submitted the Referral to the Court.

6. On 10 July 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 31 July 2019, the Court notified the Kosovo Cadastral Agency about the registration of the Referral.

8. On 30 September 2019, the Court notified the Ministry of Environment and Spatial Planning of the Republic of Kosovo about the registration of the Referral.

9. On 3 October 2019, the Ministry of Environment and Spatial Planning of the Republic of Kosovo requested from the Court to forward to them the complete Referral KO 116 19 submitted by the alleged Applicant.

10. On 9 October 2019, the Court forwarded to the Ministry of Environment and Spatial Planning of the Republic of Kosovo the complete Referral KO116/19 submitted by the alleged representative.

11. On 30 December 2019, the alleged representative requested from the court to consider his Referral with urgency.

12. On 18 February 2020, the Court again sent an information letter to the Ministry of Environment and Spatial Planning of the Republic of Kosovo on the registration of the Referral and requested from it clarify its Referral, respectively or answer specific questions:

> *„1. Is Mr. Ismet Kryeziu, Director of the Legal Directorate of the Kosovo Cadastral Agency, submitting the Referral KO 116/19, titled a request for "legal interpretation" before the Constitutional Court on his own behalf as the director of the office he represents or in the name of the Ministry of Environment and Spatial Planning (MESP)? We kindly ask from you to confirm this exactly, by sending a direct answer indicating who has submitted the Referral KO116 / 19.*
> *2. If the Referral was submitted on behalf of the MESP, please explain whether the Referral was submitted in the name of the MESP as one of the ministries of the Government of the Republic of Kosovo, or in the name of the entire Government of the Republic of Kosovo? In this regard, please confirm the decision-making process for the submission of this Referral so that we know who exactly has submitted the Referral KO116 / 19.*

13. Ministry of Environment and Spatial Planning of the Republic of Kosovo did not respond to the Court's request nor did he provide any additional documents.

14. On 13 May 2020, having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court to reject the Referral.

Summary of facts

Proceedings before the Municipal and District Court in Prishtina based on a claim for annulment of sale contracts

15. On an unknown date in 2005, MB, Đ.V, Đ.LJ, Đ.S and Đ.T, acting in the capacity of legal heirs, filed a claim for annulment of sale contracts concluded by their legal predecessor M.R. with the Enterprise PIK „Kosova-Export“ from Fushë Kosovë.

16. On 15 May 2007, the Municipal Court in Prishtina rendered Judgment C. no. 2333/2005, whereby it upheld the claims of MB, Đ.V, Đ.LJ, Đ.S and Đ.T and annulled the sale contracts concluded by their legal predecessor M.R. with the Enterprise PIK „Kosova-Export“, and

obliged the Enterprise PIK „Kosova-Export" to return to the ownership and possession of the heirs of M.R. the immovable property that was the subject of annulled contracts.

17. On an unspecified date, the Enteprise PIK "Kosova-Export" filed an appeal with the District Court in Prishtina against the Judgment (C. No. 2333/2005) of the Municipal Court in Prishtina, of 15 May 2007, arguing that this judgment was not in compliance with positive legislation.

18. On 2 October 2007, the District Court in Prishtina rendered the Judgment GŽ. no. 664/2007, whereby the appeal of the Enteprise PIK „Kosova-Export" was rejected as unfounded whilst the judgment of the Basic Court in Pristina was confirmed in its entirety.

Proceedings before the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters

19. On 11 March 2008, the Kosovo Trust Agency (hereinafter: KTA), representing the Enterprise PIK "Kosovo-Export" submitted a request to the Special Chamber of the Supreme Court of Kosovo to review once again the Judgment C. No. 2333/2005 of the Municipal Court in Prishtina, of 15 May 2007 and the Judgment GŽ. no. 664/2007 of the District Court in Prishtina, of 2 October 2007, arguing that the Municipal and District Court did not have jurisdiction to decide in these cases.

20. On 28 June 2013, the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Specialized Panel), by Decision SCA-08-0035, rejects the request of the KTA because it was filed out of time.

21. On 19 July 2013, the Privatization Agency of Kosovo (hereinafter: PAK) as the legal successor of the KTA filed an appeal with the Appellate Panel against the Decision (SCA-08-0035) of the Special Chamber of 28 June 2013, requesting to have this decision annulled and the case returned for retrial.

22. On 23 July 2015, by Decision AC-I-13-125-A0001 and A0002, the Appellate Panel rejected the appeal of the PAK and confirmed in its entirety the Decision (SCA-08-0035) of the Specialized Panel, of 28 June 2013.

Proceedings before the Office of the Kosovo Cadastral Agency in the Municipality of Graçanica

23. On 20 January 2011, the heirs of M.R. filed a request with the Office of the Kosovo Cadastral Agency in the Municipality of Graçanica for registration of ownership over the immovable properties that were returned to them by the Judgments of the Municipal and District Court.

24. On 24 June 2017, the Office of the Kosovo Cadastral Agency of the Municipality of Graçanica, by Conclusion 60/2011, suspended / terminated further resolution at the request of the heir of M.R., by reasoning *"After a detailed look into the case file, and inspection of the Judgment of the Municipal Court in Prishtina C. No.2333/05, of 15 May 2007, it was noticed that the said judgment was rendered by Judge Sh.Sh. Given that the Court of Appeals rendered the Judgment PAKR 158/15, of 05.04.2016, whereby several former judges, including Judge Sh. Sh., were found guilty of the criminal offence of issuing unlawful judicial decision, with the aim to cause harm to another person, [...]. In the said judgment, is mentioned as illegal decision taken by the defendant Sh. Sh, also the Judgment C.No.2333/05 of 15.05.2007. Due to the fact that the proceedings in this legal matter have not been concluded in a final manner, the OKCA Graçanica has suspended the decision-making in respect of your request until further notice, respectively pending the final, legal and enforceable judgment of the competent judicial authority."*

Proceedings before the Basic Court and the Court of Appeals in the case of determination of the criminal liability of Judge SH.SH

25. On 9 September 2014, the Basic Court in Prizren, by Judgment P. no. 272/13 found Judge SH.SH guilty of the criminal offence of Issuing unlawful judicial decisions and sentenced her to a suspended sentence, as well as to an accessory punishment of prohibition to perform the profession, activity or duty, for a period of two years.

26. On 24 December 2014, SH.SH filed an appeal with the Court of Appeals against the judgment of the Basic Court in Prizren, *"due to the serious violations of the provisions of criminal procedure, erroneous and incomplete determination of factual situation as well as decision on sentence."*

27. On 5 April 2016, the Court of Appeals, by Judgment PAKR158/15, partially upheld the appeal of S.S., to the extent that the defendant's intent to obtain unlawful material gain could not be proved beyond a reasonable doubt and that the accessory punishment was too vague. In the remaining part the appeal was rejected as unfounded and the first instance verdict was upheld.

28. The enacting clause of the judgment of the Court of Appeals stated, inter alia, that,

> *" Regarding the judgment of conviction against the accused: (...) S.S. and (...)*
>
> *the accused(...) S~S. (...)have committed the criminal offence of issuing unlawful judicial decisions with the aim to cause harm to another person.*
>
> *Regarding the accessory punishment imposed on the accused: (...)S.S., (...)*
>
> *Pursuant to Article 57, paragraphs 1 and 2 of the PCCK, the accused (...) S.S., (() are prohibited from performing the judicial profession, activity or duty for a period of 2 (two) years, starting from the day the judgment becomes final.*
>
> *The remainder of the challenged judgment is confirmed."*

Applicant's allegations

29. The alleged representative addresses the Court, *"we request from the Constitutional Court of Kosovo to provide us with a legal interpretation of whether we should enforce the final judgment of the Municipal Court upheld by the District Court in Prishtina, and the decision of the Special Chamber of the Supreme Court of Kosovo, rejecting the PAK's claim or suspend the proceedings pursuant to the judgment of the Court of Appeal PAKR. no. 158/15, of 05.04.2016 in order to decide on the party's request for registration of property rights in her name under the above legal acts."*

30. Further, the alleged representative also states, *"as a cadastre, we do not know whether this judgment has remained in force or is revoked, as the judgment does not clarify what should be done with these judgments of former judges, we also have other cases that are the same as this one."*

Assessment of the admissibility of the Referral

31. The Court first examines whether the submitted Referral has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law on the Constitutional Court of the Republic of Kosovo, No.03/L-121(hereinafter: the Law) and Rules of

Procedure of the Constitutional Court of the Republic of Kosovo No.01/2018(hereinafter: the Rules of Procedure).

32. Article 113, paragraph 1, of the Constitution provides: *" The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties."*

33. The Court also refers to Articles 22.4 and 48 of the Law, which provide:

Article 22 [Processing Referrals]

> *4. If the referral or reply to the referral is not clear or is incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for clarifying or supplementing the respective referral or reply to the claim. The Judge Rapporteur may request additional facts that are required to assess the admissibility or grounds for the claim.*

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."*

34. Moreover, the Court takes into account Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure, which provides:

> *"(2) The referral shall also include:*
> *[. ..]*
> *(h) the supporting documentation and information..."*

35. The Court also takes into account Rule 35 (5) [Withdrawal, Dismissal and Rejection of Referrals] of the Rules of Procedure, which provides:

> *„[...] The Court may decide to summarily reject a referral of the referral is incomplete or not clearly stated despite request by the Court to the party to supplement or clarify the referral [...].“*

36. As to the fulfillment of these conditions, the Court notes that the alleged representative in this Referral seeks a legal interpretation respectively a recommendation for further action regarding the execution of the final judgment of the regular courts.

37. The alleged Applicant, is more specifically putting the following question before the Court:

> *"should we enforce the final judgment of the Municipal Court which is confirmed by the District Court in Prishtina, and the decision of the Special Chamber of the Supreme Court of Kosovo rejecting the PAK's claim or suspend the proceedings under the judgment of the Court of Appeals PAKR. no. 158/15, of 05.04.2016."*

38. The Court first recalls that in the present case, pursuant Article 22 of the Law, the Court has informed the Ministry of Environment and Spatial Planning of the Republic of Kosovo twice and, for the purpose of final clarification, has requested from it to answer specific questions and clarify the Referral.

39. Further, on the basis of the acknowledgment of the receipt the Court finds that the notification was sent to the Applicant on 30 September 2019, after which on 9 October 2019 at the request of the Ministry of Environment and Spatial Planning of the Republic of Kosovo the complete Referral was forwarded to the Applicant, while on 18 February 2020, the Ministry of Environment and Spatial Planning of the Republic of Kosovo was once again requested to supplement and clarify its Referral to which the Court has not received any response.

40. The Court finds that the Applicant has not responded to the Court's request for clarification of the Referral and submission of supporting documents without which no public authority of the Republic of Kosovo can take any action.

41. The Court recalls that the burden of building, clarifying and supplementing the Referral falls on the Applicant, who has a direct interest in having his allegations and allegations dealt with by the Court in effective manner. Therefore, the Court cannot take into account the allegations of the alleged representative, as the Referral is incomplete and it has not clarified the complaints pursuant to the Constitution (see, *mutatis mutandis*, the case of the Constitutional Court, KI03/15, Applicant *Hasan Beqiri*, of 13 May 2015, paragraph 19, as well as the case of the Constitutional Court, KI07/16, Applicant: *Rifat Abdullahi*, of 14 July 2016, paragraph 22).

42. Therefore, the Court notes that the alleged representative, apart from his general and abstract Referral, did not provide the Court with the requested clarification or supporting documents, even though the Court has requested it from him.

43. Consequently, the Court finds that the present Referral is incomplete, as the alleged representative has not provided the requested clarification or any supporting documents requested by the Court to prove their claims.

44. The Court also notes that even if the Referral would have met the requirements stipulated by Article 35 (5) of the Rules of Procedure, the request for "legal interpretation respectively the recommendation for further action in relation to the enforcement of final judgments of regular courts" initiated by the alleged representative simply does not fall within the jurisdiction of the Court, and accordingly the Court does not deal with such requests.

45. In sum, the Court concludes that the Referral does not meet the procedural requirements for further examination provided for in Rule 35 of the Rules of Procedure. Since the Applicant has failed to submit the required documents, the Referral must be summarily rejected, pursuant to Rule 35 (5) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 of the Constitution, Articles 22.4 and 48 of the Law and Rules 29, 35 (5) of the Rules of Procedure, on 13 May 2020, unanimously

DECIDES

I. TO REJECT the Referral;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

DECISION ON EXTENSION OF INTERIM MEASURE

in

Case No. KO203/19

Applicant

The Ombudsperson

Constitutional review of specific Articles of Law No. 06/L-114 on Public Officials

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 the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged Law

2. The Applicant challenges the constitutionality of specific provisions of Law No. 06/L-114 on Public Officials (hereinafter: the challenged Law), published in the Official Gazette of the Republic of Kosovo (hereinafter: the Official Gazette), on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph

11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned provisions of the challenged Law, which according to the Applicant's allegations are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and other constitutional provisions governing the status of independent constitutional institutions.

4. The Applicant, moreover, regarding the status of the officials of Kosovo Forensic Agency (hereinafter: the KFA), personnel of Kosovo Prosecutorial Council (hereinafter: the KPC) and Police of Kosovo, although not specifying the specific articles of the Constitution, raises the issue of compatibility of the provisions of the challenged Law with the constitutional principle of equality before the law and the principle of separation of the state powers.

5. In this respect, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure for *"immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1.2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 4); 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7) , 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6) , 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68, (paragraph 8); 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and Article 85 of the [challenged Law], or at least suspension of the application of these provisions in relation to the Ombudsperson"*.

Legal basis

6. The Referral is based on paragraph 2, sub-paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and

30 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court after the approval of the interim measure

7. On 19 November 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court unanimously decided to approve the interim measure until 28 February 2020.

8. On 25 November 2019, the Secretariat of the Assembly submitted to the Court the documentation regarding the procedure for review and approval of the challenged Law in the Assembly.

9. On 27 November 2019, the KPC and the KFA submitted to the Court the comments regarding the Referral.

10. On 29 November 2019, the Ministry of Public Administration (hereinafter: the MPA), and the Kosovo Police submitted to the Court the comments regarding the Referral.

11. On 6 December 2019, the Court communicated documents submitted by the Secretariat of the Assembly as well as comments received by the KPC, KFA, the Kosovo Police and the MPA to the parties involved in the case with instructions to submit their comments to the Court, if any, within seven (7) days.

12. On 12 December 2019, the MPA notified the Court that "*after reviewing and analyzing the comments submitted by the [KFA, KPC] and the Kosovo Police, we consider that we have submitted all our comments regarding these institutions in the reply sent to you on 29.11.2019*", submitting once again the comments of 29 November 2019.

13. On 26 February 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure in the case KO203/19, approved by the Court on 19 November 2019. On the same date, the Court unanimously decided to approve the extension of the interim measure imposed by the Court on 19 November 2019, until 28 April 2020.

As to the extension of interim measure

14. The Court refers to its Decision on the Interim Measure of 19 November 2019 in this case.

15. The Court notes that the parties interested in the admissibility and merits of this Referral have submitted a considerable volume of documents and comments and that the Court considers that all the arguments presented by the parties should be taken into consideration.

16. Therefore, without prejudice to any further decision to be rendered by the Court in the future regarding the admissibility or the merits of this Referral, the Court decides to extend the interim measure until 28 April 2020.

FOR THESE REASONS

The Court, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 26 February 2020, unanimously

DECIDES

I. TO EXTEND the interim measure decided by the Decision on Interim Measure in case KO203/19 of 19 November 2019, until 28 February 2020;

II. TO EXTEND SUSPENSION of the implementation in entirety of Law No. 06/L-114 on Public Officials, in the duration specified in item I;

III. This Decision will be communicated to the parties;

IV. This Decision will be published in accordance with Article 20 (4) of the Law; and

V. This decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

DECISION ON EXTENSION OF INTERIM MEASURE

in

Case No. KO203/19

Applicant

The Ombudsperson

Constitutional review of certain Articles of Law No. 06/L-114 on Public Officials

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 is submitted by the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of specific provisions of Law No. 06/L-114 on Public Officials (hereinafter: the challenged law), published in the Official Gazette of the Republic of Kosovo (hereinafter: the Official Gazette), on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16),

35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned provisions of the challenged Law, which according to the Applicant's allegations are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and other constitutional provisions regulating the status of independent constitutional institutions.

4. The Applicant regarding the status of the officials of Kosovo Forensic Agency (hereinafter: KFA), personnel of Kosovo Prosecutorial Council (hereinafter: KPC) and Police of Kosovo, although not specifying the specific articles of the Constitution, raises the issue of compatibility of the provisions of the challenged Law with the constitutional principle of equality before the law and the principle of separation of the state powers.

5. In this respect, the Applicant requested the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure for *"immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1.2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 4); 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7) , 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6) , 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68, (paragraph 8); 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and Article 85 of the [challenged law], or at least suspension of the application of these provisions in relation to the Ombudsperson"*.

Legal basis

6. The Referral is based on paragraph 2, sub-paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116

[Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 8 November 2019, the Applicant submitted the Referral to the Court.

8. On 12 November 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 15 November 2019, the Applicant was notified about the registration of the Referral.

10. On the same date, the Referral was communicated to the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Acting Prime Minister of the Republic of Kosovo, the Acting Minister of Public Administration (hereinafter: MPA), the President of the Kosovo Prosecutorial Council, the Chief Executive of the Kosovo Forensic Agency and Director the Police of Kosovo, with instructions to submit comments to the Court, if any, by 29 November 2019. The Referral was also communicated to the Secretary of the Assembly of the Republic of Kosovo, who was requested to submit to the Court all relevant documents regarding the challenged Law.

11. On 19 November 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court unanimously decided to approve the interim measure until 28 February 2020.

12. On 25 November 2019, the Secretariat of the Assembly submitted to the Court the documentation regarding the procedure for review and approval of the challenged Law in the Assembly.

13. On 27 November 2019, the KPC and the KFA submitted to the Court the comments regarding the Referral.

14. On 29 November 2019, MPA submitted to the Court the comments regarding the Referral.

15. On 6 December 2019, the Court communicated documents submitted by the Secretariat of the Assembly as well as comments received by the KPC, KFA, the Kosovo Police and the MPA to the parties involved in the case with instructions to submit their comments to the Court, if any, within seven (7) days.

16. On 12 December 2019, the MPA notified the Court that "*after reviewing and analyzing the comments submitted by the [KFA, KPC] and the Kosovo Police, we consider that we have submitted all our comments regarding these institutions in the reply sent to you on 29.11.2019*", submitting once again the comments of 29 November 2019.

17. On 26 February 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure in the case KO203/19, approved by the Court on 19 November 2019. On the same date, the Court unanimously decided to approve the extension of the interim measure imposed by the Court on 19 November 2019, until 28 April 2020.

18. On 22 April 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure in the case KO203/19, approved by the Court on 19 November 2019 and extended on 26 February 2020. On the same date, the Court unanimously decided to approve the extension of the interim measure imposed by the Court on 19 November 2019, until 30 June 2020.

As to the extension of interim measure

19. The Court refers to its Decision on the Interim Measure of 19 November 2019 in this case and the Decision extending the Interim Measure of 26 February 2020. All the stated constitutional and legal reasons for the imposition of the interim measure and the extension of the interim measure continue to be applicable and therefore, the Court refers to the reasoning presented in its original Decision imposing the interim measure and in the Decision extending the interim measure (See, Decision on the Interim Measure in case KO203/19 and the Decision on extension of the Interim Measure in case KO203/19, quoted above).

20. The Court notes that the interested parties regarding the admissibility and merits of this Referral have submitted a considerable volume of documents and comments and that the Court considers that all the arguments presented by the parties should be taken into consideration.

21. Therefore, without prejudice to any further decision to be rendered by the Court in the future regarding the admissibility or the merits of this Referral, the Court decides to extend the interim measure in case KO203/19 until 30 June 2020.

FOR THESE REASONS

The Court, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 22 April 2020, unanimously

DECIDES

I. TO EXTEND the interim measure imposed by the Decision on Interim Measure in case KO203/19 of 19 November 2019, extended by Decision of 26 February 2020, until 30 June 2020;

II. TO EXTEND SUSPENSION of the implementation of Law No. 06/L-114 on Public Officials, in its entirety, for the duration specified in item I;

III. TO NOTIFY this Decision to the Parties;

IV. TO PUBLISH this Decision in accordance with Article 20.4 of the Law; and

V. This decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KO203/19, Applicant: the Ombudsperson, Constitutional review of specific Articles of Law No. 06/L-114 on Public Officials

KO203/19, Judgment adopted on 30 June 2020, published on 9 July 2020

Keywords: *Institutional referral, separation of power, independence of independent institutions, equality before the law, public officials*

The Referral was based on paragraph 2, subparagraph 1, of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court, and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court. The subject matter of the Referral was the constitutional review of Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of Law No. 06/L-114 on Public Officials, published in the Official Gazette of the Republic of Kosovo, on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette. The Applicant alleged that the challenged Articles are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo, and other constitutional provisions governing the status of independent constitutional institutions. In his Referral, the Applicant also requested the Constitutional Court to impose interim measure for immediate suspension of the challenged provisions, which the Court approved after the first hearing on 19 November 2019, for a period until 28 February 2020, and which extended it for another two times, until 28 April and 30 June 2020 respectively.

In the title - **CONCLUSIONS** - of this Judgment, the Court summarized the essence of the case and emphasized the following:

In assessing the constitutionality of the Law No. 06/L-114 on Public Officials the Court, unanimously decided: (i) that the referral is admissible for review on merits; (ii) that Articles 2 (paragraph 3), 4 (paragraphs 3 and 4), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41

(paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 7), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the Law no. 06/L-114 on Public Officials, are not in compliance with Articles 4, 7, 102, 108, 109, 110, 110, 115, 132, 136, 139, 140 and 141 of the Constitution; (iii) the challenged Law does not apply in relation to: Kosovo Judicial Council; Kosovo Prosecutorial Council; the Constitutional Court; the Ombudsperson Institution; Auditor -General of Kosovo; Central Election Commission; the Central Bank of Kosovo and the Independent Media Commission, while it violates their functional and organizational independence guaranteed by the Constitution; (iv) the challenged Law does not infringe the provisions of the Constitution in relation to the Kosovo Forensic Agency and the Kosovo Police Civil Servants; (v) the Assembly of the Republic of Kosovo must take the necessary actions to supplement and amend the Law No. 06/L-114 on Public Officials in accordance with the findings of this Judgment, as regards the officials of the institutions indicated under point (iii); and (vi) in order to repeal the interim measure.

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

With regard to the institutions of the justice system set out in Chapter VII [Justice System] of the Constitution, the Court found that the challenged Law gives the Government broad powers to manage and supervise civil servants of public administration, including civil servants of the institutions of the Judicial power, such as officials of the Kosovo Judicial Council and Kosovo Prosecutorial Council. Moreover, the challenged law gives the Government the power to issue a range of sub-legal acts to further regulate important matters concerning civil servants such as recruitment, appointment, promotion, working hours, and classification of positions, disciplinary violations, which in essence also affect the functioning, classification of positions but also the systematization and organizational structure of the relevant institutions of the Judiciary and Independent Institutions. The Assembly, although through the challenged Law has given the Government the power to manage the civil service system in all institutions, including the

Justice System, it has determined that the Presidency of the Assembly is entitled to issue sub-legal acts regarding the Assembly servants.

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

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

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

organizational independence are incompatible with the Constitution and the principles and values proclaimed therein.

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

As to the other institutions in respect of which the Applicant filed a claim with the Court, namely KFA officers and Kosovo Police Civil Servants, the Court stated that the Independent Agencies established under Article 142 of the Constitution do not have the same status with that of the Independent Constitutional Institutions explicitly mentioned in Chapter XII of the Constitution. This is because unlike other institutions referred to in Chapter XII of the Constitution, "Independent Agencies" provided by Article 142 of the Constitution "*are institutions established by the Assembly, based on the respective laws, which regulate their establishment, operation and competencies*." So, unlike the fact that the Assembly can create and shut down "*by law*" Independent Agencies; The Assembly can never "*shut down*" by law any of the five independent institutions mentioned above. This constitutes the main difference between the Independent Institutions referred to in Chapter XII of the Constitution.

In this respect, the Court found that both the employees of the Kosovo Forensic Agency and the civil servants of the Kosovo Police are not in an equivalent position with the KIA officials; police officers and the officers of the police inspectorate; and Kosovo customs officials, and consequently it is not necessary to treat them in the same way. This is due to the fact that the principle of unequal treatment is expressed only in cases where such treatment is done for the same or analogous situations. In the present case, we cannot talk about an unequal treatment because the KFA officials and the civil servants of the Kosovo Police are not in the same or similar position, or analogous to the officials in relation to whom they are (self) compared. Consequently, the Court considers that the challenged law, including KFA employees and Kosovo Police civil servants in the field of application of the

challenged Law, does not violate the principle of equality guaranteed by Article 24 of the Constitution in relation to Article 14 of the ECHR.

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

JUDGMENT

in

Case No. KO203/19

Applicant

The Ombudsperson

Constitutional review of specific Articles of Law No. 06/L-114 on Public Officials

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 is submitted by the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of specific provisions of Law No. 06/L-114 on Public Officials (hereinafter: the challenged Law), published in the Official Gazette of the Republic of Kosovo (hereinafter: the Official Gazette), on 11 March 2019, and which entered into force six (6) months after its publication in the Official Gazette, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11),

43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law.

Subject matter

3. The subject matter of the Referral is the constitutional review of the aforementioned provisions of the challenged Law, which according to the Applicant's allegations are not in compliance with paragraph 2 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and other constitutional provisions regulating the status of independent constitutional institutions.

4. The Applicant regarding the status of the officials of Kosovo Forensic Agency (hereinafter: the KFA), the personnel of Kosovo Prosecutorial Council (hereinafter: the KPC), and Police of Kosovo (PK), although not specifying the specific articles of the Constitution, raises the issue of compatibility of the provisions of the challenged Law with the constitutional principle of equality before the law and the principle of separation of the state powers.

5. In this respect, the Applicant requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose interim measure for *"immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1.2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 4); 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7) , 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6) , 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68, (paragraph 8); 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and Article 85 of the [challenged law], or at least suspension of the application of these provisions in relation to the Ombudsperson"*.

Legal basis

6. The Referral is based on paragraph 2, sub-paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22, 27, 29 and 30 of Law No. 03/L-121 on the Constitutional Court of the Republic of

Kosovo (hereinafter: the Law); and Rules 32, 56, and 57 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 8 November 2019, the Applicant submitted the Referral to the Court.

8. On 12 November 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

9. On 15 November 2019, the Applicant was notified about the registration of the Referral.

10. On the same date, the Referral was communicated to the President of the Republic of Kosovo, the President of the Assembly of the Republic of Kosovo, the Caretaker Prime Minister of the Republic of Kosovo, the Caretaker Minister of Public Administration (hereinafter: the MPA), the President of the Kosovo Prosecutorial Council, the Chief Executive of the Kosovo Forensic Agency and Director the Police of Kosovo, with instructions to submit comments to the Court, if any, by 29 November 2019. The Referral was also communicated to the Secretary of the Assembly of the Republic of Kosovo, who was requested to submit to the Court all relevant documents regarding the challenged Law. [*Court's clarification*: At the time of submitting the Referral to the Court, the MPA was a separate ministry of the Government, while with the current structure of the Government, the MPA and its responsibilities are incorporated within the Ministry of Internal Affairs].

11. On 19 November 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court unanimously decided to approve the interim measure until 28 February 2020.

12. On 25 November 2019, the Secretariat of the Assembly submitted to the Court the documentation regarding the procedure of review and approval of the challenged Law in the Assembly, as follows:

> 1. Draft Law No. 06/L-114 on Public Officials, processed by the Government of the Republic of Kosovo on 7 September 2018;

2. Minutes of the Functional Committee on Public Administration, Local Government and Media, review in principle of the Draft Law on Public Officials, 8 October 2018;
3. Report of the Functional Committee on Public Administration, Local Government and Media, review in principle of the Draft Law on Public Officials, 8 October 2018;
4. Invitation and agenda for the Plenary Session of the Assembly of the Republic of Kosovo, the first review of the Draft Law No. 06/L-114 on Public Officials, of 25 October 2018;
5. Transcript of the Plenary Session, first review of the Draft Law on Public Officials, of 18, 19, 28 October and 2 November 2018;
6. Minutes of the Plenary Session, first review of the Draft Law on Public Officials, of 8, 19, 25 October, 2, 7 November, 21 December 2018;
7. Decision of the Assembly of the Republic of Kosovo on the approval in principle of the Draft Law on Public Officials, No. 06-V -250, of 25 October 2018;
8. Minutes of the Functional Committee on Public Administration, Local Government and Media, review in principle of the Draft Law on Public Officials, of 29 January 2019;
9. The report with amendments to the Draft Law on Public Officials of the Functional Committee on Public Administration, Local Government and Media, proceeded for review in the standing committees;
10. The report of the Committee on the European Integration, the review of the Draft Law on Public Officials with the amendments of the Functional Committee;
11. Minutes of the Committee on the European Integration, review of the Draft Law on Public Officials with the amendments of the Functional Committee, of 30-31 January 2019;
12. The report of the Committee on Budget and Finance, the review of the Draft Law on Public Officials with the amendments of the Functional Committee;
13. Minutes of the Committee on Budget and Finance, review of the Draft Law on Public Officials with the amendments of the of the Functional Committee of 30 January 2019;
14. Report of the Committee on Rights and Interests of Communities and Returns, review of the Draft Law on Public Officials with the amendments of the Functional Committee,
15. Minutes of the Committee on the Rights and Interests of Communities and Returns, review of the Draft Law on Public Officials with the amendments of the Functional Committee, of 30 January 2019;
16. The report of the Committee on Legislation, Mandates, Immunities, the Rules of Procedure of the Assembly and the

supervision of the Anti-Corruption Agency, the review of the Draft Law on Public Officials with the amendments of the Functional Committee,
17. Minutes of the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Supervision of the Anti-Corruption Agency, review of the Draft Law on Public Officials with the amendments of the Functional Committee, of 30 January 2019;
18. Final report with the amendments proposed in the Draft Law on Public Officials of the Functional Committee on Public Administration, Local Government and Media, proceeded for consideration in the plenary session;
19. Invitation and agenda for the Plenary Session of the Assembly of the Republic of Kosovo, the second review of the Draft Law no. 06/L-114 on Public Officials;
20. Transcript of the Plenary Session of the Assembly of the Republic of Kosovo, second review of the Draft Law on Public Officials;
21. Minutes of the Plenary Session, the second review of the Draft Law on Public Officials;
22. Decision of the Assembly on the approval of Law No. 06/L-114 on Public Officials, No. 06-V-312, of 2 February 2019,
23. Law No. 06/L-114 on Public Officials, and
24. Letter No. 06/2842/L-114 of 12 February 2019, sent to the President of the Republic of Kosovo, for the promulgation of the Law on Public Officials.

13. On 27 November 2019, the KPC and the KFA submitted to the Court comments regarding the Referral.

14. On 29 November 2019, the MPA and the Kosovo Police submitted to the Court comments regarding the Referral.

15. On 6 December 2019, the Court communicated the documents submitted by the Secretariat of the Assembly as well as the comments received by the KPC, KFA, Kosovo Police and the MPA to the parties involved in the case with the instruction to submit their comments to the Court, if any, within seven (7) days.

16. On 12 December 2019, the MPA notified the Court that *"after reviewing and analyzing the comments submitted by [KFA, KPC] and the Kosovo Police, we consider that we have submitted all our comments regarding these institutions in the response sent to you on 29.11.2019"* submitting once again the comments of 29 November 2019.

17. On 26 February 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure in relation to the case KO203/19, approved by the Court on 19 November 2019. On the same date, the Court unanimously decided to approve the extension of the interim measure imposed by the Court on 19 November 2019, until 28 April 2020.

18. On 22 April 2020, the Court approved the recommendation of the Judge Rapporteur to extend the interim measure in respect of case No. KO203/19 until 30 June 2020.

19. On 30 June 2020, the Review Panel considered the report of the Judge Rapporteur and recommended to the Court the admissibility of the Referral.

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

Summary of facts

21. On 2 February 2019, the Assembly of Kosovo [Decision No. 06-V-312] adopted the challenged Law.

22. On 11 March 2019, the challenged Law was published in the Official Gazette of the Republic of Kosovo.

23. Article 86 [Entry into Force] of the challenged Law stipulates that "*This Law shall enter into force six (6) months after publication in the Official Gazette*".

Applicant's allegations

24. The Applicant challenges specific provisions of the challenged Law (Law No. 06/L-114 on Public Officials), namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8)), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85.

25. The Applicant alleges that pursuant to Article 1 [Purpose], the purpose of the challenged Law is to establish the legal basis for the employment of public officials in the institutions of the Republic of Kosovo. In this regard, he alleges that the challenged Law "vests" the Government of the Republic of Kosovo (hereinafter: the Government) and the ministry responsible for public administration with powers to administer the employment issue to all state institutions including the independent institutions. This, according to him, violates the constitutional independence of the Ombudsperson Institution guaranteed by Article 132 of the Constitution which stipulates that: *"The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo"*. The Applicant builds this allegation by elaborating the alleged violations, and the role of the Government in administering the Applicant's officials, referring to the specific provisions of the challenged Law.

26. In this regard, the Applicant first refers to paragraph 3 of Article 2 [Scope of application] of the challenged law defining "civil servants" as public officials within the civil service which also expressly includes public officials employed in the independent institutions. According to the Applicant, the violation of the Applicant's independence, guaranteed by Article 132 of the Constitution consists in the fact that the challenged Law does not contain any specific provision regarding its personnel, to ensure the independence of the Applicant, unlike Law No. 03/L-149 on the Kosovo Civil Service, repealed by the challenged Law, and which in Article 3, paragraph 7 that expressly provided that *"During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected"* and Law No. 05/L-019 on the Ombudsperson, namely paragraph 2 of Article 32 [Personnel], which foresees that: *[...] The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extend that there is no infringement of constitutional independence of the Institution."*

27. The Applicant also refers to paragraph 1, subparagraph 1.2 and paragraph 2 of Article 5 [Definitions] of the challenged Law, which defines the meaning of "other state institution" including, in this definition, independent institutions. According to him, the challenged Law and Law No. 06/L-113 on the Organization and Functioning of the State Administration *"aim at marginalizing independent institutions and bringing them under the supervision of the Government, which represents a direct interference with constitutional independence, thereby suffering a setback in terms of the separation of powers and independent institutions and the democratic functioning of the state"*.

28. The Applicant refers to Article 10 [Government] of the challenged Law stating that this Article authorizes the Government to adopt general state policies for the employment of public officials and to adopt sublegal acts based on the challenged Law, but does not specify to what extent the Government can exercise power in relation to independent institutions. He emphasizes that, given that the challenged Law makes no exception for public officials in the independent institutions, it is understood that the Government has the right to issue sublegal acts including the issues relating to the employment of public officials in the independent institutions. In this context, the Applicant states that *"the challenged law, in specific articles, concretizes the powers of the Government and the relevant ministry to issue sublegal acts on a long number of employment-related matters"*. He also links this allegation with the Judgment of the Constitutional Court KO73/16 which held, *inter alia*, that *"it could not be expected that the staff of*

the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorization and remuneration provided for by a legal act of general nature of the Government, or any act of the executive branch, without first taking into due account the specificities and uniqueness of the institutions in question".

29. The Applicant also refers to Article 11 [Department for the Management of Public Officials] of the challenged Law which defines the responsibilities of the Department for the Management of Public Officials (hereinafter: the DMPO), which provides that the DMPO has competence to request and receive from the institutions of Kosovo any information necessary for the fulfillment of its responsibilities. The Applicant also states that *"this article stipulates that every institution that employs public officials, as well as any public functionary and public official who has managerial and decision-making competences, or who has information in this field, is required to cooperate with the DMPO. According to him, this is in contradiction with Article 32, paragraph 2 of Law no. 05/L-019 on the Ombudsperson, which stipulates that the provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extent that there is no infringement of constitutional independence of the Institution".*

30. The Applicant also refers to paragraph 5 of Article 14 [Human Resource Management Unit (HRMU)] of the challenged Law which stipulates that Human Resources Management Units are required to maintain an annual report on human resources management and send a copy of it to the DMPO. The Applicant considers that this provision may affect his independence by the fact that *"is required to report to the DMPO, without specifying how independent institutions should report. The absence of a provision in the law that determines the application of this law or this provision to independent institutions, calls into question the constitutionality of this provision [...]".*

31. With regard to other Articles of the challenged Law which the Applicant claims to be in violation of the Constitution, such as Articles 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85, the Applicant states that these Articles relate to the staff

plan and the human resource management system; civil service employment relationship and job classification; admission to the civil service; transfers within the category and promotion; appointment to senior management positions; evaluation of results at work; discipline in the civil service; transfer to the civil service and related employment and public affairs matters. Bearing in mind the role of the Ombudsperson as an independent institution and the fact that the aforementioned articles of the challenged Law authorize the Government to adopt sublegal acts and Article 85 of the challenged Law on the other hand repeals any norm contrary to the challenged Law, by including the provisions of the Law on the Ombudsperson and its internal acts concerning the internal organization and systematization of jobs issued under the Law on the Ombudsperson, thereby violating the independence of the Applicant.

32. In the light of the foregoing, he refers to and cites parts of the Judgments of the Constitutional Court, such as Judgment KO73/16 of 8 December 2016 and Judgment KO171/18 of 25 April 2019 which decided on the issue of the independence of independent constitutional institutions, noting that despite the fact that the Ombudsperson has requested the Government and the Assembly to consider the abovementioned Judgments of the Constitutional Court when reviewing and adopting the challenged Law and other related laws, with the adoption of the challenged Law, the independence of the independent institutions, namely the independence of the Ombudsperson Institution, is again questioned, thus completely disregarding the Constitution and Judgment KO 73/16 of 8 December 2016 of the Constitutional Court. The Applicant also refers to the status and legal regulation of the Ombudsperson Institution in Croatia, the principles of the Venice Commission concerning the protection and promotion of the Ombudsperson Institution, and the so-called "Paris Principles".

33. The Applicant also complains about interference through the challenged law with the status of employees of other state institutions such as Kosovo Forensic Agency, staff of Kosovo Prosecutorial Council and the Police of Kosovo, referring to their complaints before the Ombudsperson. It states that the challenged law interferes with the employment relations of the personnel of these institutions in contravention of the specific laws governing the staffing issue of these institutions. In this regard, he invokes the principle of equality before the law and the principle of separation of powers. He claims, *inter alia*, that for some of these institutions had to be provided provisions that exclude the personnel of these institutions from the scope of the

challenged Law, as it is the case with the Kosovo Intelligence Agency, Kosovo Customs, Kosovo Security Force, and, judges and prosecutors.

34. Finally, the Applicant with respect to the independent constitutional institutions and other state institutions mentioned above states that *"[t]he challenged law clearly shows the tendency to centralize the authority for employment, but also for the dismissal of most public officials. Exceptions to law enforcement are not entirely adequate and logical, even in some cases they constitute unequal treatment. For example, the challenged law excludes civil servants of the administration of the Assembly of the Republic of Kosovo from its scope (see Article 4, paragraph 3), while it does not exclude civil servants in the administration of system of justice institutions and independent institutions (see Article 2, paragraph 3). Such definitions of the challenged law violate the principle of separation of powers, since it is clearly known that both the Assembly and the judiciary are separate powers from the Government, as the independent institutions"*.

Regarding the request for interim measure

35. As regards the interim measure, the Applicant requests that on the basis of the abovementioned arguments, the Constitutional Court imposes an interim measure for the immediate suspension of the challenged provisions, namely Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2, paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5) , 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85, "*or at least suspends the application of these provisions in relation to the Ombudsperson*". The Applicant refers to Rule 55 of the Rules of Procedure of the Court laying down the conditions to be met for the imposition of an interim measure, stating that all three conditions set out are fulfilled in this case.

36. First, the Applicant considers that the arguments presented above provide a *prima facie* basis for the repeal of the challenged provisions in relation to the Ombudsperson Institution.

37. Second, due to the lack of the approval of the interim measure, the functioning of the Ombudsperson Institution will be severely

hampered by the constant interference of other institutions (Government of the Republic of Kosovo, Assembly of the Republic of Kosovo) with this institution. The Ombudsperson considers, with due respect, that it is necessary that this Court immediately suspends the challenged provisions, based on which other institutions may impede the effective work of the Ombudsperson Institution and its employees.

38. Third, the Ombudsperson Institution often serves as the last hope for victims of human rights violations to address these violations and to provide solutions. The inability to function properly and exercise the mandate of the Ombudsperson, as the only national human rights institution, would inevitably impede the protection of the rights and fundamental freedoms of the citizens of the Republic of Kosovo. For these reasons, the Ombudsperson considers that the adoption of an interim measure is necessary in order to ensure the proper and unimpeded function of the Ombudsperson Institution, while respecting its organizational, functional and financial independence with respect to other institutions of the Republic of Kosovo.

Comments of KPC

39. In their comments regarding the referral, the KPC states that *"based on Article 110, paragraph 1 of the Constitution of the Republic of Kosovo, it is stipulated that [the KPC] is a fully independent institution in the performance of its functions in order to ensure an independent, professional and impartial prosecutorial system. The duties and responsibilities of the Council are defined by Law No. 06/L-056 on Kosovo Prosecutorial Council"*. The KPC adds that *"Article 7 of the Law on the Kosovo Prosecutorial Council stipulates that: [the KPC] decides on the organization, management, administration and oversight of the functioning of prosecution officers according to the law (paragraph 1.1); [...]] oversees and administers prosecution officers and their staff (paragraph 1.20) and [...] issues a regulations on the internal organization of the state prosecutor (paragraph 1.28). [...] [Hence the KPC] has the authority to organize, manage and supervise the administration of the State Prosecutor"*.

40. Furthermore, referring also to Article 31, paragraph 1, item 1.5 of the Law on KPC, the KPC states that the Secretariat of the Council has been given the power to *"manage all administrative and supportive staff of the KPC and the State Prosecutor, including performance appraisal, ensuring proper disciplining and protecting their employment rights"*.

41. Therefore, according to the KPC, is considered the challenged Law "*contradicts the Law on the Kosovo Prosecutorial Council in the following provisions: staff development plan (Article 15); classification of positions (Article 33); movements within the category (Article 38); promotion (Article 39); admission to a senior managerial category position (Article 40); composition of the commission for senior managerial positions (Article 41); performance appraisal (Article 43); performance appraisal for civil servants of senior managerial category (Article 44); competencies and disciplinary proceedings (Article 48); temporary transfer (Article 52); transfer in case of closure or restructuring (Article 54); dismissal from civil service (Article 61); competition procedure (68); performance evaluation (Article 71).*" This is because the challenged Law gives the Government the right to determine the above mentioned procedures by sub-legal act.

42. Therefore, they consider the abovementioned provisions of the Law on Public Officials are contrary to Article 110 [Kosovo Prosecutorial Council] paragraph 1 of the Constitution which stipulates that *"1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law*". According to them, the provisions of the challenged Law are in conflict with the provisions of the Law on [KPC] which based on the constitutional principle of separation of powers has given the KPC a mandate to determine, manage and administer the internal organizational structure".

43. The KPC also states that the principle of separation of powers also implies the guarantee of the exercise of power independently and without interference, and that the restriction should be based on the balance of powers only to the extent permitted by the Constitution and the competencies of the each power. They add that *"the possibility for the Government to determine the positions of the administration of the prosecutorial system by a sub-legal act means direct interference in the functioning of the constitutional institutions of [KPC] and the State Prosecutor, since in these two institutions the officials with very specific tasks are engaged".*

44. They further allege that the challenged Law also interferes with the selection procedures and qualifications for the election of senior administrative officials of the prosecutorial system, emphasizing that Article 40, paragraph 12 of the challenged Law sets out the procedure for admission to a category position of senior management, is contrary to Article 32, paragraph 1, item 1.1 of the Law on KPC which defines the manner of selection of the General Director of the Secretariat,

namely Article 33, paragraph 1 for the Director of the Prosecution Performance Review Unit.

45. The KPC finally states that during the process of drafting the challenged Law they requested that if any category of administration is given a special status, that status should also belong to the administration of the prosecutorial system, but these remarks were not taken into account by relevant institutions, despite the fact that the challenged Law has given special status to the administration of the Assembly and part of the administration of the Government, not treating equally the administration of the prosecutorial system even though it is part of the third pillar of power.

46. The KPC therefore requests the Court to find that the challenged articles infringe on the equality of powers and the functional independence of the KPC and the State Prosecutor as two constitutional institutions.

Comments of KFA

47. The KFA clarifies that it is an independent executive agency within the Ministry of Internal Affairs, established by Law No. 04/L-064 on the Kosovo Forensic Agency (hereinafter: the Law on KFA). The Law on KFA and administrative instructions regulate, among other things, the issue of ranks, recruitment, transfer, disciplinary procedures, etc., for KFA employees. They also explain that the KFA staff is specific in terms of qualifications, professional qualifications, work experience, training and specializations and the time required for promotion. Also, due to the nature and type of work that KFA has, its employees are constantly exposed to the risks that arise during the performance of forensic examinations in its laboratories, risks caused by the use of different weapons, such as exposure to different rays during the exercise of their profession, infections, risk from various litigants as a result of their expertise. According to them, *"if we make a comparison, we can clearly see the connection and common characteristics between the Kosovo Forensic Agency, the Kosovo Police, the Police Inspectorate, the Intelligence Agency, the Customs, etc"***.**

48. The KFA complains that the challenged law did not *"take into account the specifics of this institution but has decided to treat and regulate the employment relationship of its officials with the state as if it were the usual administration of a Ministry, Municipality, etc., [...]"*. According to them, the legislator did not take into account the role of the KFA according to the Code of Criminal Procedure in conducting

expertise where most of them are performed *"in KFA laboratories"*. They add that despite the fact that the KFA is an institution that serves justice and security like the Police, Customs and Police Inspectorate, they are not included in Article 3, paragraph 3 of the challenged Law as an institution with special status.

49. The KFA further states that "*It is a fact that within the meaning of [LOFASAIA], the KFA is a state administration, but the employment relationship of its employees cannot be regulated in the same way as the administration of the Assembly, the Prime Ministry, Ministries or Municipalities, due to fundamental differences and the specifics they have with each other, highlighted in paragraphs 1, 2, 3 of this letter.*

50. The KFA also emphasizes that *"[...] in the situation created by Law No. 06/L-114 on Public Officials, almost all issues related to KFA employees-officials will be changed, including salaries which will be reduced by up to 30%, from December 2019, because this law is related to Law No. 06/ l-111 on Salaries in the Public Sector, and this is a setback and jeopardization of the future of this institution.*

Comments of the Kosovo Police

51. Kosovo Police complains that the challenged Law in Article 3 of paragraph 3, sub-paragraph 3.3 has provided for the exemption from the scope of the implementation of this Law to civil staff whose employment relationship is regulated by the Law on Police, while regarding the category of cadets, it has not regulated them at all. The inclusion of the administrative staff of the Kosovo Police in the challenged Law contradicts the Law on Police which has provided for the different regulation of the employment relationship of the administrative staff, in relation to the rest of the administration. Also, the Law on Police has provided for the possibility of issuing sub-legal acts to regulate the employment relationship as well as disciplinary matters. It is similarly provided by the Law on the Police Inspectorate of Kosovo.

52. Kosovo Police states that *"by Administrative Instruction No. 02/2018 on Employment Relationships it has defined the basic criteria for employment for police personnel, including civil staff. Due to the specifics of the Kosovo Police, the large number of police personnel and complex issues involving the employment relationship in more detail this issue is provided by the provisions of Article 24 paragraph 2 of this AI to be regulated in more detail by the Department of Human Resources with (SOP) Standard Operating Procedures*

always based on the Law on Police, the Law on PIK and other legal acts."

53. Therefore, the Kosovo Police considers that the challenged Law is contrary to the Law on Police and the Law on Police Inspectorate. They consider that since the challenged Law does not specifically invalidate the above-mentioned laws, their request for exemption from the challenged Law is substantiated. As we have laws that regulate the same issue differently, then priority should be given to special laws, citing as well the principle *"lex specialis derogat legi generali"*.

54. In this regard, they also refer to the case law of the Court stating that *"in Judgment No. 04-L-093 of the Constitutional Court in case K097/12 of 12 April 2012, which deals with the constitutionality of the Law on Banks, Financial Institutions and Non-bank Financial Institutions, where the court expresses a significant position regarding the uniform implementation of laws. According to the Constitutional Court: "A new law cannot overrule the provisions of an existing law without amending the relevant provisions, which constitute the general principles... , because this would put at stake the principles of legal certainty and the rule of law" (see paragraph 128 of Judgment KO 97/12). The Constitutional Court in the same judgment states: "The Court recalls that the authorities have a constitutional obligation to ensure the uniform application of laws; therefore this obligation may be impeded by introducing provisions which completely contradict other existing provisions of the law ... without changing those provisions at the same time (see paragraph 130 of the judgment KO 97/12)"*.

55. The Police states that due to the specifics of the work of the administrative officers of the Kosovo Police, it is unacceptable for the MPA to select the administrative staff of the Kosovo Police as provided by the challenged Law.

Comments of MPA

56. Regarding the Applicant's allegation of violation of the constitutional independence by the challenged Law, the MPA clarifies that *"unlike Law No. 03/L-149 on Civil Service in the Republic of Kosovo (LCSRK) which in Article 3 paragraph 7 expressly provided that "During the implementation of this law, the constitutional autonomy of the institutions independent of the executive shall be respected" [...] The [challenged] Law does much more"*. In this respect they emphasize the clear distinction, according to them, that exists *"in Article 5 [of the challenged Law] between "the institutions of state administration"*

(government and its administration) and "other state institutions" [including independent constitutional institutions] with a specific objective to regulate differently these two groups of public bodies with a set of rules for almost all provisions of the civil service relationship [...]".

57. Regarding the above, MPA emphasizes the differences in treatment according to the challenged Law, as follows:

- the procedure for admitting employees to institutions outside the state administration (including independent institutions) is conducted by the Human Resources unit of the institutions themselves, which is reflected in Article 34, paragraph 13 of the challenged Law. Also, the final appointment is made by the Human Resources Unit and other state institutions in accordance with Article 35, paragraph 2;
- vacancies for senior management positions are organized by the Human Resources Unit of the "other state institution", including the Ombudsperson, which differs from the procedure followed for other institutions. This is also reflected in the admissions commissions established by "other state institutions" including appointment; and,
- the evaluation of the results at work for the senior management positions is done by the head of the institution and the disciplinary commission is established by "another state institution".

58. Regarding the internal organization of an independent institution in this case the Applicant, the MPA states that, independent constitutional institutions are not included in LOFASAIA as LOFASAIA regulates the organization and functioning only of state administration institutions and independent agencies established under Article 142 of the Constitution. Consequently, the law does not prohibit independent constitutional institutions from determining their own internal organization. Also, the MPA maintains that the challenged Law does not repeal Article 32 of the Law on the Ombudsperson which states that the civil service legislation applies to the Applicant to the extent it does not violate his independence.

59. The MPA further submits that the challenged Law, although allowing the Department for the Management of Public Officials (hereinafter: DMPO) to request the necessary information regarding their responsibilities, does not violate the independence of any institution, and may be interpreted, if necessary, in relation to Article 32 of the Law on the Ombudsperson where the Applicant may invoke Article 32 of the Law on the Ombudsperson to protect his independence. Similar

to the staff plans of each institution and budget planning. Invoking the principle of democratic state and rule of law, the MPA states that *"cooperation between different state institutions, makes the state stronger and allows it to achieve its objectives and effectively serve its citizens and businesses"*.

60. Regarding the Human Resources Management Information System (hereinafter: HRMIS), specifically Article 17 of the challenged Law, the MPA clarifies that "*As the Assembly agreed with the Government on who is responsible for the execution of the state budget, to use the HRMIS for the execution of salaries and bonuses, it is not mentioned that every institution should use HRMIS for all beneficiaries of the state budget. Just like the state budget and its proper execution, it is difficult to imagine in an institution that does not implement the tools (in this case an IT solution) made available to them by the responsible institution"*.

61. The MAP emphasizes that during the drafting of the challenged Law, local and international experts were engaged and assisted by SIGMA/OECD who were also consulted on the Applicant's request regarding the concept of "constitutional independence" of independent institutions. MPA in their comments quotes a part of SIGMA/OSCD opinion on this issue.

62. With regard to the competence under the challenged Law for the Government to issue sub-legal acts, the MPA states that the Constitution, namely Article 93, paragraph 4, expressly provides that the Government has the competence to issue legal acts or regulations necessary for the implementation of laws. This competence of the Government is broken down in Article 10, paragraph 1.2 as well as in the separate articles of the challenged Law. The Constitution does not authorize independent constitutional institutions to issue sub-legal acts.

63. Regarding the KFA, the MPA clarifies that *"The challenged Law does not regulate the organization and functioning and status of state administration institutions (in this case KFA) which consequently does not/cannot change the status of an agency in this case KFA. The LOFASAIA has defined the typology of what types of bodies may exist within the state administration, but the law on KFA itself stipulates that this agency is established within the Ministry of Internal Affairs. Regarding the status of KFA employees, there is no dilemma that they are public officials, while the concrete definition of KFA employees (what kind of public official they belong to) should be done according to the functions they exercise. For this purpose [the challenged Law]*

in Article 83 provides concrete provisions for declaring the status of public officials".

64. As regards the KPC, the MPA claims that the Law on KPC and the Law on State Prosecutor do not regulate the employment relationship of administrative staff. MPA states that the Law on KPC itself refers to the imposition of measures on administrative staff in accordance with the relevant Law on Civil Service.

65. With regard to the Kosovo Police, the MPA clarifies that the Law *"No. 04/L-076 on the police in Article 44 paragraph 2 "determines that the work relation for police personnel is regulated by a sub-legal act" which also includes civil servants and according to article 55 of this Law the right to issue sub-legal acts on labor relations has the general director of the Police. [...] The right to issue sub-legal acts by the general director provided by Article 55 of Law No. 04/L-076 on police, is contrary to Article 93, paragraph 4, of the Constitution of Kosovo, which explicitly states that: "The Government has the following competencies: ... (4) makes decisions and issues legal acts or regulations, necessary for the implementation of laws [...]".*

Relevant provisions of the challenged Law:

Article 2
Scope of application

[...]

3. Civil servant - public official within the Civil Service who performs the duty in a position starting from professional officer to the position of general secretary in the administration of the President, in the administration of the Assembly, in the Office of Prime Minister, Ministry, executive agency, in Agencies and in one of their local branches, in the administration of justice system institutions, in an independent institution, independent agency, municipal administration and any employee defined directly with a special Law.

[...]

Article 3
Exemptions from the scope of the Law

1. This Law shall not apply for:
1.1. public functionaries;
1.2. public functionaries with special status.
2. Public functionaries as per sub-paragraph 1.1. of this Article are:

2.1. elected officials;

2.2. members of the Government and their deputies;

2.3 functionaries appointed by the Assembly or the President of the Republic and dignitaries or members of collegial managing bodies of independent institutions and agencies.

3. Public functionaries with special status, as per sub-paragraph 1.2. of this Article are:

3.1 judges and prosecutors;

3.2. commanding and military personnel of the Kosovo Security Force or another successive organization;

3.3. Kosovo police officers and Kosovo police inspectorate;

3.4. Kosovo customs officers;

3.5. managerial personnel and employees of the Kosovo Intelligence Agency;

3.6. director or members of collegial managing body of regulatory agencies.

4. Relationship between the state and public functionary with special status, defined in paragraph 3. of this Article is regulated entirely with a special sectorial Law.

5. This Law does not, also, apply for the personnel of public companies owned by the Government or a municipality, employment relationship of which is regulated with labor legislation.

Article 4
Civil Servants with Special Status

1. Professional employees of diplomatic service and correctional service are civil servants with special status who are regulated with this Law and a special Law.

2. Regulation with special Law, as per paragraph 1. of this Article, should be done in accordance with principles stipulated in this Law and may regulate otherwise only the following elements of employment relationship:

2.1. special or additional conditions for recruitment;

2.2. specific rights or obligations other than those provided with this Law;

2.3. special rules for career development, according to the grading system;

2.4. professional development and training needs;

2.5. transfer and systematization of employees.

3. Employee of the Administration of the Assembly of Kosovo is a civil servant with special status, whose status shall be regulated

with this Law and special act approved by the Presidency of the Assembly of the Republic of Kosovo.
4. The regulation by special act, according to paragraph 4. of this Article, is carried out for:
4.1. organizational structure of functioning, classification of positions;
4.2. special conditions for recruitment;
4.3. working hours, which may exceed the working time limit defined by this Law, annual leave; and
4.4. rights and specific obligations other than those provided by this Law.

Article 5
Definitions

1. Terms or other expressions used in this Law shall have the following meaning:
[...]
1.2. Other state institution - administration of the Assembly, administration of the President, administration of a justice system institution, of an independent institution, of an independent agency, or of a municipality;
[...]

2. The terminology used in this Law, such as: Office of the Prime Minister, ministry, executive agency, regulatory agency, local branch, administration of public services, independent institution, independent agency, cabinet, have the same meaning as defined or regulated with the Law for Organization and Functioning of State Administration and Independent Agencies.
[...]

Article 10
Government

1. Government:
1.1. adopts general state policies for employment of public officials;
1.2. adopts sub- legal acts based on this Law;
1.3. publishes annual report on human resources management for public officials.
2. Government assigns one of its members for general administration of policies on public officials (hereinafter: "Responsible minister for public administration).
[...]

Article 11
Department for the Management of Public Officials

1. The Department for Management of Public Officials shall be established and operate within the ministry responsible for public administration (hereinafter "DMPO"), which will have the following responsibilities:

1.1. prepares and supervises implementation of policies on public officials;

1.2. supervises implementation of the Law on public officials in state administration institutions;

1.3. prepares and supervises implementation of policies on salaries of public officials and public functionaries;

1.4. prepares opinions on any draft act proposed by other institutions, regarding the employment relationship of public officials;

1.5. adopts and supervises implementation of training programs for civil servants; 1.6. together with the Ministry of Finance, represents Government in negotiations and consultations on general work conditions for public officials with trade unions and with representatives of public officials;

1.7. request and receive from institutions of the Republic of Kosovo any necessary information for fulfilling their responsibilities*;*

1.8. inspect any file or document related to a decision making on public official employment relationship, in state administration institutions*;*

1.9. administers and maintains Human Resources Management Information System (HRMIS*);*

1.10. supports and ensures advising of institutions implementing this Law;

1.11. prepares general instructions and manuals to guarantee unified implementation of legislation on public officials;

1.12. develops policies on the engagement of interns in public administration;

1.13. develops the general staff plan;

1.14. organizes recruitment procedures in accordance with this Law;

1.15. publishes annual report on human resources management;

1.16. exercises any competence provided with this Law.

2. Responsibilities defined in sub-paragraphs 1.1. and 1.6. of this Article as far as they relate to administrative and support staff are exercised in cooperation with the responsible ministry for labour issues.

3. Responsibilities foreseen in sub-paragraphs 1.1. and 1.7. of this Article as far as they relate to Public Services employee, are exercised in cooperation with the responsible Ministry for state policies on relevant public service.
4. Every institution that hires public officials and any public functionary and public official that has managerial and decision making competences, or that has information in this field, is required to cooperate with DMPO.
[...]

Article 14
Human Resource Management Unit (HRMU)

[...]
5. Human Resource Management Unit is required to have an annual report on human resources management for its institution and submit it by 31 December of current year for approval to the chief administrative officer of the institution. A copy of this report, after the approval by the chief administrative officer, by 15 January of the following year, must be sent to DMPO in the ministry responsible for public administration.
[...]

Article 15
Staff development plan

[...]
4. Ministry responsible for public administration based on the staff planning of institutions develops and adopts the General Plan.
[...]
6. Detailed procedures for planning of personnel, adoption of plans, contents of plans and their publication are adopted with a secondary legislation by the minister responsible for public administration.
[...]

Article 17
Human Resources Management Information System (HRMIS)

[...]
7. Minister responsible for public administration, with a sub- legal act, adopts rules for maintenance, administration and use of HRMIS.
[...]

Article 31

Obligation for professional development

[...]

3. Government, upon proposal of the ministry responsible for public administration, with a sublegal act, adopts mandatory training modules for each category, class and group of positions in Civil Service.

[...]

Article 32
Employment relationship in civil service

[...]

4. Exceptionally, a regular job position in the Civil Service may be filled in case there is a need for replacement or in case of temporary absence of a civil servant depending on the case, for a period of not longer than twelve (12) moths. In this case, recruitment procedures are conducted by the human resources unit in accordance with the rules defined in this Law on technical/ administrative and support staff.

5. Government, upon proposal of ministry responsible for public administration, with a sublegal act, adopts rules on the implementation of paragraph 4 of this Article. [...]

Article 33
Classification of positions in civil service

[...]

5. Government, upon the proposal of ministry responsible for public administration with a sublegal act, adopts:

5.1. applicable classes for each category and titles for each class;

5.2. special administration group;

5.3. general job description for each category, class and group, including general requirements for admission to each category, class and group;

5.4. detailed rules, procedures, standards and methodology for assessment and classification of a position into a certain class or group according to this Article.

[...]

Article 34
Civil Service admission procedure

[...]

16. The Government, at the proposal of the ministry responsible for public administration, with a sub- legal act adopts detailed rules on establishment, composition and activities of the Commission and on

payment of external expert, and detailed rules on the procedure of competition and evaluation of candidates.
[...]

Article 35
Selection of position and appointment

[...]
6. Government, upon proposal of the ministry responsible for public administration, with a sublegal act, adopts detailed procedures for the appointment in the professional category.
[...]

Article 37
Probation period

[...]
5. Government, with proposal of the ministry of public administration with a sub- legal act adopts employee's duties for a probation period according to this Article.
[...]

Article 38
Transfer within category

[...]
7. Government, upon proposal of the ministry responsible for public administration with a sublegal act adopts requirements that employees should meet for transfer within category and detailed procedure for transfer within category and rules for establishment and composition of the committee stipulated in paragraph 3. of this Article.
[...]

Article 39
Promotion

[...]
11. Government, upon proposal of the ministry responsible for public administration adopts with a sub- legal act the requirements that employees should meet for promotion and its detailed procedures and mandatory training modules.
[...]

Article 40
Admission to a senior managerial category position

[...]

12. Government of Kosovo, upon proposal of the responsible minister for public administration, adopts with a sub- legal act, detailed rules of procedure for application and evaluation of candidates.

[...]

Article 41
Admission commission for senior managerial category

[...]

6. Government of Kosovo, upon proposal of the responsible minister for public administration by sub-legal act, shall adopt:
6.1. rules on the functioning and decision making of Commissions;
6.2. criteria and procedure for selection of commissions members;
6.3. payment for members of commissions who are not civil servants.

[...]

Article 42
Final selection and appointment to senior managerial positions

[...]

10. Any appointment to a senior managerial category position in contradiction with this Article and Article 40 is invalid.
11. Government of Kosovo, upon proposal of the responsible minister for public administration, adopts with a sub- legal act, detailed rules for implementation of this Article.

[...]

Article 43
Performance appraisal

[...]

13. Government, upon proposal of the ministry responsible for public administration, with a sublegal act adopts detailed methodology and procedures for evaluation of results at work.

[...]

Article 44
Performance appraisal for civil servants of senior managerial category

[...]

4. Government, upon proposal of the ministry responsible for public administration with a sublegal act shall adopt the methodology and detailed procedure for evaluation of work results for senior

managerial category employee and the procedure of dispute resolution according to paragraph 3. of this Article.

[...]

Article 48
Competence and disciplinary proceedings

[...]

9. The Government, upon proposal of ministry responsible for public administration with a sublegal act, adopts the detailed disciplinary procedure, in compliance with the Law on General Administrative Procedure.

[...]

Article 49
Establishment and composition of disciplinary committee

[...]

6. The Government, upon proposal of the ministry responsible for public administration with a sub- legal act adopts detailed rules for establishment, composition, selection and decision making in National Committee for Evaluation and Discipline in compliance with general rules defined in the Law on General Administrative Procedure.

.

[...]

Article 52
Temporary transfer

[...]

7. Government, upon proposal of the ministry responsible for public administration, with a sublegal act, adopts detailed rules for temporary transfer according to this Article.

[...]

Article 54
Transfer in case of closure or restructuring

[...]

6. Government, upon proposal of the ministry responsible for public administration with a sub- legal act shall adopt detailed procedures for re-systematization of civil servants, due to termination or restructuring, as well as detailed composition of the commission.

[...]

Article 67
Organization of competition

[...]

11. Classification of managerial staff and professional staff for public services administrations is adopted, with a sub- legal act, by the Government upon proposal of the responsible ministry for public administration and ministry responsible for that field.

[...]

Article 68
Competition procedure

[...]

8. The Government, upon proposal of the ministry responsible for public administration with a sub- legal act shall adopt detailed rules for the creation, composition and activity of standing selection committees, detailed rules on organization and development of competition procedures and for evaluation of candidates.

[...]

Article 70
Probation period

[...]

8. Government, upon proposal of the ministry responsible for public administration with a sublegal act shall adopt detailed rules for probation work.

[...]

Article 71
Performance evaluation

[...]

7. Government, upon proposal of the ministry responsible for public administration, with a sublegal act adopts detailed procedure for evaluation of work results.

[...]

Article 75
Secondary legislation

Sub- legal acts provided for in this section of the Law are adopted by the Government, upon proposal of the minister responsible covering relevant public service and after the consent of responsible ministry for public administration.

[...]

Article 80
Competition

4. Government, upon the proposal of the Ministry responsible for Public Administration and Ministry responsible for Labour Issues, with a sub- legal act, adopts detailed competition procedures.

Article 83
Transitional provisions

[…]
18. Government, upon the proposal of the ministry responsible for public administration with a sub- legal act adopts detailed rules and procedures for implementation of this Article.
[…]

Article 85
With entry into force of this Law, the Law on Civil Service No. 03/L-149 of the Republic of Kosovo and any other provision in contradiction to this Law shall be abrogated.
[…]

Admissibility of the Referral

66. The Court first examines whether the Referral fulfils the admissibility requirements established in the Constitution and further specified in the Law and foreseen in the Rules of Procedure.

67. Initially, the Court refers to paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which provides: *"The Constitutional Court decides only on matters referred to the Court in a legal manner by authorized parties"*.

68. In addition, the Court refers to paragraph 2, subparagraph 1 of Article 113 of the Constitution, which provides that:

> *"2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters:*
>
> > *(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;"*

69. The Court also refers to paragraph 4 of Article 135 [Ombudsperson Reporting], which stipulates: "*The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.*"

70. In this regard, the Court notes that the Applicant is an authorized party who raises before the Court the issue of the compliance of the challenged Law, based on Article 113 paragraph 2 of the Constitution.

71. The Court also takes into account Article 30 [Deadlines] of the Law and Rule 67 paragraph 4 of the Rules of Procedure, which provide that a referral must be filed within a period of six (6) months from the day of entry into force of the challenged act. In this regard, the Court notes that the challenged Law entered into force on 12 September 2019, while the Applicant submitted the referral to the Court on 8 November 2019, and consequently, within six (6) months after the entry into force of the challenged act.

72. In addition, the Court takes into account Article 29 [Accuracy of the Referral] of the Law, which establishes that:

> *"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.*
>
> *2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;.*
>
> *3. A referral shall specify the objections put forward against the constitutionality of the contested act."*

73. The Court also refers to Rule 67 of the Rules of Procedure, which specifies:

> Rule 67
> Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law
>
> *(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.*

(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.

74. The Court notes that the Applicant stated the relevant constitutional provisions which have allegedly been violated, and he also cited the provisions of the challenged Law which he considered to be inconsistent with the Constitution and provided evidence to substantiate his allegations.

75. In conclusion, the Court finds that the Applicant is an authorized party, that he has identified the challenged provisions of the challenged Law, stated his constitutional allegations, submitted supporting evidence and filed the referral within the prescribed time limit.

76. Therefore, the Court declares that the Referral is admissible.

Merits of the Referral

77. The Court recalls once again that the Applicant challenges the constitutionality of certain provisions of the challenged Law, namely, Articles 2 (paragraph 3), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 8), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law.

78. With regard to Article 71, paragraph 8 of the challenged Law, which is challenged by the Applicant, the Court notes that this Article has only 7 paragraphs. Based on the circumstances of the case and in relation to the other allegations of the Applicant, the Court finds that in fact the Applicant, in relation to Article 71 of the challenged Law, challenges paragraph 7 of Article 71 of the Challenged Law.

79. With regard to challenged articles, the Applicant essentially alleges that the challenged Law:

(i) Interferes with the employment relationships of the KPC personnel as part of the justice system defined by Chapter VII [Justice System] of the Constitution, violating the principle of separation of powers, the independence of the KPC and the principle of equality before the law.

(ii) Gives the Government and the Ministry responsible for public administration the authority to administer the employment issue and to issue sub-legal acts for all public officials of state institutions, including independent constitutional institutions such as the Applicant, violating their constitutional independence*;*

(iii) Interferes with the employment relations of the staff of KFA employees and Kosovo Police officers, violating the specific laws that regulate the issue of personnel of these institutions and the principle of equality before the law.

80. Therefore, the Court recalls that the Applicant does not challenge the constitutionality of the challenged Articles of the challenged Law in their entirety and in relation to all public officials regulated by the challenged Law. But, he only challenges the constitutionality of the challenged Law in relation to the abovementioned state institutions, raising important issues of separation of state powers, independence of independent constitutional institutions and equality before the law.

81. Consequently, the Court will further assess the constitutionality of the challenged norms of the challenged Law in relation to these institutions, namely the allegations of:

A) Violation of the principle of separation of powers and independence of the justice system defined by Chapter VII [Justice System] of the Constitution;

B) Violation of the independence of independent constitutional institutions specifically established in Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions]; *and*

C) Violations of the principle of equality before the law in relation to officials of the administration of the KFA and the Kosovo Police.

A) REGARDING THE CONSTITUTIONALITY OF THE CHALLENGED LAW RELATING TO THE JUSTICE SYSTEM ESTABLISHED IN CHAPTER VII [JUSTICE SYSTEM] OF THE CONSTITUTION

82. The Court notes that the Applicant and the KPC complain that the challenged Law has prevented the KPC from regulating the employment relationship of administrative staff through internal rules based on the Law on KPC authorizing the KPC to regulate, among others, the classification of positions; movement within the category; promotion; admission to a senior management position; commissions for management positions, etc. In this regard, the KPC alleges that the principle of separation of powers defined by the Constitution has been violated, as well as the independence of the KPC guaranteed by Article 110 of the Constitution, by challenging the possibility for the Government to determine the positions of the prosecutorial system by sub-legal act. In this regard, the KPC also raises the issue of the special status of the Assembly administration, emphasizing that the principle of separation of powers, institutional independence and the principle of equal treatment of the KPC administration in relation to the legislative and executive power has been violated.

83. With regard to this allegation, the Court notes that the Applicant and the KPC, in essence, challenge the constitutionality of Article 4 [Civil Servants with Special Status], paragraph 3, of the challenged Law which provides that the employees of the Assembly Administration are civil servants with special status, where it allows the Presidency of the Assembly to issue a special act to regulate the issue of the organizational structure of functioning; classification of positions; special conditions for recruitment; working hours; as well as other specific rights and obligations set out in the challenged Law.

84. Therefore, the Applicant and the KPC allege that the non-inclusion of the KPC administration in Article 4, paragraph 3, has resulted in a violation of the principle of separation of powers, violation of the independence of the KPC and unequal treatment among the state powers, the allegations related not only to the prosecutorial system but to the justice system in general, which includes the judicial and prosecutorial system, and the independence of the justice system.

85. With regard to these allegations of the Applicants, the Court recalls Article 3 [Equality Before the Law] of the Constitution which stipulates that:

"1. The Republic of Kosovo is a multi-ethnic society, [...] governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.
[...]"

86. The Court also recalls that according to Article 4 [Form of Government and Separation of Power] of the Constitution, Kosovo is a democratic Republic based on the principle of separation of powers and the checks and balances among them, where the Assembly exercises the legislative power, the Government is responsible for implementation of laws and state policies, while it is specifically defined that the Judicial Power is exercised by the courts.

87. The Court also refers to Article 7 [Values] of the Constitution which stipulates that *"The constitutional order of the Republic of Kosovo is based on the principles of [...] respect for human rights and freedoms and the rule of law, non-discrimination,, [...], separation of state powers [...]".*

88. The Court further recalls its case law where it found that "*The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of the separation of powers and the checks and balances among them. The separation of powers is one of the bases that guarantees the democratic functioning of a State.*" (See Constitutional Court of the Republic of Kosovo: Case no. KO98/11, Applicant, *Government of the Republic of Kosovo*, Judgment of 20 September 2011, paragraph 44).

89. Further, the Court recalls that the Venice Commission has emphasized that *"The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers" (Rule of Law Checklist, approved by the Venice Commission at the Meeting of 106th Plenary Session of 11-12 March 2016, page 20).*

90. With regard to the separation of powers and the relationship between the legislature, the executive and the judiciary, the Court refers to Judgment No. U-I-4039/2009, U-I-25427/2009, U-I-195/2010, of the Constitutional Court of Croatia, of 18 July 2014, which found as follows: *"The government should be given [...] direct competence to influence the salary setting of the judiciary, meaning a priori that the relationship between the two state powers, the executive, this is the political executive, and the judiciary is based on postulates which are*

unacceptable in a democratic society based on the principle of separation of powers and the rule of law, all in the light of the need for the judiciary to be independent.
Consequently, it is a requirement deriving from the Constitution that all elements of the salaries of the judiciary should be regulated by the legislator through the law issued in a democratic parliamentary procedure in order to respect the essence of guaranteeing the stability of the judiciary, which is appropriate, is qualified and independent administrator of justice, and where all elements of the salary of the judiciary must be in conformity with the dignity of the judge's profession and his/her burden of responsibility".

91. Regarding the justice system in Kosovo, the Court refers to Chapter VII [Justice System] of the Constitution which regulates the judicial and prosecutorial system of Kosovo. According to Article 102 [General Principles of the Judicial System], paragraph 1 of the Constitution "*Judicial power in the Republic of Kosovo is exercised by the courts".*

92. The Court also refers to Article 108 [Kosovo Judicial Council] which stipulates that:

> *"1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.*
> *2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. […]*

93. Regarding the prosecutorial system of Kosovo, the Court refers to Article 109 [State Prosecutor] of the Constitution which stipulates that:

> *"1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.*
> *[…]"*

94. The Court also refers to Article 110 [Kosovo Prosecutorial Council], paragraph 1 of the Constitution which stipulates that:

> *"The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law."*

95. Regarding the above, the Court emphasizes that the Constitution of Kosovo stipulates that Kosovo is a democratic society based on the principle of the rule of law which guarantees the separation of powers in legislative, executive and judicial, which ensures independence

between the three powers and mutual check, according to the principles set out in the Constitution.

96. The Court emphasizes that the Constitution specifically stipulates that legislative power is exercised by the Assembly, executive power by the Government, and judicial power is exercised by the courts. The Constitution also provides for the establishment of the Kosovo Judicial Council (hereinafter: the KJC) to ensure the independence of the judicial system.

97. The Court recalls that the Constitution of Kosovo does not specifically include the prosecutorial system in the classical separation of powers, namely within the judicial system, as a third power, as the Constitution specifically provides that judicial power is exercised by the courts.

98. In this regard, according to the Venice Commission Report, there are legal systems where the prosecution system is not independent of the executive, and in relation to such systems concentrate on the necessity for guarantees at the level of the individual case that there will be transparency concerning any instructions which may be given. (see Report on *European Standards as regards the Independence of the Judicial System, Part II of the Prosecution Services*, adopted by the Venice Commission at its 85th Plenary Meeting of 17-18 December 2010, paragraph 23; see also, *Compilation of the Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI (2018) 001, Strasbourg, 11 November 2017, page 27).

99. However, the Venice Commission emphasizes that only a few of the countries belonging to the Council of Europe have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. see Report on *European Standards as regards the Independence of the Judicial System, Part II of the Prosecution Services*, adopted by the Venice Commission at its 85th Plenary Meeting of 17-18 December 2010, paragraph 23).

100. According to the Venice Commission, as the prosecutor acts on behalf of society as a whole and because of the serious consequences of a criminal conviction, the prosecutor must act fairly, impartially and to a high standard. Even in systems where the prosecutor is not part of the judiciary, the prosecutor is expected to act in a judicial manner. While the Constitution should confer independence on the system as

well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly (see also, *Compilation of the Venice Commission Opinions and Reports Concerning Prosecutors*, CDL-PI(2018)001, Strasbourg, 11 November 2017, page 28).

101. However, with regard to the Constitution of Kosovo, although the Constitution specifically provides that judicial power is exercised by the courts, the Kosovo prosecutorial system is included in Chapter VII [Justice System] of the Constitution together with the judicial system, where specifically is established that the State Prosecution is an independent institution with the authority and responsibility for criminal prosecution, while the KPC, according to Article 110 of the Constitution, is mandated to ensure, *inter alia*, the independence of the State Prosecutor, similar to the Judicial Council to ensure the independence of the courts.

102. Therefore, the Court considers that the Constitution of Kosovo intended to provide the prosecutorial system with the same independence to exercise its functions as the judicial system. Therefore, the Court, for the purposes of their institutional independence related to the challenged Law, will treat the judicial system and the prosecutorial system, together in relation to the legislative power exercised by the Assembly and the executive power exercised by the Government.

103. The Court notes once again that the Applicant did not make a concrete reference to the independence of the courts or the KJC, but specifically challenged the challenged Law, in particular, the exemptions made by civil servants with the special status set forth in Article 4 [Civil Servants with Special Status] of the challenged Law, alleging a violation of the principle of separation of powers as a result of the non-inclusion of the KPC in these exemptions, by making it impossible to regulate by itself the specifics of work of its employees.

104. However, the Court reiterates that it is master of the characterization to be given in law to the facts of the case *vis-a-vis* constitutional norms, and it does not consider itself bound by the characterization given by an applicant (see case KO171/18, cited above, paragraph 148; see also, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, paragraph 44).

105. In this regard, the Court notes that the challenged Law gives the Government broad powers to manage and supervise civil servants of public administration, including, with some exceptions, civil servants of institutions such as KJC and KPC officials. Furthermore, the challenged Law gives the Government the power to issue a series of sub-legal acts to further regulate important issues related to civil servants such as, issues of recruitment, appointment, promotion, working hours, classification of positions, disciplinary violations, which in essence affect the functioning, classification of positions, but also the systematization and organizational structure of institutions, including the administration of the KJC and KPC.

106. This makes it impossible for the KJC and the KPC, as part of the justice system, to autonomously define specific rules for regulating the employment issues of their employees, thus influencing the determination of their organizational structure and other issues related to civil servants of these institutions, although such a restriction is not provided by LOFASAIA, which determines the rules for the organization and functioning of state administration institutions and independent agencies established by the Assembly of Kosovo (see Article 1 [Purpose and scope] of LOFASAIA).

107. In this regard, the Assembly of Kosovo, as a legislative body, with the approval of the challenged Law, has defined the general criteria for the management of public officials in the Republic of Kosovo, including civil servants employed in public institutions, authorizing the Government to manage and oversee the civil servant system and issue sub-legal acts to regulate certain issues.

108. However, unlike the justice system, in respect of which employees it has not provided for any exceptions, as far as the civil servants of the Assembly of Kosovo is concerned, the legislator has established some exceptions by giving competence to the Presidency of the Assembly, which according to Article 4 [Civil Servants with Special Status], paragraph 3 of the challenged Law to issue a special act to regulate the issue of organizational structure of functioning; classification of positions; special conditions for recruitment; working hours; as well as other specific rights and obligations from those defined by the challenged Law.

109. Consequently, the Assembly of Kosovo has given the Government the competence to manage the civil service system in all institutions, including the justice system, but by determining that the Presidency of the Assembly issues sub-legal acts regarding the civil servants of the

Assembly, thus ensuring that the Government will not interfere with the management of Assembly officials, as a legislative power.

110. However, the Assembly has failed to provide the same exception for civil servants of the justice system in order to ensure the separation of powers not only in terms of judges and prosecutors but also in relation to the staff supporting them, just as it had done for civil servants of the Assembly of Kosovo.

111. This is due to the fact that by applying the same rules regarding the issue of employment, classification of positions, recruitment criteria and other issues related to the employment of civil servants, and more importantly, allowing the Government to issue sub-legal acts which regulate the issue of employment in institutions outside the executive, without taking into account the separation of powers and the independence of institutions such as the KJC and KPC, interferes with determining their organizational structure and other issues related to civil servants of these institutions guaranteed by Articles 102, 108, 109 and 110 of the Constitution.

112. Therefore, the Court considers that by not including the civil servants of the KJC and KPC in the exceptions of Article 4 [Civil Servants with Special Status], paragraphs 3 and 4 of the challenged Law, the challenged Law violates the principle of separation of power guaranteed by Articles 4 and 7 of the Constitution as well as the independence of the judicial system guaranteed by Articles 102 and 108 of the Constitution, as well as the independence of the prosecutorial system guaranteed by Articles 109 and 110 of the Constitution.

113. Consequently, the Court considers that the challenged Law is not in accordance with the Constitution in relation to KJC and KPC officials and does not apply as long as the provisions of this Law contradict their functional and organizational independence guaranteed by the Constitution.

114. However, the Court does not find it necessary to repeal Article 4 of the challenged Law in its entirety, or other provisions of the challenged Law, as in relation to officials of other institutions, their constitutionality has not been challenged before the Court, or for those that have been challenged, the Court has not found a violation (see part of the Judgment on the KFA and Kosovo Police officers).

115. However, given that the Court has just found a violation of the challenged Law in relation to KJC and KPC officials but has not

annulled the application of the challenged Law in relation to other institutions regarding which the constitutionality of the challenged Law has not been challenged, the Assembly of Kosovo must take the necessary actions to supplement and amend the challenged Law in accordance with the findings of this Judgment, in order to recognize the right of the KJC and KPC to issue and apply their internal rules, as regards, *inter alia*, the matters of organizational structure of functioning; classification of positions; special conditions for recruitment; working hours; as well as specific rights and obligations defined by the challenged Law, as provided for the employees of the Assembly according to Article 4 [Civil Servants with Special Status], paragraphs 3 and 4, where the Presidency of the Assembly has the right to issue sub-legal acts to regulate certain matters of its civil servants.

B) REGARDING THE ALLEGATION OF VIOLATION OF THE CONSTITUTIONAL INDEPENDENCE OF THE INDEPENDENT CONSTITUTIONAL INSTITUTIONS PROVIDED FOR IN CHAPTER XII [INDEPENDENT INSTITUTIONS] AND CHAPTER VIII [THE CONSTITUTIONAL COURT] OF THE CONSTITUTION

116. With regard to independent constitutional institutions, the Court refers to the independent institutions expressly listed in Chapter XII [Independent Institutions], specifically in Articles 132-135 [Role and Competencies of the Ombudsperson], 136-138 [Auditor General of Kosovo], 139 [Central Election Commission], 140 [Central Bank of Kosovo] and 141 [Independent Media Commission], as well as regarding the Court as defined in Chapter VIII [Constitutional Court] of the Constitution.

117. In this regard, the Court notes that the independent agencies established under Article 142 of the Constitution, although established on the basis of Article 142 of the Constitution, contained in Chapter XII of the Constitution, do not have the same status as the independent constitutional institutions referred to expressively in Chapter XII of the Constitution. This is because the establishment, role and status of independent constitutional institutions is expressly regulated by Chapter XII of the Constitution. Whereas "Independent Agencies" provided by Article 142 of the Constitution "*are institutions established by the Assembly, based on relevant laws, which regulate their establishment, functioning and competencies*". Therefore, unlike the fact that the Assembly can create and shut down "*by law*" Independent Agencies; the Assembly can never shut down "*by law*" any of the above-mentioned five independent institutions. This is the

main difference between the Independent Institutions referred to in Chapter XII of the Constitution.

118. Therefore, the references in this Judgment concerning independent constitutional institutions refer to independent constitutional institutions specifically referred to in Chapters VIII and XII of the Constitution and not to independent agencies established under Article 142 of the Constitution and other similar institutions, and do not create rights for those agencies.

119. With regard to the present case, the Court recalls that with regard to the constitutional independence of independent constitutional institutions, namely the independence of the Ombudsperson, the Applicant essentially alleges that: the challenged Law includes in its scope civil servants of the institutions of constitutional independence, specifically the Ombudsperson, but without defining any specific provision that respects the independence of the Ombudsperson; authorizing the Government and/or the relevant ministry for public administration with competencies also related to the employees of independent institutions; and, by authorizing the Government/ministry responsible for public administration to issue sub-legal acts on a long range of employment issues, including the Ombudsperson, results in a violation of its independence defined by the Constitution. He also links this allegation with the Judgment of the Constitutional Court KO73/16, which, among other things, stated that "*it could not be expected that the staff of the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorization and remuneration provided for by a legal act of general nature of the Government, or any act of the executive branch, without first taking into due account the specificities and uniqueness of the institutions in question*".

120. Consequently, the Applicant essentially challenges the applicability of the challenged Law to independent constitutional institutions, such as the Ombudsperson, as well as the competencies of the Government provided by the challenged Law on supervision, reporting requirements, and the issuance of sub-legal acts embodied in the challenged articles of the challenged Law, which are also binding on independent institutions, regardless of their internal rules issued under the authorizations of the Constitution and special laws. The Applicant alleges that the legislation regarding the public officials cannot be applied to independent constitutional institutions, specifically in this case, the Ombudsperson, as well as to public officials of other institutions, as this violates the independence of

independent constitutional institutions guaranteed by the Constitution and special laws.

121. The Court notes, on the other hand, that the MPA maintains that the challenged Law does not infringe the Applicant's independence as the challenged Law does not repeal Article 32 of the Law on the Ombudsperson which stipulates that civil service legislation applies to the Applicant to the extent it does not violate its independence.

122. In relation to the above, the Court initially finds it necessary to determine the scope of the challenged Law in relation to public officials of the public institutions of Kosovo and in relation to other laws governing the employment of public officials in Kosovo.

123. In this regard, as will be explained below, the officials of independent constitutional institutions are also subject to the challenged Law. In this respect, the Court refers to Article 2 [Scope of application] paragraph 3 of the challenged Law which stipulates that a civil servant is any *"public official within the Civil Service who performs the duty in a position starting from professional officer to the position of general secretary in the administration of the President, in the administration of the Assembly, in the Office of Prime Minister, Ministry, executive agency, in Agencies and in one of their local branches, in the administration of justice system institutions, in an independent institution, independent agency, municipal administration and any employee defined directly with a special Law"*. The Court also refers to Article 5 [Definitions] of the challenged Law which emphasizes that *"Other state institution - administration [...] of an independent institution, of an independent agency, or of a municipality"*.

124. The Court also refers to Article 3 [Exemptions from the scope of the Law] of the challenged Law which stipulates that the challenged Law does not apply to:

i) public functionaries (elected officials, members of the Government and their deputies, functionaries appointed by the Assembly or the President of the Republic and dignitaries or members of collegial managing bodies of independent institutions and agencies);

ii) public functionaries with special status (judges and prosecutors, commanding of the Security Force; Kosovo police officers and Kosovo police inspectorate; customs officers; managerial personnel and employees of the KIA; and, director

or members of collegial managing body of regulatory agencies).

125. The Court also refers to paragraphs 1 and 2 of Article 4 [Civil Servants with Special Status] of the challenged Law, which provides that professional officers of the diplomatic service and the correctional service are regulated by this Law and special law. Such an exception is Article 4, paragraphs 3 and 4, of the challenged Law which provides for the employees of the Administration of the Assembly that authorizes the Presidency of the Assembly to adopt a special act to regulate the organizational structure of functioning and classification of positions; special recruitment conditions; working hours; as well as specific rights and obligations other than those provided by the challenged Law.

126. The Court notes that, in accordance with the abovementioned provisions, the officials of the administration of independent constitutional institutions are included in the scope of the challenged Law, as they are specifically mentioned in Article 2 of the challenged Law.

127. The Court also notes that the independent constitutional institutions are not included in Articles 3 and 4 of the challenged Law which provides for exceptions to the application of the challenged Law. Therefore, the challenged Law includes and regulates the issue of employment of the employees of independent constitutional institutions, specifically the Applicant.

128. With regard to the relationship between the challenged Law and other special laws governing the issue of employment, the Court also refers to Article 85 of the challenged Law which stipulates that:

"With entry into force of this Law, the Law on Civil Service No. 03/L-149 of the Republic of Kosovo and any other provision in contradiction to this Law shall be abrogated."

129. The Court therefore notes that the challenged Law under Article 85 clearly repeals the Law on Civil Service and any other legal provision that is inconsistent with it, including the special laws of independent institutions such as is the Ombudsperson while those laws or regulations regulate differently the issue of the employees of these institutions.

130. Therefore, as a conclusion regarding the scope of the challenged Law and the relationship of this law with other laws, the Court considers

that the challenged Law applies to all institutions of Kosovo that employ civil servants except those defined in Articles 3 and 4 of the challenged Law, clarified above, and where independent constitutional institutions are not included in the list of exceptions to the application of the challenged Law.

131. Therefore, the Court will further assess the Applicant's allegations that the challenged Law, specifically the challenged articles, provides the same rules for all state institutions, including independent constitutional institutions, providing for oversight and reporting by the Government on the issue of employment for these institutions, in particular by preventing independent constitutional institutions from issuing internal acts, violates the independence of independent institutions, including the Ombudsperson, guaranteed by the Constitution. The Court will first: *a)* elaborate general principles regarding the independence of independent constitutional institutions such as the Ombudsperson; and b) assess whether the challenged provisions of the challenged Law violate these principles.

a) General principles regarding the independence of independent constitutional institutions established in Chapter VIII and XII of the Constitution as well as established in the case law of the Court

132. The Court notes that the Applicant challenges the challenged Law mainly in relation to the Ombudsperson and its independence guaranteed by Article 132 of the Constitution. However, the Court reiterates that it is master of the characterization to be given in law to the facts of the case *vis-a-vis* constitutional norms, and it does not consider itself bound by the characterization given by an applicant (see case KO171/18, cited above, paragraph 148; see also, among other authorities, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998, paragraph 44)

133. Therefore, the Court, taking into account the status, role and constitutional function of independent constitutional institutions defined by the Constitution, will assess the Applicant's allegations in relation to all independent constitutional institutions specifically stated in Chapters VIII and XII of the Constitution.

134. The Court recalls that the independence of independent constitutional institutions has been the subject of review in case KO171/18, Applicant*, the Ombudsperson*, Constitutional review of Articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3) 18, 19

(subparagraphs 5, 6, 7 and 8), 20 (paragraph 5) 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on the Independent Oversight Board for Civil Service of Kosovo, Judgment of 25 April 2019 (hereinafter: Judgment KO171/18) and case KO73/16, Applicant, *the Ombudsperson*, Constitutional review of the Administrative Circular No. 01/2016, of 21 January 2016, issued by the Ministry of Public Administration of the Republic of Kosovo, Judgment of 16 November 2016 (hereinafter: Judgment KO73/16).

135. In the abovementioned judgments, the Court had held that *"the Constitution is based on the principle of separation of powers. The Republic of Kosovo is defined by the Constitution as a democratic Republic based on the principle of separation of powers and the checks and balances among them, The separation of powers is one of the bases that guarantees the democratic functioning of a State. In addition to the three branches of government referred to above, the Constitution guarantees a special status to the Office of the Ombudsperson and to the other independent institutions enumerated in Chapter XII of the Constitution. The Constitution also safeguards a special status to the Constitutional Court as thefinal guarantor and interpreter of the Constitution. The Applicant and the Constitutional Court are not part of the legislative, executive and the regular judiciary. The same applies for the other independent institutions enumerated in Chapter XII of the Constitution"* (See, Judgment KO171/18, paragraph 119; and Judgment KO73/16, paragraphs 63, 64, 65. See also Judgment in case KO98/11 of 20 September 2011, Applicant *the Government of Kosovo*, regarding the immunity of deputies of the Assembly of the Republic of Kosovo, President Republic of Kosovo and members of the Government of the Republic of Kosovo, paragraph 44).

136. In this respect, the Court recalls Article 132.2 of the Constitution, which provides that "*The Ombudsperson independently exercises her/his duty and does not accept any instructions or intrusions from the organs, institutions or other authorities exercising state authority in the Republic of Kosovo*" and Article 133 [Office of Ombudsperson], which establishes that "*The Office of the Ombudsperson shall be an independent office and shall propose and administer its budget in a manner provided by law".* (see Judgment KO171/18, paragraph 120).

137. The Court also refers to Law No. OS/L-019 on the Ombudsperson, namely Article 3 [Basic Principles of the Ombudsperson's Activity], paragraph 2, which states that "*The institution of the Ombudsperson enjoys organizational, administrative and financial independence in the implementation of tasks set forth by the Constitution of the*

Republic of Kosovo and the Law", as well as Article 32 [Personnel], paragraph 2, which establishes that: "*The provisions of the Law on Civil Service shall apply to employees of Ombudsperson Institution, to that extent that there is no infringement of constitutional independence of the Institution".* (see Judgment KO171/18, paragraph 121).

138. The Court also recalls that under Article 37 [Regulations of the Institution] of the Law on Ombudsperson, "*The Ombudsperson issues the Rules of Procedure, Regulation for internal organization and systematization of job positions, decision making processes and other organizational issues in accordance with the Law".*

139. The Court in Judgment K073/16 and Judgment KO171/18, noted that "*The Court notes that the Office of Ombudsperson is an independent institution which was created to ensure accountability from the public authorities vis-a.-vis the rights and freedoms of individuals. In fulfilling this role, the Institution independently exercises its mandate without accepting any instructions or intrusions from any other state authority. Additionally, the Constitution places an obligation on the organs of state through legislative and other means to ensure the independence, impartiality, dignity and effectiveness of the Office of the Ombudsperson and the other independent institutions*" (See Judgment K073/16, paragraphs 68 and 69; and Judgment KO171/18, paragraph 123).

140. In addition, the Court emphasized that all institutions are obliged by the Constitution to respect the independence of the Office of Ombudsperson. The Court also emphasized that the Ombudsperson is obliged to ensure its independence by issuing regulations, orders or other legal acts in such a manner that they do not curtail its functional, organizational and financial independence. (See, *mutatis mutandis*, Judgment K073/16, paragraph 69 and Judgment KO171/18, paragraph 124).

141. In this respect the Court also recalls the role and status that the Constitution guarantees to other independent constitutional institutions specifically included in its Chapter XII. Regarding the Auditor General of Kosovo, its role and constitutional status, the Court recalls that according to Article 136 [Auditor-General of Kosovo], paragraph 1 which stipulates that *"The Auditor-General of the Republic of Kosovo is the highest institution of economic and financial control"* and paragraph 2 which stipulates that *"Organization, operation and competencies of the Auditor-General of*

the Republic of Kosovo shall be determined by the Constitution and law."

142. With regard to the Central Election Commission and its role and status as an independent constitutional institution, the Court refers to Article 139, paragraph 1 of the Constitution, which stipulates that: "*The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results".* Therefore, as the Court clarified in its case KO58/19, the CEC is a permanent body mandated to administers elections and referendums in Kosovo, which carries out its functions in a professional and impartial manner, regardless of any political interest. Accordingly, the Constitution attributes to the CEC the nature of a permanent state body and recognizes it as the sole and independent authority to control and certify the mandate of representative institutions. (see the case of Court KO58/19, Judgment of 29 July 2019, paragraphs 99 and 100).

143. The Court also recalls Article 140 [Central Bank of Kosovo] which expressly regulates the status of this independent constitutional institution, specifically paragraph 1 of Article 140 which stipulates that *"The Central Bank of the Republic of Kosovo is an independent institution which reports to the Assembly of Kosovo*", and paragraph 2 that stipulates that *"The Central Bank of the Republic of Kosovo exercises its competencies and powers exclusively in accordance with this Constitution and other applicable legislative instruments."*

144. The Court also refers to the specific status of the Independent Media Commission, which according to Article 141 [Independent Media Commission] "*is an independent body, which regulates the Range of Broadcasting Frequencies in the Republic of Kosovo, issues licenses to public and private broadcasters, establishes and implements broadcasting policies and exercises other competencies as set forth by law".*

145. Similarly to the Applicant, as regards the Constitutional Court, in its Judgment KO73/16, and Judgment KO171/18, the Court found that the mandate to issue its own rules of procedure was established within the exclusive competence of the Court, reasoning also the purpose of this the definition as follows: *"[evidently the authors of the 27 Constitution aimed at securing the independence and efficiency of the Constitutional Court by enabling the Court itself to create its own rules of procedure and thereby prevent any interference with the exercise of its assigned responsibilities. This also shows and confirms that the Court has a special position and authority according to the*

Constitution and within the system of the state institutions. Accordingly the independence of the Court requires it to be governed by specific rules, moreover, of constitutional values, and obliges the Government and its branches to respect them" (See Judgment K073/16, paragraph 79 and 80; and Judgment KO171/18, paragraph 128).

146. The Court also emphasized that it should be able to decide for itself on its internal organization and to achieve efficient functioning. It is up to the Assembly to determine and approve the budget of the institutions of the Republic of Kosovo, but in accordance with the Constitution. The Constitution obliges the lawmaker and the executive to not violate the independence of the Court (See, for example, *Decision on the admissibility and merits of the Constitutional Court of Bosnia and Herzegovina* in case No. U. 6/06 of 29 March 2008; see also Judgment KO171/18, paragraph 129).

147. This special status of the Applicant and of the independent constitutional institutions set forth in Chapter VIII and XII of the Constitution is further reflected in Law No. 03/L-149 on Civil Service of the Republic of Kosovo, namely, paragraph 4 of Article 1 [Purpose and Scope] that stipulates that "*The institutions of the public administration that regulated by special law shall be subject to the provisions of this law [Law on Civil Service], except in cases where the special law contains provisions that are different from this law*" and Article 3 [The Civil Service of the Republic of Kosovo] which establishes that "[*During the implementation of this law, the constitutional autonomy of the institutions independent from the executive shall be respected". (*see Judgment KO171/18, paragraph 130).

148. The Court also notes that in its Judgment KO73/16, where it assessed the Government Circular on the classification of positions in the civil service, it stated that *"the implementation of laws and state policies is one of the constitutional duties of the Government. However, the Government is to take into account the special status of the Ombudsperson, the Court and the other independent institutions in accordance with the constitutional guarantee of their independence as outlined above. Accordingly the preparation, the content and the applicability of any norms related to their functioning and internal job descriptions and remuneration has to be adequately and appropriately developed and determined. The Government cannot suffice by applying identical criteria to those applied to the governmental agencies to be applied in the same manner to the*

independent institutions defined in the Constitution" (See, *mutatis mutandis*, Judgment KO73/16, paragraph 69).

149. The Court in case K073/16 and KO171/18 as to the independence of the constitutional institutions, the Constitutional Court of Albania in Decision (V-19-07) in Case. No. 43/13 of 3 May 2007 reasoned:

> "*The notion of independence does not and cannot have the same substance or meaning in reference to all constitutional organs and institutions, That notion varies depending on th e nature of the organ and its constitutional duties and junction, However', generally speaking, it must be emphasized that their' independence as guaranteed by the Constitution and the respective organic laws, has as its component or inherent element organizational, functional and financial independence, Beside questions of election, appointment or dismissal o manager's and other high officials of constitutional organs and institutions, among other's, the organizational independence is also valid with regard to their' entitlement to draft and appoint, in compliance with certain criteria, their structure and organogram, including the right to appoint directors and advisors, the quantity and the set up of officials of supporting cabinets, appointment of officials of lower positions, recruitment of personnel of different levels, etc, The functional independence of the constitutional organs and institutions is closely knit with the substance of the work that they discharge, which is directly regulated for and has its foundations in the respective constitutional provisions [...] no other organ or' institution, whether it a part of one of the three branches of the government, cannot interfere in treatment and solving of questions, as the case may be, would make up the central object of the work of other constitutional organs and institutions ... while, on the other hand, the constitutional provisions and organic laws patently establish that management of the budget in accordance with the law should be left at the hand of these organs themselves. Surely, they know and assess their requests and problems, needs for investment, objectives that they want to reach, etc better than anyone else"* (see Decision (V-19-07) in case no. 43/13, of 3 May 2007, of the Constitutional Court of Albania).

150. Therefore, as regards the status of the personnel of the independent constitutional institutions, as it derives from the Constitution and the special laws, and principles explained above, the Court in Judgment KO171/18, reiterated that:

a) the provisions of relevant legislation, including civil service legislation which was in force before the adoption of the challenged Law, do not specifically refer to the staff of independent constitutional institutions as civil servants, but foresee the application of the civil service legislation;

b) civil service legislation, including the challenged Law, applies to the staff of these independent constitutional institutions only to the extent that they do not violate their independence;

c) the Constitution and the special laws authorize and oblige the independent institutions, in particular the Applicant and the Court, to issue regulations, orders and other legal acts to regulate the specifics related to the employment relationship of their staff, which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence, but only to the extent necessary to ensure their independence as provided for by the Constitution and special laws.

d) the regulations and other legal acts of the independent constitutional institutions that regulate the specifics related to the employment relationships of the staff of independent institutions deriving from the Constitution and the special laws must be respected by all institutions including the executive and other institutions, such as the Board, and have priority over other laws. (see Judgment KO171/18, paragraph 133).

151. On the other hand, the Court emphasized that the independent institutions, including the Applicant, cannot act in vacuum in relation to the legal framework. The Court considers that the independence of the Applicant and the Court is also subject to some limitations and control. These are included in Article 14.3 of the Law on the Constitutional Court that provides: "*The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo*". In a similar way, Article 35-4 of the Law on Ombudsperson Institution provides: "*The Ombudsperson Institution independently manages with its own budget and is subject to internal and external audit by the Auditor General of the Republic Kosovo*" (see Judgment KO73/16, paragraph 90; and Judgment KO171/18, paragraph 134).

152. In addition, the Court notes that according to Article 137 of the Constitution [Competencies of the Auditor-General of Kosovo], the Auditor General of the Republic of Kosovo is the only authority

established by the Constitution that can audit the economic activity of the Applicant and the Court, as well as of all other public institutions in the Republic of Kosovo (see Judgment KO73/16, paragraph 91; and Judgment KO171/18, paragraph 135).

b) Application of these principles regarding the challenged Law

153. The Court recalls that under Article 2 [Scope of application] of the challenged Law, it is provided that the challenged Law applies to all public institutions, including independent constitutional institutions, such as the Applicant, but not to those specified in Article 3 [Exemptions from the scope of the Law] and 4 [Civil Servants with Special Status] of the challenged Law which includes public officials, public officials with special status (to whom the challenged Law does not apply) and public servants with special status (officials of the diplomatic service and officials of the Assembly of Kosovo, to whom this Law and their special acts apply).

154. The Court notes that the challenged Law does not provide for an exception within the scope of the challenged Law in Article 2 [Scope of application] or in the exceptions set out in Article 3 [Exemptions from the scope of the Law] and Article 4 [Civil Servants with Special Status] as regards the independent constitutional institutions included in Chapters VIII and XII of the Constitution, as made by the Constitution, special laws and the Law on Civil Service foreseen to be repealed by the challenged Law. Namely, the challenged Law does not provide for the possibility that during the implementation of the Law, the special laws of independent institutions and their internal rules will be taken into account to ensure their independence, because, as explained above, in: Article 85 repeals any provision that is inconsistent with this Law, including the special laws governing these institutions.

155. In this regard, the Court also refers to Article 10 of the challenged Law which stipulates that *"Government, among other, adopts general state policies for employment of public officials and adopts sub- legal acts based on this Law"*. Also, other challenged provisions of the challenged Law give the Government the competence to, *inter alia*, issue rules concerning personnel plans and the human resource management system; employment relationship in the civil service and job classification; admission to the civil service; movement within the category and promotion; appointment to senior management positions; evaluation of results at work; discipline in the civil service;

transfer to the civil service and similar matters relating to the employment and employment matters of public officials.

156. Therefore, the Court considers that the challenged Law provides for the same approach to all public institutions, including independent constitutional institutions, with some exceptions set out in specific provisions of the challenged Law, which the MPA states in its response, which exceptions are reflected in the fact that the procedure of vacancy announcement of employees for institutions outside the state administration (including independent institutions) is conducted by the Human Resources Unit of the institutions themselves (see paragraph 3 of Article 34 [Civil Service admission procedure] of the challenged Law). Also, the Admissions Commission is appointed by the head of the institution (paragraph 13 of Article 34); vacancies for senior management positions are organized by the Human Resources Unit of the "other state institution" (see paragraph 5 of Article 41 [Admission Commission for senior managerial category] of the challenged Law; the latter is appointed by the Human Resources Unit of another state institution (see paragraph 4 of Article 42 [Final selection and appointment to senior managerial positions] which differs from the procedure followed for the institutions of the Government.

157. However, the Court notes that all these actions and exceptions are foreseen to be performed either on the basis of the provisions of the challenged Law, or on sub-legal acts issued by the Government and, in essence, the challenged Law does not take into account the independence of independent constitutional institutions, their specific laws and their internal rules deriving from the Constitution and special laws.

158. In this regard, the Court recalls once again that according to the Constitution and special laws as well as the case law of this Court, elaborated in detail in this Judgment: the rules of civil service are applied to the staff of independent constitutional institutions to the extent they do not violate their independence. In this regard, the Court is aware that not all of the challenged articles and the powers conferred on the Government in relation to the challenged Law directly affect the independence of independent institutions.

159. However, as required by the Constitution and special laws, the independent institutions, the Applicant, are authorized to issue internal acts, to regulate the specifics regarding the employment relationship of their staff, which differ from general norms laid down by other laws, including the challenged Law, in such a way that they

ensure their functional and organizational independence and only insofar as this is necessary to protect their independence and in relation to those matters for which such a thing is necessary.

160. These special norms must be respected by all institutions including the Government and the institutions that oversee the implementation of these provisions.

161. Therefore, the Court considers that by authorizing the Government to issue sub-legal acts governing the employment issue, including the classification of positions, recruitment criteria and other matters in independent constitutional institutions, without regard to the independence of independent institutions, the challenged Law taken in its entirety, violates the essence of the independence of independent constitutional institutions guaranteed by Chapters VIII [Constitutional Court] and XII [Independent Institutions] of the Constitution, as state authorities separate from the legislative, the executive, regular judiciary and other institutions.

162. However, as noted above, with regard to the institutions of the justice system, the Court does not consider it necessary to annul these provisions in their entirety as these provisions also apply to officials of independent constitutional institutions to the extent they do not infringe their independence and also applied in relation to the officials of other institutions, their constitutionality has not been challenged before the Court specifically.

163. The Court finds that Articles 2 (paragraph 3), 4 (paragraphs 3 and 4), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 7), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the challenged Law violate the independence of independent constitutional institutions, set out in Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions]. Consequently, the challenged Law is not in accordance with the Constitution in relation to these institutions, and does not apply to these institutions, as long as this Law does not respect their institutional and organizational independence guaranteed by the Constitution.

164. Considering that the Court has found a violation of the challenged Law in relation to the independent constitutional institutions but has not annulled the application of the challenged Law in relation to other institutions in relation to which the constitutionality of the challenged Law has not been challenged, and the fact that the challenged Law applies to independent constitutional institutions as long as it does not violate the independence of these institutions, the Assembly of Kosovo must, as soon as possible, take the necessary actions to supplement and amend the challenged Law in accordance with the findings of this Judgment, in order to recognize the functions and specific authority of independent constitutional institutions reflected in the issuance and application of their internal rules to protect their independence established in the Constitution and special laws, as regards, *inter alia*, the issue of organizational structure of functioning; classification of positions; special conditions for recruitment; as well as specific rights and obligations other than those defined by the challenged Law, according to the specifics of the work of their personnel.

C) REGARDING ALLEGATIONS OF CONSTITUTIONAL VIOLATIONS IN RELATION TO THE KFA AND KOSOVO POLICE OFFICERS

165. The Court refers to the Applicant's allegations but also to the comments of the KFA and the Kosovo Police submitted to the Court. The Court notes that the main allegation of the KFA before the Court is that the challenged Law does not take into account the specifics of the KFA set out in Law No. 04/L-64 on the KFA, Law No. 05/L-022 on Weapons, Law 05/L-017 on Weapons, Ammunition and Related Security Equipment for Authorized State Security Institutions (with its amendments) as well as the Code of Criminal Procedure despite the fact *"that KFA is an institution that serves justice and security like the Police, Customs and Police Inspectorate"*. Therefore, they claim that despite these specifics and the nature of their work, in contrast to Kosovo Police officers and of the Police Inspectorate; as well as customs officers, the KFA is not included in Article 3 [Exemptions from the scope of the Law], paragraph 3 of the challenged Law which defines officials with special status, to whom the special law is applied and not the challenged Law.

166. Therefore, the Applicant and the KFA challenge the fact that the KFA has been treated by the challenged Law, as the executive agency whose legal relationship is regulated by the challenged Law according to the definition of Article 2 [Scope of application], paragraph 3 which contains the definition of civil servant of the challenged Law.

167. Therefore, the KFA essentially alleges that the challenged Law discriminates against the KFA officials in relation to police officers and the Kosovo Police Inspectorate and customs officials.

168. With regard to Kosovo Police officers, the Kosovo Police also challenges non-inclusion in the exemptions of Article 3 [Exemptions from the scope of the Law], paragraph 3 of the challenged Law on Kosovo Police civil servants as they did exception for police officers and this is contrary to the Law on Police and sub-legal acts of the Kosovo Police. In this regard, they complain that the challenged Law does not take into account the specifics of the employment relationship of the Kosovo Police officers.

169. The Court, before addressing the issue of equality before the law regarding the employees of the KFA and the Kosovo Police, wishes to recall once again what it has determined in case KO171/18, mentioned above, that the independent agencies established under Article 142 of the Constitution do not have the same status as that of the independent constitutional institutions expressly mentioned in Chapter XII of the Constitution. This is because the establishment, role and status of the independent constitutional institutions is expressly regulated by Chapter XII of the Constitution, while "Independent Agencies" provided by Article 142 of the Constitution "*are institutions established by the Assembly, based on relevant laws, which regulate their establishment, functioning and competencies*." So, unlike the fact that the Assembly can create and shut down "*by law*" Independent Agencies; The Assembly can never "shut down" any of the above-mentioned five independent institutions "by law". This is the main difference between the Independent Institutions referred to in Chapter XII of the Constitution.

170. In this regard, also in relation to the abovementioned allegations of the KFA and the Kosovo Police related to their status, initially of the Kosovo Police as an institution defined by Article 128 of the Constitution included in Chapter XI [Security Sector] of the Constitution as well as the KFA as the Executive Agency, the Court reiterates that these institutions do not enjoy the same status as the independent constitutional institutions explicitly defined in Article XII of the Constitution.

171. Therefore, in view of the above, the Court will further assess whether Article 2 [Scope of application], paragraph 3, which defines civil servants in a way that includes both the KFA staff as an executive agency, and Kosovo Police officers to whom the challenged Law applies, and by not excluding them from the application of the

challenged Law such as police officers, of the police inspectorate, KIA officers and customs officers, the right to equality before the law has been violated, under Article 24 of the Constitution and Article 14 of the ECHR.

General principles regarding equality before the law

172. The Court reiterates that Article 24 of the Constitution as well as Article 14 of the European Convention on Human Rights (hereinafter: the ECHR) stipulates that all are equal before the law and that all enjoy the right to equal protection before the law.

173. The Court refers to the case law of the Court and of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which the Court pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. In this regard, the Court notes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution and Article 14 of the ECHR. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, case KO157/18, Applicant: *the Supreme Court of the Republic of Kosovo*, Constitutional review of Article 14, paragraph 1.7 of Law No. 03/L-179 on the Red Cross of the Republic of Kosovo, Judgment of 13 March 2019 (hereinafter: Judgment KO157/18), paragraph 77, see also *mutatis mutandis, Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Applications No. 5095/71, 5920/72 and 5926/72, 7 December 1976, par. 56, *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, paragraph 61).

174. The Court considers that, for the purposes of interpreting Article 24 of the Constitution and Article 14 of the ECHR, a difference of treatment, in similar of analogous circumstances, is unequal and arbitrary if: *1)* it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim, and *2)* if there is not a reasonable relationship (namely proportionality) between the means employed and the aim sought to be realised (see, Judgment KI157/18, cited above, paragraph 78; see also, *mutatis mutandis, Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application no. 9214/80; 9473/81 and 9474/81, 24 April 1985, paragraph 72).

175. The Court emphasizes that the Government and the Assembly enjoy a margin of appreciation, respectively a discretionary space, in assessing

whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin varies according to the circumstances, according to the subject matter and the history of the case. A wide margin is usually allowed when it comes to general measures of the economic or social strategy, unless they are clearly without any reasonable grounds (see, Judgment KI157/18, cited above, paragraph 78; see also, *mutatis mutandis*, *Burden v. United Kingdom*, Application No. 13378/05, 29 April 2008, paragraph 60; *Khamtokh and Aksenchik v. Russia*, cited above, paragraph 64).

Whether there has been unequal treatment in analogous or similar situations

176. The Court first determines whether there is a difference in treatment in an analogous situation or in a similarly relevant situation. If such a condition is met, then the Court will assess whether such treatment: 1) has an objective and reasonable justification, in other words, if it pursues a legitimate aim, or 2) has a reasonable proportionality relationship (respectively proportionality) between the means used and the aim intended to be achieved.

177. With regard to the KFA, the Court notes that, according to paragraph 2, item 2.3 and 3 of Article 2 [Scope of application] of the challenged Law, the officials of the executive agencies are public officials whose employment is regulated by the challenged Law. The Court also notes that civil staff of the Kosovo Police also fall into the category of civil servants to whom the challenged Law applies.

178. The Court reiterates that under Article 3 [Exemptions from the scope of the Law] paragraph 3, subparagraphs 3.3, 3.4 and 3.5 respectively, the police officers and the police inspectorate officers; customs officers; and KIA officials are excluded from the application of the challenged Law and in relation to the employment relationship to which the special Law applies. Therefore, the Court emphasizes that Kosovo Police and Kosovo Customs officers are not included in the exemptions of Article 3 of the challenged Law.

179. Considering that the KFA officers and Kosovo Police officers are treated differently by the challenged Law in relation to police and inspectorate officers, customs officials and KIA officers, the Court should first address whether the KFA officers and Kosovo Police civil staff are in the same or analogous position in relation to officials with whom they make comparison.

180. In this respect, regarding the KFA, the Court refers to Article 4 [Establishment of the Kosovo Agency of Forensic] of Law No. 04/L-064 on the KFA which stipulates that: the KFA is *"is established as an independent and executive Agency in the framework of Ministry of Internal Affairs"*. According to Article 2 [Scope], the KFA is the responsible institution in impartial provision of forensic scientific objective analysis. However, the KFA for administration and management responds to the Minister responsible for internal affairs as Article 11 [Minister] of the KFA Law stipulates that *"Chief Executive of KAF shall report and respond directly to the Minister for the administration and management of KAF"*.

181. With regard to the Kosovo Police, the Court refers to Law No. 04/L-076 on Police which in Article 3 [Definitions], paragraph 1.2 specifies that *"Civilian Staff – police staff members who are employed to perform administrative or support services, but who do not have police authorizations"*.

182. On the other hand, the Court recalls Article 128 [Kosovo Police] of the Constitution which stipulates that the Kosovo Police is responsible for maintaining order and public safety throughout the territory of Kosovo.

183. Whereas, regarding KIA, the Court recalls that Article 129 [Kosovo Intelligence Agency] provides that KIA identifies, investigates and monitors threats to security in the Republic of Kosovo.

184. With regard to customs officials, the Court notes that pursuant to Article 4, paragraph 3 of Customs and Excise Code of Kosovo No. 03/L-109, "*'Customs' means Customs of Kosovo, designated as responsible amongst others for applying customs legislation*".

185. In connection with the above, the Court notes that the police officers and the police inspectorate; and those of the KIA have specific responsibilities under the Constitution to maintain public order and security, namely the detection, investigation and surveillance of security in Kosovo, and while customs officials are responsible for enforcing customs legislation.

186. While the KFA employees provide objective scientific analysis and assistance to some institutions in support of these institutions. Also, the KFA officials are part of the executive who report directly to the minister responsible for internal affairs. Therefore, the nature of work, the specifics of work and the legal status of the KFA employees, differ

from the nature of work of other institutions with which they are compared.

187. The Court also considers that the specifics of Kosovo Police civil servants are not similar to the specifics of the work of police officers, customs officials and KIA officials, as they are not responsible for maintaining order and security, as police officers, or for the implementation of customs legislation such as customs officials, but only provide administrative support to the Kosovo Police. In fact, given the specifics of their work, the Court considers that they have more in common with the functions of civil servants employed in other institutions, such as ministries and executive agencies, than with police officers, customs officials and those of the KIA.

188. Consequently, the Court considers that neither the KFA officials nor the civil servants of the Kosovo Police are in an equivalent position to KIA officials; the police and police inspectorate officers; and Kosovo customs officials, and consequently it is not necessary to be treated in the same way as police officers, inspectorate officials, customs officials and KIA officials.

189. Therefore, in view of the above, the principle of unequal treatment is expressed only in cases where such treatment is made for the same or analogous situations, in the present case there can be no question of unequal treatment, because the KFA officials are not in the same or similar position or analogous to the officials in relation to whom they are compared.

190. The Court concludes that KFA officials are not in a similar or analogous position to police, customs and inspectorate officials, making it unnecessary to analyze whether different treatment has an objective purpose and whether there is a proportionality relationship between the measure taken and the aim to be achieved.

191. Consequently, the Court notes that the challenged Law, including the KFA officials and the Kosovo Police civil servants in the field of application of the challenged Law, does not violate the principle of equality guaranteed by Article 24 of the Constitution and Article 14 of the ECHR.

192. The Applicant and the Kosovo Police also complain that contrary to the Judgment of the Court KO97/12 "*paragraphs 128 and 130 of Judgment KO97/12 of the Constitutional Court, the challenged Law does not specifically repeal the Police Law and consequently violates the principle of legal certainty*".

193. In this regard, the Court has clarified above that the challenged Law under Article 85 clearly repeals the Law on Civil Service as well as any other legal provision that is inconsistent with it, including special laws such as the provisions of the Law on Police regarding Kosovo Police officers with the exception of police officers and the Police Inspectorate to be excluded from the application of the challenged Law under Article 3 [Exemptions from the scope of the Law], paragraph 4.

194. Regarding the allegation of the Kosovo Police that the challenged Law violates the principle of legal certainty as it does not specifically repeal the Law of the Kosovo Police regarding the provisions governing the employment relationship of administrative staff, the Court refers to the case of the Court KO97/12 , Applicant: *The Ombudsperson*, Judgment of 13 March 2013, where it found that the principle of legal certainty and rule of law requires that a new law cannot repeal the provisions of an existing law without changing the relevant provisions (see case KO97/12, paragraph 128).

195. The Court in this case had concluded that Law No. 04 L-093 on Banks, Microfinance Institutions and Non-Bank Financial Institutions had provisions that were not in accordance with the Law on Freedom of Association in NGOs, but this Law in Article 117 [Effect on Previous Statutory Provisions] stipulated that this Law only repeals UNMIK Regulation No. 1999/21.

196. The Court considers that the circumstances of this case differ from the circumstances of the challenged Law, as the challenged Law in Article 85 clearly repeals the Law on Civil Service and any other provision that is contrary to it by regulating the employment relationship for all public officials except those specified in Articles 3 and 4 of the challenged Law.

197. Therefore, the Court finds that the allegation of the Kosovo Police regarding the violation of the principle of legal certainty contrary to the Judgment of the Court in case KO97/12, is not grounded.

198. In conclusion, the allegations of constitutional violations regarding the KFA officials and Kosovo Police officers are not grounded.

Request for interim measure

199. On 8 November 2019, the Applicant submitted the Referral to the Court where, *inter alia*, requested the imposition of an interim measure in relation to the challenged Law.

200. On 19 November 2019, the Court, in its Decision on interim measure in case KO203/19, upheld the request for interim measure as grounded and suspended the application of the challenged Law until 28 February 2020. On 26 February 2020, the Court decided to approve the extension of the interim measure imposed by the Court on 19 November 2019, until 28 April 2020. While on 22 April 2020, the Court decided to extend the interim measure regarding case No. KO203/19 until 30 June 2020.

201. Given that the Court has already declared the Referral admissible and decided on its merits, it is no longer necessary to keep the interim measure in force.

Conclusions

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

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

204. With regard to the institutions of the justice system set out in Chapter VII [Justice System] of the Constitution, the Court found that the challenged law gives the Government broad powers to manage and supervise civil servants of public administration, including civil servants of the institutions of the Judicial power, such as officials of the Kosovo Judicial Council and Kosovo Prosecutorial Council. Moreover, the challenged law gives the Government the power to issue a range of sub-legal to further regulate important matters concerning civil servants such as recruitment, appointment, promotion, working hours, and classification of positions, disciplinary violations, which in essence also affect the functioning, classification of positions but also the systematization and organizational structure of the relevant institutions of the Judiciary and Independent Institutions. The Assembly, although through the challenged Law has given the Government the power to manage the civil service system in all institutions, including the Justice System, it has determined that the Presidency of the Assembly is entitled to issue sub-legal acts regarding the Assembly servants.

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

206. Therefore, the Court assessed that, by not including civil servants of the institutions set out in Chapter VII [Justice System] in the exceptions of Article 4 [Civil Servants with Special Status], paragraphs

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

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

208. In this respect, the Court assessed that the Assembly, authorizing the Government through the challenged Law to issue sub-legal acts which regulate the issue of employment, including the classification of positions, criteria for recruitment and other issues in the Independent Constitutional Institutions, without taking into account their independence – violates the essence of the independence of the Independent Constitutional Institutions guaranteed by Article 115 of Chapter VIII of the Constitution and Articles 132, 136, 139, 140, 141 of Chapter XII of the Constitution, as State public authorities separated from the Legislature, the Executive authority, and the regular Judiciary. Therefore, the Court finds that the above-mentioned

violations make the disputed Law inconsistent with the Constitution in relation to the Judiciary and Independent Institutions and that it cannot be applied to them as long as it does not respect their institutional and organizational independence.

209. As to the other institutions in respect of which the Applicant lodged a claim with the Court, namely KFA officers and Kosovo Police Civil Servants, the Court stated that the Independent Agencies established under Article 142 of the Constitution do not have the same status with that of the Independent Constitutional Institutions explicitly mentioned in Chapter XII of the Constitution. This is because unlike other institutions referred to in Chapter XII of the Constitution, "Independent Agencies" provided by Article 142 of the Constitution "*are institutions established by the Assembly, based on the respective laws, which regulate their establishment, operation and competencies*." So, unlike the fact that the Assembly can create and shut down "*by law*" Independent Agencies; The Assembly can never "*shut down*" by law any of the five independent institutions mentioned above. This constitutes the main difference between the Independent Institutions referred to in Chapter XII of the Constitution.

210. In this respect, the Court found that both the employees of the Kosovo Forensic Agency and the civil servants of the Kosovo Police are not in an equivalent position with the KIA officials; police officers and the officers of the police inspectorate; and Kosovo customs officials, and consequently it is not necessary to treat them in the same way. This is due to the fact that the principle of unequal treatment is expressed only in cases where such treatment is done for the same or analogous situations. In this case, we cannot talk about an unequal treatment because the KFA officials and the civil servants of the Kosovo Police are not in the same or similar position or analogous to the officials in relation to whom they are (self) compared. Consequently, the Court considers that the challenged law, including KFA employees and Kosovo Police civil servants in the field of application of the challenged Law, does not violate the principle of equality guaranteed by Article 24 of the Constitution in relation to Article 14 of the ECHR.

211. In the end, the Court concluded that it is not necessary for the challenged Law to be repealed in its entirety. In the circumstances of the present case, the analysis led to a conclusion that the non-implementation of the Contested Law in relation to the institutions mentioned above, does not make the Law unenforceable in practice. Consequently, the Court found that the Assembly is obliged to take the necessary actions to supplement and amend the Law No. 06/L-114 on Public Officials in accordance with the findings of the present

Judgment, in relation to the employees of the institutions specifically defined in the Enacting Clause of the Judgment. Until the supplementation and amendment of the Law No. 06/L-114 on Public Officials by the Assembly, the provisions of this Law shall apply only insofar as it does not infringe the functional and organizational independence of the Independent Institutions specifically referred to in the Enacting Clause of this Judgment. While in relation to all other institutions, Law No. 06/L-114 on Public Officials shall apply from the entry into force of the present Judgment.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, pursuant to Article 113.2 of the Constitution, Articles 20 and 27 of the Law and Rules 56, 57 and 59 of the Rules of Procedure, on 30 June 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Articles 2 (paragraph 3), 4 (paragraphs 3 and 4), 5 (paragraph 1, subparagraph 1. 2 and paragraph 2), 10 (paragraphs 1 and 2), 11, 14 (paragraph 5), 15 (paragraphs 4 and 6), 17 (paragraph 7), 31 (paragraph 3), 32 (paragraph 5), 33 (paragraph 5), 34 (paragraph 16), 35 (paragraph 6), 37 (paragraph 5), 38 (paragraph 7), 39 (paragraph 11), 40 (paragraph 12), 41 (paragraph 6), 42 (paragraphs 10 and 11), 43 (paragraph 13), 44 (paragraph 4), 48 (paragraph 9), 49 (paragraph 6), 52 (paragraph 7), 54 (paragraph 6), 67 (paragraph 11), 68 (paragraph 8), 70 (paragraph 8), 71 (paragraph 7), 75, 80 (paragraph 4), 83 (paragraph 18) and 85 of the Law No. 06 / L-114 on Public Officials, are not in compliance with: Articles 4 [Form of Government and Separation of Power]; 7 [Values]; 102 [General Principles of the Judicial System]; 108 [Kosovo Judicial Council]; 109[State Prosecutor]; 110[Kosovo Prosecutorial Council]; 115[Organization of the Constitutional Court]; and Articles 132 [Role and Competencies of the Ombudsperson]; 136 [Auditor-General of Kosovo]; 139 [Central Election Commission]; 140 [Central Bank of Kosovo] and 141 [Independent Media Commission] of Chapter XII [Independent Institutions] of the Constitution;

III. TO HOLD that the Law No. 06/L-114 on Public Officials does not apply in relation to: the Kosovo Judicial Council; Kosovo Prosecutorial Council; the Constitutional Court; Ombudsperson Institution; Auditor- General; Central Election Commission; the Central Bank of Kosovo and the Independent Media Commission, as long as it violates their functional and organizational independence guaranteed by the Constitution;

IV. TO HOLD that the Law No.06/L-114 on Public Officials does not violate the provisions of the Constitution in relation to the

Kosovo Forensic Agency and the civil servants of the Kosovo Police;

V. TO HOLD that the Assembly of the Republic of Kosovo must take the necessary actions to supplement and amend the Law No. 06/L-114 on Public Officials in accordance with the findings of this Judgment, with regard to the employees of the institutions defined in point III of this enacting clause;

VI. TO REQUEST from the Assembly of the Republic of Kosovo, in accordance with Rule 66 (4) of the Rules of Procedure, to notify the Constitutional Court of the Republic of Kosovo, regarding the measures taken to implement this Judgment;

VII. TO REPEAL the decision on imposition of the interim measure of 19 November 2019 and the decisions extending the interim measure of 26 February 2020 and 22 April 2020;

VIII. TO NOTIFY this Judgment to the Parties;

IX. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law; and

X. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

DECISION ON EXTENSION OF INTERIM MEASURE

in

Case No. KO219/19

Applicant

The Ombudsperson

Constitutional review of Law No. 06/L-111 on Salaries in Public Sector

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 the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of Law No. 06/L-111 on Salaries in Public Sector (hereinafter: the Challenged Law), published in the Official Gazette of the Republic of Kosovo (hereinafter: Official Gazette), on 1 March 2019, which entered into force nine (9) months after its publication in the Official Gazette, namely on 1 December 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Law, which the Applicant claims to be incompatible with

paragraph 2 of Article 3 [Equality Before the Law], 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], 10 [Economy], 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], 23 [Human Dignity], 24 [Equality Before the Law], 46 [Protection of Property], 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], 119 [General Principles] paragraphs 1 and 2 of Article 142 [Independent Agencies], 130 [Civilian Aviation Authority] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 1 of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR), and paragraph 2 of Article 23 of the Universal Declaration of Human Rights.

4. The Applicant also requests the Constitutional Court of the Republic of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure for "*immediate suspension"* of the challenged Law.

Legal basis

5. The Referral is based on sub-paragraph 1 of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22 [Processing Referrals], 27 [Interim Measures], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32 [Filing of Referrals and Replies], 56 [Request for Interim Measures], and 57 [Decision on Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court after the approval of the interim measure

6. On 12 December 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court, with majority of votes, decided to suspend in entirety the implementation of the challenged Law, until 30 March 2020 (See the operative part of the Decision of the Constitutional Court on imposition of interim measure, KO219/19, of 12 December 2019).

7. On 23 December 2019, the Ministry of Public Administration submitted its comments regarding Referral KO219/19 in response to

the Applicant's allegations and the specific allegations raised in the Referral.

8. On 14 January 2020, the Court sent a request to the Venice Commission to submit an Opinion in capacity of *Amicus Curiae* regarding case KO219/19.

9. On 23 January 2020, the Applicant notified the Court that several requests were submitted to the Ombudsperson Institution for *"revocation of the Decision on Interim Measure of the Constitutional Court KO219/19, of 12 December 2019, on suspension of the Law on Salaries"*. On that occasion, the Applicant notified the Court about that regarding this matter: *"The Ombudsperson has received requests from 17 municipalities, with 266 educational institutions and 7.047 thousand signatures"*. The Applicant submitted all these requests to the Court stating he is forwarding them to the attention of the Court, but without explaining or clarifying what is the specific request to the Court in relation to the documents forwarded.

10. On 30 January 2020, the United Trade Union of Education, Science and Culture, the Federation of Health Trade Unions (hereinafter: SBASHK), the Police Trade Union, the Independent Trade Union of Kosovo Customs and the Firefighters' Trade Union, submitted to the Court a *"Request for revocation of the interim measure (suspension) of the Law on Salary"*. The trade unions in question stated that they submitted the Referral in accordance with Article 32 [Right to Legal Remedies] of the Constitution and paragraph 11 of Rule 57 [Decision on Interim Measures] of the Rules of Procedure. The trade unions in question also notified the Court about their communication with the Ombudsperson Institution.

11. On 3 February 2020, the Venice Commission sent to the Court several documents and opinions of the Venice Commission concerning the salaries of judges and the Ombudsperson, notifying the Court that this case is more appropriate for the Venice Commission Forum than for an *Amicus Curiae* Opinion. In this regard, the Venice Commission recommended the Court to refer to the Venice Commission Forum, where the constitutional and supreme courts are the members of the Venice Commission, to obtain a more detailed comparative information regarding the issue dealt with in case KO219/19.

12. On 6 February 2020, the Court requested the Applicant to clarify the documents submitted by the Ombudsperson on 23 January 2020 and what specifically the Court is required to take in relation to the

documents forwarded. In the request of the Court addressed to the Applicant, the Court explained, *inter alia*, that:

> *"[…] the only party in the case KO219/19 is the Ombudsperson Institution, as a party that has filed a referral with the Constitutional Court requesting a thorough assessment of the constitutionality of the said Law and its entire suspension. All others, including the aforementioned trade unions, may only have the status of an interested party but not a "party" within the meaning of the aforementioned provisions of the Rules of Procedure* [Rule 57 of the Rules of Procedure].
> *[…] We note that the documents you have forwarded to the Constitutional Court, have in fact been addressed to you and it is the Ombudsperson Institution, the body that should review the documents addressed to the Ombudsperson and decide what step you want to take in relation to those requests. If the Ombudsperson Institution considers that a request for "revocation of an interim measure" should be made, then the Institution you run must file a specific and reasoned request, in accordance with the relevant constitutional and legal provisions, and with the necessary clarifications what concrete action is required to be taken by the Constitutional Court. It follows that, in order to set the Constitutional Court in motion, it is not sufficient to simply forward the requests of other interested parties without the necessary clarification regarding the documents and files submitted to the Court."*

13. On 13 February 2020, the Judge Rapporteur, after consulting the judges of the Court and following the recommendation of the Venice Commission to address the Venice Commission Forum, addressed the following questions regarding the case KO219/19:

> *"(1) How the issue of salaries in the public sector is regulated in your respective countries, in relation to the principle on "separation of powers" and "checks and balances" between the different government branches? Has your Court dealt with any case in which these two principles were discussed in relation to salaries in public sector?*
>
> *(2) Has your Court dealt with any cases in which issues related to the "organisational, functional and financial independence" of public institutions were discussed and decided upon?*
>
> *(3) According to your Constitution, your laws and case-law (if applicable), is the Parliament authorized with the competence to*

deny budgetary independence and internal job-position categorization to public institutions that used to enjoy such independence with previously existing laws?

(4) Do you recall any instances in your country in which the salaries of the judiciary or other public institutions have been lowered and if that happened, what were the circumstances and rationale for such decrease? In this aspect:

a) do you have any relevant practice which shows how such lowering of salaries impacts the independence of the judiciary and other constitutionally independent institutions;
b) do you have any relevant practice in which you have analysed the applicability of Article 1 of Protocol no. 1 to the ECHR (protection of property) in relation to already acquired rights and the manner in which such rights may be modified by the Parliament?
c) do you have any relevant practice which shows that the regulation of salaries and remunerations must follow constitutional specificities of certain public institutions within the meaning of institutional independence?"

14. Between 14 February 2020 and 12 March 2020, the Court received a response from the liaison officers of the Venice Commission, recommending that, in the circumstances of the present case, the following documents and opinions of the Venice Commission should be analyzed and used, as well as the following cases of various international and constitutional courts:

(i) *Amicus curiae* to the Constitutional Court of North Macedonia regarding the amendment and supplementation of certain laws relating to the system of salaries and allowances for elected and appointed officials CDL-AD (2010)038 – the relevant part on the lowering of the salaries of judges;
(ii) Opinion CDL-AD (2002) 008 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part discussing the salary of the Ombudsperson and judges;
(iii) Opinion CDL-AD (2004) 006 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part on the issue of the Ombudsperson's independence and his salary;
(iv) Opinion CDL-AD (2019)005, known as "The Principles of Venice" for the Protection and Promotion of the Ombudsperson Institution – the part relevant to the

Ombudsperson staff and employment issues of the Ombudsperson staff;

(v) Check-list for principle of the Rule of Law CDL-AD (2016)007;

(vi) The case of the European Court of Justice, with reference no. ECJ-2018-1-003;

(vii) The case of the European Court of Human Rights, with reference no. ECH-2017-3-006;

(viii) Cases of the Constitutional Court of Portugal, with reference no. POR-2015-3-018, POR-2013-3-018; POR-2013-1-006; POR-2012-2-011;

(ix) The case of the Constitutional Court of Cyprus, with reference no. CYP-2014-2-001;

(x) The case of the Constitutional Court of Andorra, with reference no. AND-2014-2-001;

(xi) Cases of the Czech Constitutional Court, with reference no. CZE-2011-2-007; CZE-2010-1-003;

(xii) The case of the Constitutional Court of Slovenia, with reference no. SLO-2009-3-006;

(xiii) The case of the Constitutional Court of Poland, with reference no. POL-2001-H-001;

(xiv) The case of the Supreme Court of Canada, with reference no. CAN-1997-3-005

15. Within the aforementioned dates, in addition to the aforementioned documents, opinions and cases proposed by the liaison officers of the Venice Commission, the Court has also received nine (9) direct replies from nine (9) constitutional/supreme members of the Forum of the Venice Commission, namely from: the Federal Constitutional Court of Germany, the Constitutional Court of North Macedonia, the Constitutional Court of Moldova, the Supreme Court of Sweden, the Constitutional Court of Croatia, the Supreme Court of Mexico, the Constitutional Court of Slovakia, the Constitutional Tribunal of Poland, the Constitutional Court of South Africa. All of these courts have clarified their constitutional legislation as well as their case law on the matters relating to the allocation of salaries in the public sector to various officials, employees and servants of the public sector.

16. On 14 February 2020, the Applicant responded to the Court's request for clarification of 6 February 2020 concerning the Ombudsperson submissions to the Court on 23 January 2020 as well as the documents submitted by several trade unions on 30 January 2020. The Applicant clarified the following: "*In this case, SBASHK, as an interested third party, has requested us to process these requests before the Constitutional Court, and as a result of these claims on 23 January*

2020, we have forwarded such requests for notification to the Constitutional Court". The Applicant neither stated nor requested the revocation of the interim measure but upheld his first request for the imposition of an interim measure and for a complete suspension of the implementation of the challenged Law.

17. On 29 March 2020, the Court notified the abovementioned trade unions that the Court received their documents and they will be reviewed within the Referral submitted by the Ombudsperson as the party that has filed Referral KO219/19.

18. On 30 March 2020, the Judge Rapporteur recommended to the Court the extension of the interim measure to continue the suspension of the application of the challenged Law on two grounds which are reflected in the remaining part of this Decision on the extension of the interim measure (see paragraphs XX). of this Decision).

19. On the same date, the Court, unanimously, decided to approve the extension and interim measure decided by the Court on 12 December 2019 until 30 June 2020 and, consequently, to suspend the applicability of the challenged Law until that date, or until the Court decides on the present case.

As to the extension of interim measure

20. The Court refers to its Decision on Interim Measure of 12 December 2019. All of the constitutional and legal grounds cited for the imposition of interim measures continue to be applicable even now and, accordingly, the Court invokes the reasoning set out in its initial Decision on imposition of the interim measure. (See, Decision on Interim Measure in Case KO219/19, cited above).

21. The Court further notes that after the imposition of the interim measure, various interested parties on the admissibility and merits of this Referral have submitted a considerable volume of documents and comments, to which the Court should pay attention and deal with them in relation to the allegations made. This is the first reason why the extension of the interim measure for an additional period of time is necessary.

22. The second reason for the extension of the interim measure is the extremely large volume of materials received by the Venice Commission and the constitutional/supreme courts as integral part of the Venice Commission Forum. All these materials, including the legislative and judicial practice submitted by the member courts of the

Venice Commission Forum, must be analyzed so that the Court can apply them in the circumstances of the present case, to the extent applicable.

23. In the light of the foregoing reasons, the Judge Rapporteur proposed to the Court to adopt her proposal for the extension of the interim measure, a proposal that was unanimously approved by the judges of the Court.

24. Therefore, without prejudice to any further decision to be taken by the Court in the future as to the admissibility or merits of this Referral, the Court decides to extend the interim measure until 30 June 2020.

FOR THESE REASONS

The Court, in accordance with Article 116.2 of the Constitution, Article 27 of the Law and Rule 57 of the Rules of Procedure, on 30 March 2020, unanimously,

DECIDES

I. TO EXTEND the interim measure decided by the Decision on Interim Measure in case KO219/19 of 12 December 2019, until 30 June 2020;

II. TO CONTINUE SUSPENSION of the implementation in entirety of Law No. 06/L-111 on Salaries in Public Sector in the duration specified in item I;

III. This decision will be notified to the parties;

IV. This decision will be published 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

KO219/19, Applicant: The Ombudsperson, Constitutional review of Law No. 06/L-111 on Salaries in Public Sector

KO219/19, Judgment adopted on 30 June 2020, published on 9 July 2020

Key words: *Referral by the Ombudsman, law-making, separation of powers, rule of law, legal certainty, predictability of law, constitutional values, public sector, salaries, equality before the law, judiciary, constitutional independent institutions*

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

Under the heading **V – CONCLUSIONS –** of this Judgment (see paragraphs 308 – 332), the Court summarized the essence of the case and stated the following:

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

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

The Court concluded that the challenged Law contained a number of serious problems at the constitutional level that could be summarized as follows: (i) the challenged Law itself contradicts its purpose to "*harmonize*" salaries at the level of the entire public sector – by making arbitrary and unreasonable exceptions for some institutions, among others the Kosovo Security Force, the Kosovo Intelligence Agency, the Privatization Agency of Kosovo, the Central Bank of Kosovo, and the Assembly itself; (ii) the challenged Law completely excludes the independence of the Judicial power, by not leaving any self-regulatory competence for issues related to the implementation of "functional, organizational and budgetary" independence; (iii) the challenged Law, although emphasizing that the salaries are regulated by this Law, has reduced the legal regulation for many issues at the level of sub-legal acts, giving the possibility of sub-legal regulation only to the Executive and the Legislative; (iv) out of a total of eighteen (18) competencies to issue sub-legal acts, sixteen (16) are for the Government and two (2) for the Assembly, while no self-regulatory competence for the Judiciary or Independent Institutions; (v) the Judiciary and Independent Institutions have not been given any self-regulatory competence through which they could enjoy their "institutional, organizational, structural and budgetary" independence in relation to internal organization and their staff; (vi) only one (1) of the eighteen (18) sub-legal acts that had to be approved within the ninth (9) monthly period of *vacatio legis* has been approved, namely by 1 December 2019; (vii) as confirmed by the data of the Ministry of Finance and Transfers, for about 42% of the positions it is not possible to decipher the salary because the latter will finally be determined through the relevant classifications with sub-legal acts of the Government; (viii) as confirmed by the data of the Ministry of Finance and Transfers the "*additional budget cost*" of the challenged Law "*is not part of the budget projections 2019-2021*"; (ix) as confirmed by the data of the Ministry of Finance and Transfers, even if the challenged Law entered into force today, it could not be fully implemented in the absence of the sub-legal acts.

Regarding Article 1 of the challenged Law, which provided for the purpose of comprehensive harmonization of salaries of the entire public sector, the Court noted that the legislator, without any justification and in an arbitrary manner had excluded from this Law, among others, the KIA (Kosovo Intelligence Agency) and the KSF (Kosovo Security Force), CBK and PAK. In other parts of the Law, the legislator had granted other exceptions, direct or completely unstressed, for the employees of the Assembly, the political staff

of the Assembly and the deputies of the Assembly. The Court concluded that the exceptions granted by the challenged Law clearly contradict the very purpose of comprehensive "*harmonization"* for which, it is said, to have been issued. Consequently, the exceptions made were considered to be against the very purpose of the Law and create unreasonable, unproven and arbitrary differentiations.

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

Regarding Articles 4, 5 and 12 of the challenged Law, the Court noted that the Assembly, as one of the three classical powers of the government of the Republic of Kosovo, has provided that all matters relating to the allowances and remunerations of its employees, regular and political staff, and the deputies themselves are to be regulated by "special acts" approved by the Presidency of the Assembly and that such an exception, according to the legislator, "*is made based on the nature and specific working conditions of the Assembly of the Republic of Kosovo*". The Court considered that such exceptions provided for only one power - represent one of the most serious constitutional problems of the Law in question. The very selective exclusion of only one power and non-respect of the constitutional guarantees of other powers, completely ignoring the Judiciary and Independent Institutions is a legislative solution that does not coincide with the values and principles of

the Constitution, especially the principle of separation and balance of powers.

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

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

Regarding Article 31 (in conjunction with Article 34) of the challenged Law which provided that all sub-legal acts provided by this Law must be "*approved within 9 months after publication in the Official Gazette*" and that the challenged Law "*enters into force 9 months after publication in the Official Gazette*", the Court noted that only one (1) of the eighteen (18) sub-legal acts that should have been approved by 1 December 2019, namely within the period that the legislator left as *vacatio legis* for preparation for the implementation of the challenged Law, was approved. In the answers submitted to the Court, the Ministry of Finance and Transfers has acknowledged that the challenged Law, even if it entered into force today, it could not be implemented in entirety due to the absence of sub-legal acts.

The lack of the latter, according to the explanation of the Ministry of Finance and Transfers, has made it impossible for it to respond to about 42% of the positions paid from the state budget because without the approval of sub-legal acts it is not known how much would be the salaries for a number of positions that are currently paid from the state budget. All this careless legislative process, without any doubt, leads to an unacceptable situation of legal uncertainty that can in no way be compatible with the Constitution and its values and principles of predictability, legal certainty and the rule of law.

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

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

The first concerned the vacuum and legal contradiction created by the challenged Law. That is for fact that at the legal moment that the challenged Law would enter into force, Article 33 of this Law would repeal all relevant norms which currently regulate the salaries of the Judiciary, of the Constitutional Court, the chairpersons of the Judicial and Prosecutorial Councils (see points 1.4; 1.6; 1.7; 1.8 of Article 33 of the challenged Law) and for whose salaries at the same time the Law states that they will be saved for

the respective period. The question arises as to whether the articles of the organic laws governing the current salaries would be repealed upon the entry into force of the challenged Law - on the basis of which Law these special functionaries would receive a salary. What salary would be preserved for them when the provisions governing their old salary - which was supposed to be maintained - would be repealed. By this careless legal regulation, it turns out that the legislator would have left the functionaries in question without any legal regulation. The second had to do with the concept of saving the salaries of the Judiciary only until the end of 2022, and then the drastic reduction of salaries after that date. Such a scenario is not considered to contribute to a guarantee of an independent Judiciary. On the contrary, such a legislative solution would place undesirable pressure on the Judiciary versus Legislative and Executive power.

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

Regarding the Assembly, the Court emphasized that the legislative power has the main constitutional competence for legislation at the national level. In terms of the circumstances of the present case, it was therefore indisputable the authorization of the Assembly, that in exercising its competence for "adoption of laws", it regulates salaries in the public sector according to a certain public policy voted by the Assembly itself. The latter has full authority to choose the best and most appropriate modality, which it considers that in terms of public policy fits the salary system for the Republic of Kosovo. The only limitation that the Assembly has in the legislation is to respect the procedures of law-making and to vote laws that are in accordance with the Constitution and the values and principles proclaimed there.

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

Regarding the role of the Constitutional Court in the abstract assessment of the constitutionality of the challenged Law, it was clarified that in all cases where a Law of the Assembly is challenged before the Constitutional Court

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

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

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

In addition, the Court emphasized that the Constitution has recognized a special and important status and role in the conduct of public state duties also to the Independent Institutions referred to in Chapter XII of the

Constitution, which have been singled out as such, not without reason. This chapter includes: (i) The Ombudsperson; (ii) the Auditor-General of Kosovo; (iii) Central Election Commission; (iv) Central Bank of Kosovo; (v) Independent Media Commission; and (vi) Independent Agencies.

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

The key conclusions reached by the Court after analyzing the answers of the Forum of the Venice Commission and the Opinions of the Venice Commission and the case law of the various constitutional and supreme courts, were as follows: (i) there is no single possible system for regulating salaries in the public sector and that there is no internationally recognized principle governing the regulation of "equal pay for equal work"; (ii) most countries regulate salaries through different laws and at the same time apply different methods by regulating this issue either through special laws for specific sectors or through some more concentrated legal regulation; (iii) the Assembly, as a legislative body, has the competence and organic right to issue any kind of legislation on the regulation of salaries in the public sector provided that it complies with the Constitution; (iv) the principle of separation of power and the balance between Legislative, Executive and Judicial power does not imply the isolation of powers and the absence of mutual dependence; however, the latter also means avoiding situations in which unconstitutional "interference", "dependence" or "subordination" can be created between independent powers; (v) the independence of the judiciary, as one of the branches of power, implies that the judiciary is free from external pressure, and is not subject to influence by the executive branch; (vi) sufficient resources are essential to guarantee judicial

independence from other state institutions and private parties - so that the judiciary can perform its duties with integrity and effectiveness; (vii) the reduction of the budget by the executive is an example of how the resources of the judiciary can be put under excessive and undesirable pressure; (viii) there is no rule that creates absolute guarantee that the salaries in the public sector cannot be reduced *per se* - but that reduction of salaries must be justified; (ix) the reduction of the salary of the judiciary may occur only under conditions of a pronounced economic and financial crisis and which, moreover, must be officially recognized as such; (x) sacrifices in times of crisis [since the emphasis on reduction is always when there are crises] resulting in reduction of salaries that are not universal and are not evenly distributed among all citizens, in proportion to their individual financial ability - are not considered to be compatible with the concepts of distribution of burden among beneficiaries of salaries in a state;

Finally, the Court also noted several important issues.

In case of new legislation in this field, the Government as the proposer of laws and the Assembly as the voter of the laws are obliged to take into account the principles emphasized in this Judgment and other Judgments from the case law of the Constitutional Court in interpreting the respective articles of the Constitution. The "institutional, functional, organizational and budgetary independence" of the Judiciary and Independent Institutions must be recognized, and any legal initiative must respect this independence (See Judgments KO73/16 and KO171/18).

Finding the aforementioned violations made the challenged Law in its entirety unconstitutional. The Court analyzed very carefully the possibility of partial repeal of the challenged Law. However, in the circumstances of the present case such a solution, in contrast to the circumstances of the Law No. 06/L-114 on Public Officials which was partially repealed, was not possible for two main reasons. First, because the constitutional violations evidenced in the challenged Law are of such serious gravity that the latter affect the core of the functioning of government in the Republic of Kosovo - causing an imbalance in the separation of power to the detriment of the Judiciary and Independent Institutions. Second, because the challenged Law does not provide an opportunity to repeal only a few provisions and only a few items of Annexes 1 and 2 because any kind of repeal would make the Law inapplicable in practice. And, in cases where the analysis leads to the conclusion that the Law with partial repeal becomes inapplicable with the remaining articles in force as constitutional, the Court is obliged to repeal the Law in its entirety.

The Court also emphasized that all powers without exception, have a constitutional obligation to cooperate with each other and perform public

duties for the common public good and in the best interest of all citizens of the Republic of Kosovo. These public duties also include the obligation of each power to take care during the performance of its constitutional duties for respect of the independence of the power to which it is creating an "interference". For example, the Government and the Assembly, despite having the competence to propose and vote on laws, which could also affect the sphere of the Judiciary, as a third power; they [the Government and the Assembly] must ensure that during the drafting of their proposals and until their finalization by the vote of the Assembly, the constitutional independence of the sister power, namely the Judiciary, is preserved. The Government and the Assembly must show the same care and sensitivity to other state actors, which the Constitution has provided with constitutional guarantees of functional, organizational, structural and budgetary independence. Guaranteeing and prior ensuring of the constitutionality of the initiatives of the Government and the Assembly should be the permanent and inseparable aspect of the legal creativity of these two powers.

JUDGMENT

in

Case No. KO219/19

Applicant

The Ombudsperson

Constitutional review of Law No. 06/L-111 on Salaries in Public Sector

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 the Ombudsperson Institution of the Republic of Kosovo (hereinafter: the Applicant or the Ombudsperson).

Challenged law

2. The Applicant challenges the constitutionality of Law No. 06/L-111 on Salaries in Public Sector (hereinafter: Law on Salaries or the challenged Law).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Law, which according to the Applicant's allegation is not in compliance with paragraph 2 of Article 3 [Equality Before the Law], Article 4 [Form of Government and Separation of Power], paragraph

1 of Article 7 [Values], Article 10 [Economy], Article 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 24 [Equality Before the Law], Article 46 [Protection of Property], Article 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], Article 119 [General Principles], paragraphs 1 and 2 of Article 142 [Independent Agencies], Article 130 [Civilian Aviation Authority] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 1 of Protocol No. 1 (Protection of property) of the European Convention on Human Rights (hereinafter: the ECHR), and paragraph 2 of Article 23 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

4. In addition to challenging the constitutionality of the Law on Salaries in its entirety, of the Applicant, namely the Ombudsperson, also challenges the constitutionality of the following articles of the Law on Salaries: 4.4; 4.5; 5.5; 6.4; 7.5; 8; 8.3; 9.5; 14.4; 15.4; 17.4; 18.2; 19.4; 20.5; 21.8; 22.5; 23.5; 25.3; 26.2; 29; 33, alleging that the provisions of the Law in question are not in compliance, in particular, with the principle of separation of powers.

5. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure for "*immediate suspension"* of the challenged Law.

Legal basis

6. The Referral is based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution; Articles 22 [Processing Referrals], 27 [Interim Measures], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law); and Rules 32 [Filing of Referrals and Replies], 56 [Request for Interim Measures], and 57 [Decision on Interim Measures] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

7. On 5 December 2019, the Applicant submitted the Referral to the Court.

8. On 6 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.

9. On 10 December 2019, the Applicant was notified about the registration of the Referral. On the same date, the Referral was communicated to the President of the Republic of Kosovo, and the Caretaker Prime Minister of the Republic of Kosovo, with an invitation to submit eventual comments to the Court, by 24 December 2019. The Referral was also communicated to the Secretary of the Assembly of the Republic of Kosovo, who was requested to submit to the Court all relevant documents regarding the challenged Law. [*Clarification of the Court*: at the time of submitting the Referral to the Court, the Government of Kosovo had a Caretaker Prime Minister].

10. On 12 December 2019, the Judge Rapporteur recommended to the Court the approval of interim measure. On the same date, the Court decided with majority of votes to suspend the implementation of the challenged Law in entirety until 30 March 2020. (See the operative part of the Decision of the Constitutional Court, KO219/19, of 12 December 2019).

11. On 23 December 2019, the Ministry of Public Administration (hereinafter: the MPA) submitted its comments regarding Referral KO219/19 in response to the Applicant's allegations. [*Clarification of the Court*: at the time of submitting the Referral to the Court, the MPA was a separate Ministry of the Government, while with the current structure of the Government, the MPA and its responsibilities have been incorporated within the Ministry of Internal Affairs].

12. On 14 January 2020, the Court sent a request to the Venice Commission to submit an Opinion in capacity of *Amicus Curiae* regarding case KO219/19.

13. On 23 January 2020, the Applicant notified the Court that several requests were submitted to the Ombudsperson for *"revocation of the Decision on Interim Measure of the Constitutional Court KO219/19, of 12 December 2019, on suspension of the Law on Salaries"*. On that occasion, the Applicant notified the Court about that regarding this matter: *"The Ombudsperson has received requests from 17 municipalities, with 266 educational institutions and 7.047 thousand signatures"*. The Applicant submitted all these requests to the Court

without explaining or clarifying what is the specific request to the Court in relation to the documents forwarded.

14. On 30 January 2020, the United Trade Union of Education, Science and Culture (hereinafter: SBASHK), the Federation of Health Trade Unions, the Police Trade Union, the Independent Trade Union of Kosovo Customs and the Firefighters' Trade Union, submitted to the Court a *"Request for revocation of the interim measure (suspension) of the Law on Salaries"*. The trade unions in question stated that they submitted the Referral in accordance with Article 32 [Right to Legal Remedies] of the Constitution and paragraph (11) of Rule 57 [Decision on Interim Measures] of the Rules of Procedure.

15. On 3 February 2020, the Venice Commission sent to the Court several documents concerning the salaries of judges and the Ombudsperson, notifying the Court that due to the lack of international standards concerning the principle of "*equal pay for equal work*", this case is more appropriate for the Venice Commission Forum than for an *Amicus Curiae* Opinion. In this regard, the Venice Commission recommended the Court to refer to the Venice Commission Forum, to obtain more detailed comparative information regarding the issue dealt with in case KO219/19.

16. On 6 February 2020, the Court requested the Applicant to clarify the documents submitted on 23 January 2020. In the request of the Court addressed to the Applicant, the Court explained, *inter alia*, that:

> *"[...] the only party in case KO219/19 is the Ombudsperson Institution, as a party that has filed a referral with the Constitutional Court requesting a thorough assessment of the constitutionality of the said Law and its entire suspension. All others, including the aforementioned trade unions, may only have the status of an interested party but not a "party" within the meaning of the aforementioned provisions of the Rules of Procedure.*
> *[...] We note that the documents you have forwarded to the Constitutional Court, have in fact been addressed to you and it is the Ombudsperson Institution, the body that should review the documents addressed to the Ombudsperson and decide what step you want to take in relation to those requests. If the Ombudsperson Institution considers that a request for "revocation of an interim measure" should be filed, then the Institution you run must file a specific and reasoned referral, in accordance with the relevant constitutional and legal provisions, and with the necessary clarifications what concrete action is*

required to be taken by the Constitutional Court. It follows that, in order to set the Constitutional Court in motion, it is not sufficient to simply forward the requests of other interested parties without the necessary clarification regarding the documents and files submitted to the Court.

17. On 13 February 2020, the Judge Rapporteur, after consulting other judges of the Court and following the recommendation of the Venice Commission to address the Venice Commission Forum, addressed the latter with the following questions regarding the case KO219/19:

"(1) How is the issue of salaries in the public sector regulated in your respective countries, in relation to the principle on "separation of powers" and "checks and balances" among the different government branches? Has your Court dealt with any case in which these two principles were discussed in relation to salaries in public sector?

(2) Has your Court dealt with any cases in which issues related to the "organisational, functional and financial independence" of public institutions were discussed and decided upon?

(3) According to your Constitution, laws and case-law (if applicable), is the Assembly authorized with the competence to deny budgetary independence and internal job-position categorization to public institutions that used to enjoy such independence with previously existing laws?

(4) Do you recall any instances in your country in which the salaries of the judiciary or other public institutions have been lowered and if that happened, what were the circumstances and rationale for such decrease? In this aspect:

a) Do you have any relevant practice which shows how such lowering of salaries impacts the independence of the judiciary and other constitutionally independent institutions?

b) Do you have any relevant practice in which you have analysed the applicability of Article 1 of Protocol no. 1 to the ECHR (protection of property) in relation to already acquired rights and the manner in which such rights may be modified by the Parliament?

c) Do you have any relevant practice which shows that the regulation of salaries and remunerations must follow

constitutional specificities of certain public institutions within the meaning of institutional independence?"

18. Between 14 February 2020 and 12 March 2020, the Court received a response from the liaison officers of the Venice Commission, recommending that, in the circumstances of the present case, the following documents and opinions of the Venice Commission should be analyzed and used, as well as the following cases of various international and constitutional courts:

(xv) *Amicus curiae* to the Constitutional Court of North Macedonia regarding the amendment and supplementation of certain laws relating to the system of salaries and allowances for elected and appointed officials CDL-AD (2010)038 – the relevant part on the lowering of the salaries of judges;
(xvi) Opinion CDL-AD (2002) 008 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part discussing the salary of the Ombudsperson and judges;
(xvii) Opinion CDL-AD (2004) 006 on Bosnia and Herzegovina regarding Ombudsperson status – the relevant part on the issue of the Ombudsperson's independence and his salary;
(xviii) Opinion CDL-AD (2019)005, known as "The Principles of Venice" for the Protection and Promotion of the Ombudsperson Institution – the part relevant to the Ombudsperson staff and employment issues of the Ombudsperson staff;
(xix) Check-list for principle of the Rule of Law CDL-AD (2016)007 – relevant part speaking about judges;
(xx) The case of the European Court of Justice (hereinafter: the ECJ), with reference no. ECJ-2018-1-003;
(xxi) The case of the European Court of Human Rights (hereinafter: the ECtHR), with reference no. ECH-2017-3-006;
(xxii) Cases of the Constitutional Court of Portugal, with reference no. POR-2015-3-018, POR-2013-3-018; POR-2013-1-006; POR-2012-2-011;
(xxiii) The case of the Constitutional Court of Cyprus, with reference no. CYP-2014-2-001;
(xxiv) The case of the Constitutional Court of Andorra, with reference no. AND-2014-2-001;
(xxv) Cases of the Czech Constitutional Court, with reference no. CZE-2011-2-007; CZE-2010-1-003;
(xxvi) The case of the Constitutional Court of Slovenia, with reference no. SLO-2009-3-006;

(xxvii) The case of the Constitutional Court of Poland, with reference no. POL-2001-H-001;

(xxviii) The case of the Supreme Court of Canada, with reference no. CAN-1997-3-005.

19. Within the aforementioned dates, in addition to the aforementioned documents, opinions and cases proposed by the liaison officers of the Venice Commission, the Court has also received nine (9) direct replies from nine (9) constitutional/supreme members of the Forum of the Venice Commission, namely from: the Federal Constitutional Court of Germany, the Constitutional Court of North Macedonia, the Constitutional Court of Moldova, the Supreme Court of Sweden, the Constitutional Court of Croatia, the Supreme Court of Mexico, the Constitutional Court of Slovakia, the Constitutional Tribunal of Poland, the Constitutional Court of South Africa.

20. On 14 February 2020, the Applicant responded to the Court's request for clarification of 6 February 2020 concerning the submissions forwarded to the Court on 23 January 2020 as well as the documents submitted by several trade unions on 30 January 2020. The Applicant clarified the following: "*In this case, SBASHK, as an interested third party, has requested us to process these requests before the Constitutional Court, and as a result of these claims on 23 January 2020, we have forwarded such requests for notification to the Constitutional Court*". The Applicant neither stated nor requested the revocation of the interim measure but upheld his first request for the imposition of an interim measure and for a complete suspension of the implementation of the challenged Law.

21. On 29 March 2020, the Court notified the abovementioned trade unions that the Court received their letters and that the latter would be considered in the context of the Referral submitted by the Ombudsperson as a party who filed Referral KO219/19.

22. On 30 March 2020, the Court extended the interim measure until 30 June 2020, thus postponing the suspension of the application of the challenged Law until that date.

23. On 10 April 2020, the Court requested the Caretaker Minister of the Ministry of Finance and Transfers, Mr. Besnik Bislimi (hereinafter: the Ministry of Finance and Transfers), to answer some questions of the Court and submit some additional documents. Specifically, the Court asked the Ministry of Finance and Transfers to answer the following questions:

1. For what positions exactly and how much will the salary be reduced? Please tell us exactly, emphasizing that for X position, of X institution, the salary was X euro with the previous laws, while with the challenged Law the salary will be X euro, which consequently results in the salary difference of minus X euro?

2. For what positions exactly and how much will the salary increase? Please tell us exactly, emphasizing that for X position, of X institution, the salary was X euro according to the previous laws, while with the challenged Law, the salary will be X euro, which consequently results in the salary difference of plus X euro?

3. Is there an existing position in the Republic of Kosovo which continues to receive a salary according to the laws in force - and for which the new salary is not defined in the challenged Law? If so, what exactly are those positions, in what institutions are they and how much is their current salary? What will happen to their next salary? How much will their salary be if the challenged Law is applied?

4. What positions will be paid exactly from the state budget of the Republic of Kosovo? What positions and what institutions are exactly excluded from the challenged Law?

5. How is the issue of their salaries regulated by the challenged Law for public enterprises and those which are not financed by the state budget of the Republic of Kosovo or which are not fully financed by the state budget of the Republic of Kosovo. Exactly how they will be paid and by what means their salary will be generated?

6. The challenged law provides for about 18 special competencies for the Government to regulate certain issues through sub-legal acts. In this regard, please explain whether all public sector salaries are regulated solely and exclusively by the challenged Law and Annex no. 1 of it, or are there salaries which will be determined by the sub-legal acts of the Government? If so, what positions are they and for what institutions? If not, tell us how the claim of lack of direct determination for some existing positions in employment is explained and how salaries will be set for such positions?

7. Has the Government approved all the sub-legal acts mentioned in the challenged Law, taking into account that the deadline for their adoption was 9 months after the entry into force

of the challenged Law? If yes, please send us a copy of such sub-legal acts.

24. The Court also requested the Ministry of Finance and Transfers to submit to the Court two additional documents, namely:

"[F]inal list of salaries disbursed by the Ministry of Finance and Transfers for March 2020 for all employees at the level of the Republic of Kosovo. This list will help to clarify exactly that by the applicable law, what positions are paid and how exactly is the salary for each position.

[F]inal list of salaries that would be disbursed by the Ministry of Finance and Transfers if the challenged Law were to be implemented. This list will help to clarify exactly what positions are included in the challenged Law and how exactly the salary will be for each position. This will also clarify: (i) where the salary reduction was made; (ii) where the increase of salaries has taken place; (iii) the salary of what position has not yet been determined (if such a claim is correct)."

25. On 17 April 2020, the Ministry of Finance and Transfers requested an extension, reasoning that: *"In the initial review of your letter, we noticed that the questions are very complex and need very serious treatment on our part. On the other hand, given the pandemic situation, the Ministry of Finance and Transfers is working with reduced capacities and the main focus of work at this time is on the implementation of the Fiscal Emergency Package and other budget processes. Therefore, I sincerely request that the deadline set by you for response is extended until 20 May 2020."*

26. On 21 April 2020, the Court approved the request of the Ministry of Finance and Transfers for extension of the deadline.

27. On 21 May 2020, the Court received the answers requested from the Ministry of Finance and Transfers, stating the following: "*On 10 April 2020, I received from you the letter no. Protocol 330 in the Ministry of Finance and Transfers, where you requested answers to some questions related to Law no. 06-L-111 on Salaries in Public Sector. Upon receipt of the letter, I formed a professional commission composed of senior officials from the Ministry of Finance and Transfers and the Ministry of Internal Affairs and Public Administration, who assisted me with professional advice in drafting answers to questions related to yours".*

28. On 22 May 2020, the Ministry of Finance and Transfers, has submitted an explanatory letter which states: "*We would like to inform you that due to a technical problem we had on 20.05.2020, we could not send the complete answer to the Constitutional Court of the Republic of Kosovo. In fact, the file was ready and was registered with that date in our Ministry, but we had a problem uploading the documentation to the CD. This has caused the delay. I hope that this is understood by you, and that the comments are taken into account by the Constitutional Court of the Republic of Kosovo".*

29. On 1 June 2020, the Court sent a copy of the responses received from the Ministry of Finance to all interested parties for their information.

30. On 30 June 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

31. On the same date, on 30 June 2020, the Court: (i) to declare, unanimously the Referral admissible; (ii) to declare, with majority that Law No. 06/L-111 on Salaries in Public Sector, in its entirety, is not in compliance with Articles 4 [Form of Government and Separation of Power]; 7 [Values]; 102 [General Principles of the Judicial System]; 103 [Organization and Jurisdiction of Courts] paragraph 1; 108 [Kosovo Judicial Council]; 109 [State Prosecutor]; 110 [Kosovo Prosecutorial Council], 115 [Organization of the Constitutional Court]; and Articles 132 [Role and Competencies of the Ombudsperson]; 136 [Auditor-General of Kosovo]; 139 [Central Election Commission]; and 141 [Independent Media Commission] of Chapter XII [Independent Institutions] of the Constitution; (iii) to declare invalid, in its entirety, Law No. 06/L-111 on Salaries in Public Sector; (iv) to repeal the decision on the imposition of the interim measure of 12 December 2019 as well as the decision on the extension of the interim measure of 30 March 2020. The main conclusions of the Court and the Operational Part of Judgment KO219/19 were published on the same day.

32. On 9 July 2020, the Court published full Judgment in case KO219/19.

Summary of facts

33. In 2018, the MPA started drafting the Law on Salaries.

34. On 8 June 2018, the Draft Law on Salaries in Public Sector was published on the electronic platform for public consultation and was open for comments until 28 June 2018.

35. On 23 June 2018, the MPA forwarded to the Office of the Prime Minister for approval of the Draft Law on Salaries. The accompanying letter stated that the Budget Impact Assessment compiled by the Ministry of Finance was missing in this file, while the latter would be sent at the time of completion.

36. On 3 September 2018, the Ministry of Finance forwarded the budget impact assessment for the Draft Law on Salaries. In this assessment it was concluded that the Draft Law on Salaries will have additional costs for the Budget of the Republic of Kosovo and that this cost is not part of the budget projections 2019-2021.

37. On 3 September 2018, the Government of the Republic of Kosovo (hereinafter: the Government), by Decision No. 08/63, approved the Draft Law on Salaries.

38. On 14 August 2018, the Ministry of European Integration (hereinafter: MEI) drafted the Legal Opinion on Compliance with the "*acquis*" of the European Union (hereinafter: the EU) on the Draft Law on Salaries.

39. On 24 August 2018, the MPA sent to the Office of the Prime Minister the final version of the Draft Law on Salaries, with a request that the latter be reviewed and approved at a Government meeting. Along with (i) the Draft Law on Salaries, the following were also sent: (ii) Explanatory Memorandum; (iii) Declaration of conformity; and, (iv) MEI Legal Opinion. It was stated that the budget impact assessment by the Ministry of Finance would be sent as soon as it is received by the MPA.

40. On 27 August 2018, the Secretary General of the Office of the Prime Minister issued a Certificate confirming that the Draft of the challenged Law *"has gone through all the procedural stages provided by the Rules of Procedure."*

41. On 3 September 2018, the Ministry of Finance submitted to the MPA the Opinion regarding the budgetary impact assessment of the Draft Law on Salaries. In the conclusions of this Opinion it was emphasized: "*Ministry of Finance - Budget Department assesses that in terms of budgetary impact the estimated cost of the Draft Law on Salaries for 2019 compared to the budget allocations of 2018 will have additional budgetary costs for the Budget of the Republic of Kosovo in the amount of 90,669,920 €. Whereas, compared to document of MTEF 2019-2021, the additional budget cost for the Budget of the Republic*

of Kosovo will be in the amount of 205,768,891 € for the period 2019-2021, for the category of wages and salaries, for 2019 the amount of 69,747,219 €, for 2020 the amount of 67,776,873 € and for 2021 the amount of 68,244,799 €.
Ministry of Finance - Budget Department estimates that the additional budget cost presented above is not part of the budget projections 2019-2021".

42. On 3 September 2018, the Government by Decision No. 08/63 approved the challenged Law and decided to send it to the Assembly of the Republic of Kosovo (hereinafter: the Assembly) for review and approval.

43. On 7 September 2018, the Government, in accordance with its abovementioned Decision, processed the challenged Law to the Assembly *"in order for it to be reviewed and approved in the prescribed procedure."*

44. On 12 September 2018, the President of the Assembly sent the Draft of the challenged Law to the deputies of the Assembly and charged the Committee on Public Administration, Local Government and Media, as a Functional Committee (hereinafter: the Functional Committee), to review the Draft Law in question and submit to the Assembly a Report with recommendations.

45. On 8 October 2018, the abovementioned Functional Committee recommended the approval in principle of the Draft Law on Salaries.

46. On 25 October 2018, the Assembly proceeded with the first reading of the Draft Law on Salaries. On the same date, the Assembly by Decision No. 06-V-248 approved the Draft Law in principle and instructed five parliamentary committees to review the Draft Law in question and submit their reports with recommendations. The Assembly on this occasion charged the Functional Committee for Public Administration, Local Government and Media; Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and Oversight of the Anti-Corruption Agency; Committee on Budget and Finance; Committee on European Integration; and the Committee on the Rights, Interests of Communities and Returns.

47. On 29 January 2019, the Functional Committee for Public Administration, Local Government and Media, processed the Draft Law in question for review to the standing committees.

48. On 30 January 2019, the Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of the Anti-Corruption Agency decided to recommend to the Functional Committee that the Draft Law on Salaries and Proposed Amendments are in compliance with the Constitution and applicable Law. This Committee also introduced some amendments.

49. On 30 January 2019, the Committee on the Rights and Interests of Communities and Returns decided to recommend to the Functional Committee that the Draft Law on Salaries does not infringe on or affect the rights of communities.

50. On 31 January 2019, the Committee on European Integration explained to the Functional Committee that the scope of the Draft Law on Salaries is not specifically regulated by the EU legislation.

51. On 31 January 2019, the Committee on Budget and Finance, decided to submit to the Functional Committee the recommendation that the Draft Law on Salaries contains affordable costs for the Budget of the Republic of Kosovo.

52. On 1 February 2019, the Functional Committee handed over to the deputies of the Assembly a "Report with Recommendations" for the Draft Law in question. In this Report it was explained that in the initial Draft Law of 32 articles in total, a total of 58 amendments were proposed which had received the support of the Functional Committee meanwhile, without the support of the Functional Committee, another 19 amendments were proposed. A total of 77 amendments were submitted to the Assembly for consideration in the plenary session.

53. On 2 February 2019, the Assembly proceeded for the second reading the Draft Law on Salaries. On the same date, the Assembly, by Decision No. 06-V-310, approved the challenged Law.

54. On 12 February 2019, the challenged Law was sent to the President of the Republic of Kosovo for decree and promulgation in the Official Gazette.

55. On 1 March, 2019, the challenged Law was published in the Official Gazette. Article 34 [Entry into force] of the challenged Law stipulates that "*This Law shall enter into force nine (9) months after its publication in the Official Gazette of the Republic of Kosovo*".

56. On 1 December 2019, the challenged Law entered into force.

Applicant's allegations

57. The Applicant challenges the challenged Law (Law No. 06/L-111 on Salaries in Public Sector) in entirety. The Applicant alleges that the challenged Law and Annex one (1) to it have failed to carry the constitutional spirit in terms of: (i) separation of powers, (ii) equality before the law (iii) guaranteeing the property right; and (iv) the rule of law.

Allegations regarding "separation of powers"

58. As to the "separation of powers", the Ombudsperson in a capacity of the Applicant alleges that the challenged Law does not adequately provide for the separation of powers as set out in Article 4 of the Constitution. Therefore, according to him, it is necessary to ensure the principle of separation of powers both hierarchically and operatively in the matter of salaries in the public sector.

59. The Applicant states that the challenged Law giving the right to issue sub-legal acts only to the Government and in certain cases to the Assembly does not take into account the constitutional requirement to respect the principle of separation of powers set out in Article 4 of the Constitution. This determination as such has an impact on (i) organizational, functional and financial independence, and also interferes with (ii) the check and balance mechanism that guarantees the democratic functioning of the state. In this regard, the Applicant claims that the specifics of the constitutional status of the institutions should be respected in their entirety, including the issuance of the sub-legal acts set forth in this Law, and their independence should be preserved and secured. In relation to this allegation, the Applicant specifically challenges the following provisions of the challenged Law: Article 4 paragraph 4, Article 5 paragraph 5, Article 6 paragraph 4, Article 7 paragraph 5, Article 8 paragraph 3, Article 9 paragraph 5, Article 14 paragraph 4, Article 15 paragraph 4, Article 17 paragraph 4, Article 18 paragraph 2, Article 19 paragraph 4, Article 20 paragraph 5, Article 21 paragraph 8, Article 22 paragraph 5, Article 23 paragraph 5, Article 25 paragraph 3 and Article 26 paragraph 2.

60. The Applicant considers that the challenged Law applies the same criteria to authorities, institutions and bodies in the Republic of Kosovo, without regard to the order and separation of powers in accordance with the Constitution and the specificity of the constitutional status of public sector entities.

61. The Applicant states, *inter alia*, that the challenged Law infringes the principle of separation and balancing of powers without regard to the fact that many of these institutions have specific laws, which specifically govern the rights and obligations of the employees of these institutions. According to the Applicant, the challenged Law violates the principle of justice *lex specialis derogat legi generalis*, which stipulates that when a given factual situation falls within the scope of two normative acts, priority is given to the special act over the general act (the challenged Law is general act).

62. The Applicant also states that as regards the independent institutions set out in Chapter XII of the Constitution and the Constitutional Court as established in Chapter VIII of the Constitution, the Constitutional Court's views and case law expressed by Judgment KO73/16 have not been taken into account (see, Applicant the Ombudsperson, *"Constitutional review of the Administrative Circular No. 01/2016, of 21 January 2016, issued by the Ministry of Public Administration of the Republic of Kosovo"*, Judgment of 16 November 2016 (hereinafter: Judgment KO73/16), in particular paragraphs 88, 97, 98 and 100 of that Judgment). The Applicant also states that he has repeatedly requested the Government as well as the Assembly to consider the Judgment of the Constitutional Court in the course of the review and adoption of laws constituting the package of laws on administrative reform, including the challenged Law in case KO73/16, which was not taken into account.

Allegations regarding "rule of law"

63. As to the principle of the "rule of law", the Applicant states that the Constitution, in Article 7 [Values], defines the rule of law as one of the values of the constitutional order in the country. In this respect, the Applicant refers to the principles of rule of law, according to the Report of the Venice Commission on the Rule of Law (see Report of the Venice Commission on the Rule of Law adopted by the Venice Commission at the 86th Plenary Session, 25-26 2011).

64. In this context, the Applicant highlights some of the principles that are considered relevant in the present case, such as: (i) principle of legal certainty - that requires that legal rules be clear and precise, the purpose of which is to ensure that legal situations and relationships are predictable. According to the Applicant, the Assembly is not allowed to ignore the fundamental rights by ambiguous laws, but that through this principle, to provide legal protection to individuals *vis-a-vis* the state, its organs and agents; (ii) respect for human rights - respect for the rule of law and respect for human rights are not

necessarily synonymous. However, these two concepts largely overlap and many of the rights enshrined in the ECHR refer directly or indirectly to the rule of law; (iii) prohibition of discrimination and equality before the law - in addition to presenting fundamental human rights, they also present concepts of the rule of law.

65. Consequently, the Applicant alleges that the challenged Law contains provisions which are not sufficiently clear and precise, then the Assembly with its approval has circumvented the right not to discriminate against and the right to property, which along with other constitutional violations urged the Applicant to refer the challenged Law to the Constitutional Court for review.

Allegations regarding "equality before the law"

66. As to the equality before the law, the Ombudsperson in capacity of the Applicant states that the challenged Law, failed to provide "*equal salary for equal work"*, in the entire public sector. The challenged Law has allegedly created a divergent situation for equivalent positions, because in different institutions the same or comparable positions have been assessed with different salary levels. In this respect, the Ombudsperson considers that the challenged Law is incompatible with Articles 3 paragraphs (2), 7 (1); 21, 22 and 24 paragraph (1) of the Constitution – the Articles which establish equality before the law and general principles of fundamental rights and freedoms. The Applicant also alleges that the challenged Law is not in compliance with Article 23 paragraph (2) of the UDHR, which stipulates that: *"Everyone, without any discrimination, has the right to equal pay for equal work*." Accordingly, the Applicant refers to paragraph (1) of Article 22 of the Constitution, which stipulates that the UDHR is applied directly to the Republic of Kosovo and the human rights and freedoms guaranteed by this Declaration take precedence over the provisions in the event of a conflict of laws and other acts of public institutions.

67. The Applicant states that taking into account that human rights and fundamental freedoms are inseparable, inalienable and inviolable and as such are at the core of the legal order of the Republic of Kosovo, consequently any distinction, exception, limitation or preference in any ground, intended or effected to invalidate or impair the recognition, enjoyment or exercise, in the same way as others, of the fundamental rights and freedoms set forth in the Constitution and the laws applicable in the Republic of Kosovo, present discrimination.

Allegations regarding "protection of property"

68. Regarding to the "protection of property", the Ombudsperson in capacity of the Applicant alleges that the challenged Law violates the property rights of individuals or groups of the public sector. The Applicant refers to Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution to assess the proportionality of reduction of salaries in the public sector, thus stating: "*In the present case, the Constitu6ional Court should assess whether the reduction of salaries in a number of entities in the public sector has been made in accordance with Article 55 of the Constitution, which provides for the limitation of fundamental rights and freedoms, the essence of the limited right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and the goal to be achieved, as well as the possibility of achieving that goal with less limitation".*

69. The Applicant also alleges that the salary is a "goods" from the point of view of Article 1 of Protocol no. 1 of the ECHR, because the employees have legitimate expectations of "materializing" their salaries. The Applicant adds that the reduction of salaries is the main complaint addressed to him and that, in his view, the challenged Law in many sectors "has reduced salaries". Based on the case law of the ECtHR, the Applicant considers that the challenged Law has not found a fair balance between the public interest and the fundamental rights and freedoms of the individual.

70. In this regard, citing the ECtHR case *Hasani vs. Croatia* (see the ECtHR case *Hasani vs. Croatia,* application no. 20844/09, Decision as to the admissibility of 30 September 2010), the Applicant states that: "*The ECtHR emphasizes the obligation of public authorities to maintain a fair balance necessary for the public interest and for the protection of the fundamental rights of citizens. This balance is not reached when citizens have to bear a large and disproportionate burden, with a direct impact on the reduction of economic rights. In these circumstances, there is a violation of Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR), due to a breach of the rationality and proportionality of the reduction in property rights [...] It is clear that budgetary issues impose heavy burdens and disproportionate to employees paid from the budget, without maintaining a fair balance between the public interest and the necessary protection of fundamental human rights. Moreover, in the case of Kjartan Asmundsson v. Iceland, if the amount of benefits has been reduced or stopped, this is a restriction on property rights and this should be justified by the general interest. In essence, the ECtHR considers that a restriction is justified (even where applicants should be in possession of assets) in circumstances where the legitimate aim*

pursued (balancing the state budget in economic crises) is proportionate, considering the wide margin of appreciation of the state in the economic and social policies and the balance struck by the application of such measures".

Individual complaints of institutions and other entities interested in the constitutionality of the challenged Law - submitted to the Ombudsperson and forwarded by the latter to the Constitutional Court as part of the case file KO219/19

71. In addition to the above-mentioned allegations of the Ombudsperson through which the full constitutionality of the Law on Salaries is challenged, the Ombudsperson has forwarded to the Court thirty-five (35) individual complaints that have been submitted to the Ombudsperson by various institutions and entities concerned. [Clarification: these complaints were received by the Court from the Ombudsperson as part of the case file KO219_19 and the same were sent to the Ombudsperson by all 35 interested parties who considered that the challenged Law violates certain constitutional norms or certain rights and freedoms].

72. Regarding the above-mentioned individual requests which have been submitted to the Ombudsperson, the Applicant considers that it is in the interest of the complainants, but also of the public, for the Court to assess whether the challenged Law affects the legitimate interests of these complainants. More specifically, the Applicant, regarding the 35 complaints received by the Ombudsperson considers that the Court should provide an assessment regarding the following issues: (i) *"If the principle of separation of powers and the constitutional guarantee, which has to do with equality before the law, has been reached with the challenged Law and its Annex 1";* (ii) *"Whether the challenged Law should include public enterprises, which exercise public authority in the Republic of Kosovo and if their inclusion in the challenged Law violates the Constitution, respectively the principle of free market economy, expressed in Article 10 and in Article 119 of the Constitution of the Republic of Kosovo, reflected in Law no. 03/L-087 on Publicly Owned Enterprises";* (iii) "*Whether the challenged Law should carefully treat the employees of institutions, bodies and authorities of special importance and the employees in the public sector for whose specialization has been invested."*

73. The Court will next present the substance of all 35 the complaints in question. On the admissibility of the Referral, the Court will be specifically respond for the status of these complaints in the examination of this case (see paragraphs 188-191 of this Judgment).

Complaint by the Central Election Commission (CEC)

74. The CEC alleged before the Ombudsperson, that the challenged Law has inadequately categorized the CEC towards constitutional responsibility of this institution. The complainant states that according to Chapter XII of the Constitution of the Republic of Kosovo, the independent institutions have been established as: the Ombudsperson, the Auditor General, Central Bank of Kosovo, Central Election Commission and Independent Media Commission. The complainant further alleges that the CEC has never been treated in the same way as other institutions which have the same constitutional basis, although the nature of their responsibilities is not the same as that of the CEC. The CEC, pursuant to Law No. 03/L-073 on General Elections in the Republic of Kosovo; pursuant to Judgment KO73/16 of the Constitutional Court and pursuant to Article 17 of the Rules of Procedure of the Central Election Commission, has issued its internal rules of procedure. As a result, the CEC assigned grades and coefficients to its employees on the basis of job specifics. In this regard, the CEC requests that the Law on Salaries in Public Sector respects the constitutional independence of the CEC, as an independent institution and maintain current salaries and grades according to the CEC internal regulations (Regulation No. 02/2017 on Job Descriptions and Classification of Jobs in the Central Election Commission Secretariat).

Complaint by the Kosovo Judicial Council (KJC)

75. The KJC alleged before the Ombudsperson that the adoption of the challenged Law inevitably renders inapplicable in practice the constitutional principles of the Constitution and consequently of the international agreements that the Republic of Kosovo has concluded with the European Union, more specifically, Stabilization and Association Agreement, which is concluded in the spirit of respecting the criteria for separation of powers. The KJC states that the Law on Salaries is in violation of the Constitution because it violates the principle of equality of powers and consequently violates the rights of KJC employees. According to Article 4 of the Constitution of the Republic of Kosovo, it is stated that the judicial power is unique, independent and exercised by the courts, which results in the judicial power being equal to the legislative and executive power, therefore, under this rule, employees should be treated equally, in particular the salaries of civil servants at all three levels (powers). The KJC also states that, given the fact that the judiciary is independent, the salaries should also be determined in accordance with the role and weight of the judicial system and, consequently, its administration within the

constitutional system of the Republic of Kosovo. The KJC further alleges that the challenged Law did not include some of the existing positions of the judiciary, which is due to the fact that the Government and the Assembly did not take into account the comments and proposals submitted by the KJC. The latter also refers to and considers as part of this referral the request from the Independent Trade Union of Judiciary of the Republic of Kosovo. In view of all the above-mentioned circumstances, the KJC requests the Ombudsperson to refer the case to the Constitutional Court for the purpose of assessing the constitutionality of the challenged Law.

Complaint by the Kosovo Prosecutorial Council (KPC)

76. The KPC alleged, before the Ombudsperson, that the challenged Law is not in accordance with the Constitution of the Republic of Kosovo and violates the principle of equality of powers and consequently violates the rights of employees in the Kosovo prosecutorial system. The complainant requested the compensation of salaries in accordance with the principle of separation and equality of powers, as provided by the Constitution, namely that the judiciary should be equal to the legislative and the executive in terms of salaries. In this respect, the complainant requested that the challenged Law be harmonized in Annex 1 so that the position of Chairperson of the Council and of the Chief State Prosecutor could be transferred to the subgroup of A2 positions, with a coefficient 10. The complainant requests that the Deputy State Prosecutor receives 95% of the salary of the Chief State Prosecutor. The complainant further alleges that according to the amendments made to Law No. 05/L-032 on Courts, the prosecutors of the Office of the Chief State Prosecutor, the Special Prosecution Office of Kosovo and the Chief Prosecutor of the Appellate Prosecution Office receive 90% of the salary of the President of the Supreme Court. Prosecutors of the Appellate Prosecution receive 90% of the salary of the Chief Prosecutor of the Appellate Prosecution. Also, 90% of the salary of the Chief Prosecutor of the Appellate Prosecution Office is received by the Chief Prosecutors of Basic Prosecutions. Prosecutors of Serious Crimes Department receive 90% of salary of Chief Prosecutor of Basic Prosecution, while the General Department prosecutors receive 85% of the salary of the Chief Prosecutor of the Basic Prosecution. The salary scheme explained above is considered by the Prosecutorial Council in accordance with the Constitution of the Republic of Kosovo, namely in accordance with Article 21, paragraph 1, item 10 of the Law on State Prosecution. The complainant announced that it would not accept that the salary of the Chairperson of the Council and the Chief State Prosecutor be equal to the executive power and that the salary of basic level prosecutors be in the A9

position group, with a coefficient 5.5, as this violates Article 4 of the Constitution and contradicts the basic laws that regulate the courts and the prosecutorial system.

Complaint by Kosovo Prosecutors Association

77. The Kosovo Prosecutors Association alleged, before the Ombudsperson that the challenged Law is in violation of the Constitution. They state that Article 4, paragraph 1, of the Constitution provides that Kosovo is a democratic republic, based on the principle of separation of powers, control and balance between them. According to them, this means balancing the obligations, but also the rights of the three powers, which must also be balanced in terms of salaries. In accordance with Article 4 of the Constitution, they stated there are five constitutional categories that should be treated equally and they are: the President, the Assembly, the Government, the judiciary and the Constitutional Court. In this regard, the complainant states that in the annex to the challenged Law, the President of the Supreme Court, the Chief State Prosecutor, the Chair of the Judicial Council, and the President of the Prosecutorial Council are listed in Class A4 with coefficient 8, which is two categories lower than the President of the Assembly, than the Prime Minister and then the President of the Constitutional Court, who are listed in Class A2, with coefficient 9. According to them, this difference is contrary to the provisions of Law No. 06/L-054 on Courts (Article 35, paragraph 1, subparagraph 1.1); of Law No. 03/L-225 on the State Prosecutor (Article 21, paragraph 1, subparagraph 1.1) and Law No. 03/L-001 on Benefits to Former High Officials (Article 3, as amended by Law No. 04/L-038, Article 3, paragraph 2), because, under these laws, the President of the Supreme Court and the Chief State Prosecutor are equal to the President of the Assembly and the Prime Minister. The other issue raised by the Kosovo Prosecutors Association is the provision of Article 13, paragraph 3, of the challenged law, which does not provide for any additional allowances on basic salary for special status functionaries, a category that includes both judges and prosecutors. Whereas, according to Article 12 of the same law, special allowances belong to certain categories of deputies of the Assembly of the Republic of Kosovo. The complainant also considers that the challenged Law not only violates the principle of balancing the three powers, but also discriminates between different positions within the judicial system. They consider that this discrimination lies in the fact that Annex 1 of the challenged Law in Class A5, with a coefficient of 7.75, lists the judges of the Supreme Court of Kosovo, while in a category below, in Class A6, are listed Prosecutors of the Office of the Chief State Prosecutor, with the coefficient 7.5. It is stated that this provision only

discriminates against Prosecutors of the Office of the Chief State Prosecutor and Prosecutors of the Special Prosecution Office of the Republic of Kosovo, because judges and prosecutors in other instances of the judicial and prosecutorial system are equal in terms of salaries. The complainant also considers that the Constitutional Court should address the provision of Article 28, paragraph 1, of the challenged Law. This provision provides that for the system of salaries, allowances, bonuses and Annex No. 1 shall not apply to a public functionary with special status: a judge of the Constitutional Court, a judge, a prosecutor, the President of the Judicial Council and the President of the Prosecutorial Council, until 31 December 2022. According to the Kosovo Prosecutors' Association, this provision allows for the reduction of salaries for judges and prosecutors from 1 January 2021, by approximately half, which is contrary to the principle of independence of the judicial power provided for in Article 4, paragraph 5, Article 102, paragraph 2, and Article 109, paragraph 1, of the Constitution.

Complaint by experts on anticorruption from the Special Prosecution Office of the Republic of Kosovo

78. The complainants alleged before the Ombudsperson that the challenged law violates the following constitutional provisions: the values on which the constitutional order of the Republic of Kosovo is based (Article 7), human dignity (Article 23), equality before the law and prohibition of discrimination (Article 24) and the right of property (Art 46). Anticorruption experts from the Special Prosecution Office of the Republic of Kosovo stated that their title under the appointment act is expert, while the current salary under the same act is 1,450.00 euro, including allowances. Whereas, according to Annex 1 of the challenged Law, the position of the expert on anticorruption, belonging to the category of expert in court and prosecution, is foreseen in Class L6, with a basic salary of 836.50 euro. Further, anti-corruption experts pointed out that the challenged Law divides Annex 1 into the ranking of positions, so that for experts in the State Prosecutor is provided number position 92, with coefficient 2.9, also the position number 93, with coefficient 2.65, but also the position 194, which includes experts in the prosecution, with a coefficient 3.5. This division is reflected in the respective salaries. The anti-corruption experts of the Special Prosecution regard this division as discriminatory, but also as confusing, as it is not known precisely in which position they should be categorized. This is due to the fact that 5 expert positions exist throughout the administration of the Kosovo Prosecutorial Council and the State Prosecutor's Office and actually work in the Special Prosecution Office while reporting directly to the

Chief Prosecutor of the Special Prosecution Office. In this regard, the Applicants have emphasized the issue of the prohibition on retroactive effect of the law and emphasize that their case concerns property rights, as provided for in Article 46 of the Constitution, in conjunction with Article 1 of Protocol 1 to the ECHR. Also, anti-corruption experts challenge the disproportionality of the challenged Law, noting that some institutions are excluded from the categorization and have the right to set their own salary levels. In the challenged Law these institutions are listed before the Special Prosecutor's Office, which according to anti-corruption experts, represents discrimination. Furthermore, the Special Prosecutor's Office of the Republic of Kosovo, according to the experts on anticorruption, has been deprived of the right to benefit from risk allowances and other allowances. Further, anti-corruption experts point out that any legislation of the Assembly must take into account the Constitution and the Constitutional Court. In the request of anti-corruption experts from the Special Prosecution is further stated that the Special Prosecution Office of the Republic of Kosovo is a constitutional institution with specific specifications, and this should also be reflected in the reclassification of jobs. According to Annex 1, which presents the job catalog, the principle of equal pay for the same work has been violated because anti-corruption experts are listed together with professional associates and it is not known on what legal basis these experts were reclassified. According to them, the discrimination lies in the fact that the job of Expert in the Special Department for Anticorruption is equivalent to other positions in other institutions, because their job requires broader and specific legal knowledge, and it cannot be compared with the work of experts in other institutions, nor with the work of professional associates. Anticorruption experts request that their position be categorized similar to legal advisors in the Constitutional Court, in category L4, with a coefficient 5.5. They also request to take into consideration the fact that all experts already have eight years of experience in the fight against corruption, organized crime, money laundering and other offenses being investigated by the Special Prosecution Office of the Republic of Kosovo. Anticorruption experts also refer to the case KO73/16 of the Constitutional Court

Complaint by the Police of Kosovo (PK)

79. The PK alleged, before the Ombudsperson, that the challenged Law does not provide that police officers are entitled to the allowance for market conditions (Article 6, paragraph 1). The PK alleges that the challenged Law, namely Article 6 [Allowance for market conditions], Section 13 [Salary of public functionary with special status], Article 14 [Special allowance for the public functionary with special status], are

inconsistent with Law No. 04/L-076 on Police, namely Article 47. Concerning these uncertainties, the PK has commented earlier requesting that the police officers also be included and enjoy the right to market conditions allowance and taking of two (2) allowances not be restricted. The comments of the Police of Kosovo were not taken into consideration by the Ministry of Public Administration.

Complaint by Police Inspectorate of Kosovo (PIK)

80. The KPI alleged before the Ombudsperson that its employees are categorized as employees with special status under the Law on Public Officials, while the challenged Law, in Annex No. 1 includes only the position of police inspector, but not other leadership positions according to the PIK hierarchy. PIK proposes to include other leading positions in Annex No.1, as follows:: PIK Chief Executive, head of PIK Department, Head of Operational Division at PIK, and rank them in equivalence with positions in the Police of Kosovo, requesting that the level of salaries for PIK leadership positions be included in the Annex 1. According to the allegations, PIK enjoys the right to risk because of the nature of the work and proposes that Article 14 of the challenged Law, which regulates special allowances for public functionaries with special status, to include PIK operational staff in order for them to receive a special allowance for tasks they perform in the sector or in special operations with life-threatening effects, to treat PIK operating staff alongside Kosovo Police officers.

Complaint by Kosovo Forensic Agency (KFA)

81. The KFA alleged before the Ombudsperson that by the challenged Law, the salaries of the KFA employees are reduced by about 20%. The KFA further claims that this law violates the principle *"same salary for same work",* because this agency has the same system of grades as the Police of Kosovo. This grade system according to the KFA is set out in Article 17 of Law 04/L-064 on the Kosovo Forensic Agency and sub-legal acts. Given the job risks that employees of this agency carry out, as well as the fact that the qualification and promotion of the agency is based on work experience as well as on the various trainings carried out for a time relatively long and in countries such as the US, Switzerland, Turkey etc., the complainant alleges that the agency employees are the holders of professional and competency tests since the KFA have been verified at the secret level. The complainant alleges that their activities pose great risks because they are expert in the areas of ballistics, fingerprinting, narcotics, Serology and DNA, then confronting agency employees through court testimony and to the prosecution for the tests handled by them. Based on the above, the

agency claims that they face the same risks and difficulties of work as the Police of Kosovo, such as the Police Inspectorate and the Intelligence Agency, because by Law No. 05/L- 022 on Weapons (Article 2, paragraph 1, sub-paragraph 1.1), by Law no. 05/L-017 on Amending and Supplementing the Law no. 03/L-246 on Weapons, Ammunition and Relevant Security Equipment for Authorized State Security Institutions (Article 1), determine that the Kosovo Forensic Agency is part of the state security institutions as the Police of Kosovo, as the Police Inspectorate, and as the Kosovo Intelligence Agency.

Complaint by Anti-Corruption Agency (ACK)

82. The ACK alleged before the Ombudsperson that it has been discriminated against both at the level of the institution ranking, in determining the coefficients, as well as in terms of the percentage of the benefit of particular allowances. The ACK concerns mainly relate to the benefit of special allowances to civil servants, who in the ACK as a benefit on behalf of special allowances enjoy up to 20% on basic salary, according to Article 8 of Law no. 06/L-111. The ACK states that it is ranked at number 32 by importance level and considers this to be an impairment of its role and importance. Further, the ACK states that the level of salary or the determination of coefficients for its staff has not been made at all according to the duties, responsibilities or functions exercised by ACK officials. The salary of the Director of ACK has been reduced compared to the actual salary, which according to them, underestimates the role and level of responsibility of this position. This agency considers the reduction of the level of salaries of ACK employees as discrimination. For these reasons, the ACK addressed its concerns to the Ombudsperson, requesting that its complaint be examined and all presented facts and circumstances, so that the ACK, based on its role and importance, is listed as it was, in parallel with other law enforcement agencies (police, prosecution, customs, National Audit Office etc) and enjoy special allowances, just like other law enforcement agencies.

Complaint by Energy Regulatory Office (ERO)

83. The ERO alleged before the Ombudsperson that the inclusion of ERO in the challenged Law and Law no. 06/L-113 on the Organization and Functioning of State Administration is in violation of the Constitution, contrary to the relevant provisions of the European Directives (Package III, of the European Union energy legislation) and contrary to Law No. 05/L-084 to the Energy Regulator, in particular to the provisions relating to the financial independence of the Energy Regulator. ERO states that it is financed from own source revenues,

namely from taxes collected from energy sector licensed companies and operators and not from the budget of the Republic of Kosovo. ERO claims to have the status of an independent agency under the Constitution of the Republic of Kosovo, Article 142, paragraph 1, and has its own budget, which is administered independently, pursuant to Article 142, paragraph 2, of the Constitution. In addition, Law no. 05/L-084 on the Energy Regulator has established ERO as an independent agency, defining its duties and responsibilities. Further, ERO states that it is financed from own source revenues, while Articles 21 and 22 of Law no. 05/L-084 on the Energy Regulator emphasize ERO right to use its own revenue, thus setting its own budget according to specific needs. ERO also states that it is a contracting party to the Energy Community and is obliged to adopt and implement the Energy Community directives, including the Third Energy Package, which sets out strict requirements for energy regulator's decision-making and financial independence. ERO further notes that Chapter IX of the Internal Market Directive (Directive 2009/72/EC) of the European Parliament and of the Council, in Article 35.5, requires *inter alia* that Member States ensure that the regulatory authority has separate allocation from the budget and autonomy in implementing its own budget. ERO also draws attention to Kosovo progress reports, which emphasize the need for independence of the ERO budget. ERO considers its staff to be one of the most important resources and considers that staff salaries should be in line with the level of regulated industry salaries, in order to avoid staff departures to industry and to enable ERO to maintain and attract qualified and sufficient human resources. Whereas according to the ERO, the challenged Law potentially endangers the departure of ERO staff. ERO announces that they have followed these requirements during the drafting period of these laws, but have not been considered.

Complaint by the Civil Registration Agency (CRA)

84. The CRA alleged before the Ombudsperson that staff in management and sub-management positions in the vehicle registration centers and in the supply documentation centers in the Civil Registration Agency are not satisfied with the coefficients set by the challenged Law, which, according to CRA, are in violation of Law No. 06/L-114 on Public Officials. The CRA stated that the new coefficients were not determined in accordance with the work nor with the responsibilities at the vehicle registration centers or at the supply documentation centers at the Civil Registration Agency, because these duties and responsibilities are much higher than those set by the coefficients and in this respect require that salaries be adjusted based on Law No. 06/L-113 on the Organization and Functioning of the State

Administration and Independent Agencies and Law No. 06/L-114 on Public Officials (provisions for management level) and to be supplemented in Annex No.1 to the challenged Law, for management positions in the Civil Registration Agency. The CRA claims that its staff should be paid the same salary for the same job, pursuant to Article 3, paragraph 1, item 1.3, of the challenged Law, because it considers that they have been discriminated against because they have equal positions, duties and responsibilities the same as officials in ministries and other institutions provided by Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies.

Complaint by the Kosovo Civil Aviation Authority (CAA)

85. The CAA alleged before the Ombudsperson that it is a separate constitutional category, as provided by Article 130 of the Constitution of the Republic of Kosovo. According to the Constitution, the CAA regulates civil aviation activity in the Republic of Kosovo and is a provider of air navigation services. The complainant also states that, under Law No. 03/L-051 on Civil Aviation, the CAA is an independent regulatory agency that governs all aspects of civil aviation security and is responsible for the economic regulation of airports and of the air navigation service providers. Further, the CAA alleges that the salaries of its staff are set out in Article 24, paragraph 2, of Law No. 03/L-051 on Civil Aviation. According to this law, the Minister of Finance has adopted a salary scheme, which is competitive and has enabled the attraction of professional personnel in the field of aviation. In addition, the CAA states that it generates its own revenue for its operation, from security fees, from licensing fees, certification and supervision fees for civil aviation operators. The complainant notes that Annex 19 of the Convention on International Civil Aviation states that States must take the necessary measures, such as: setting remuneration and providing conditions of service to ensure the recruitment and retention of personnel qualified to perform civil aviation security oversight functions. In addition, the CAA states that the International Civil Aviation Organization (ICAO), in its safety oversight manual, stipulates that civil aviation staff must enjoy conditions of employment that are competitive with those provided by the civil aviation industry. The CAA also notes that in the private sector of the civil aviation industry in the Republic of Kosovo, the salaries are significantly higher than the level of pay under the challenged Law. Moreover, according to the CAA, there is a possibility for CAA professionals to find work in the international labor market. AAC, highlights personnel concerns due to a high reduction in salaries for

professional aviation staff and draws attention to the pay difference caused by the different pay grades within the CAA.

Complaint by the Air Navigation Service Agency (ANSA)

86. ANSA alleged before the Ombudsperson that its inclusion in the challenged Law infringes its autonomy in applying the provisions of international agreements that are binding on the Republic of Kosovo. ANSA states that the Agreement on the Establishment of the European Common Aviation Area (ECAA Agreement), in Article 13, and Annex 1, item B, envisages financing and setting fees for the use of air navigation services. This funding is based on the "user pays" principle, which, according to ANSA, was violated by its inclusion in the challenged law. Furthermore, ANSA states that the Stabilization and Association Agreement that the Republic of Kosovo has signed with the European Union, in Article 53, stipulates that the basis for the operation of civil aviation activity is in the ECAA Agreement. Also, ANSA emphasizes its role in the control of the airspace of the Republic of Kosovo, its importance as an agency for the alarm of the unauthorized violation of the airspace of the Republic of Kosovo and efforts to fully acquire airspace management competencies. According to the complainant, its main resource is staff consisting of specialized professionals in the field of air navigation. With the inclusion of ANSA staff in Law no. 06/L-111 on Salaries these professionals risk leaving Kosovo to pursue careers elsewhere. The complainant also states that the allocation of salaries and other expenses of ANSA as a consequence of the signing of the ECAA agreement are based on European Union Regulation No. 1794/2006 transposed through Regulation 3/2016 of the Civil Aviation Authority of Kosovo, which sets the fee for aeronautical service users. The complainant finally considers that the treatment provided by Law no. 06/L-111 on Salaries in Public Sector will also have a direct impact on the trust built with stakeholder, with a particular emphasis on NATO, KFOR and airlines.

Complaint by the Independent Judicial Trade Union of the Republic of Kosovo (IJTURK)

87. The IJTURK alleged before the Ombudsperson that the challenged Law made unfair, discriminatory, degrading treatment, which contradicts the basic principles of the Constitution, conflicts with the contractual relations and the challenged Law itself, due to the inequality of compensation *"same salary for same work"*. The IJTURK bases this allegation on Article 4 of the Constitution, which deals with the separation of powers and clearly states that the judicial

power is separate and equal to the legislative and executive power. Further, the Trade Union claims that this law preserves the salaries of prosecutors and judges in relation to their current salaries, but this has not happened with the rest of the judicial and prosecutorial support and management staff in relation to the salaries and coefficients of the management and support staff of the legislative power, thus directly affecting the reduction of basic salaries for almost all management and support positions, and this law also created a very high difference between the salaries of prosecutors and judges and the salaries of the support staff of both budget organizations.

Complaint from the Kosovo Civil Service Trade Union and the Independent Trade Union of the Administration of Kosovo

88. The Trade Union alleged before the Ombudsperson that the challenged Law is discriminatory, unrealistic, partial and, above all, unconstitutional. According to the complainants, the challenged Law violates the provisions of Article 3, Article 21, paragraph 1, Article 24 and Article 58, paragraph 3 and paragraph 7 of the Constitution of the Republic of Kosovo. The complainants further allege that this law has seriously violated the principle of *"equal salary for the same or similar jobs",* the principle of non-discrimination of workers and the principle of legality. The complainants notify that this law infringes the exercise of the right to special allowances for management positions and for administrative-technical staff at both levels of the public administration of Kosovo. According to the complainants, this is infringed by the provision of Article 12, paragraph 4, of the challenged Law. According to the complainants, this law does not include fair, non-discriminatory, comprehensive, principled, realistic, objective and correct solutions, nor with regard to salary levels, neither in terms of fair and equal treatment of the same categories according to the principle of equal or similar work, same or similar salary. For this reason, according to the complainants, this law creates inequality and dissatisfaction, deepens differences and problems in the civil service and in the state administration of Kosovo.

Complaint by the Kosovo Academy of Sciences and Arts (KASA)

89. The KASA alleged before the Ombudsperson that its inclusion in the challenged Law undermines the status of a member of the academy. The KASA states that it is an institution established by the Assembly of the Republic of Kosovo and has a special law: Law no. 05/L-038 on the Kosovo Academy of Sciences and Arts (Article 2). The KASA maintains that it is an independent institution in the field of science and art, while the activity of the academy is an activity of special public

interest in the Republic of Kosovo. Also, the issue of remuneration of the member of KASA is regulated by the Law on the Kosovo Academy of Sciences and Arts (Article 25). According to the KASA announcement, it is understood that its members receive no salary, but receive a remuneration, which is characteristic of all academies of sciences, and the current provisions of the challenged Law contradict this rule. The KASA claims that the challenged Law generally violates the Law on the Kosovo Academy of Sciences and Arts, which was not taken into account at the time of the adoption of the challenged Law.

Complaint from the Institute of Forensic Medicine (IFM)

90. The IFM calls before the Ombudsperson for the suspension of the application of Article 33, paragraph 1.8, of the challenged Law, for the IFM staff, and upholding the allowance on basic salary of 30%, for every hour of work as a hazard provided by Article 13, paragraph 1, of Law no. 05/L-060 on Forensic Medicine, pending the approval of the sub-legal acts provided for in Article 31 of the challenged Law and the meritorious assignment of the allowance for occupational hazard to the IFM staff. The IFM states that during the drafting of the challenged Law, the fact that the IFM is the only and specific body in the Republic of Kosovo was not taken into account, by the nature and specifics of the work carried out in this institute. For this reason, the IFM requires that the grades of its employees be allocated based on merits, taking into account the fact that IFM is the only and specific body in the Republic of Kosovo, and the role it has within the institutions of the Republic of Kosovo. Finally, the IFM requests its supportive staff has the same status at UCCK and other health institutes.

Complaint from University Clinical Center Administration

91. The University Clinical Center Administration alleged before the Ombudsperson that the challenged law reduces the current administrative positions of the administrative staff of the UCCK-HUCSK. The complainants allege that pursuant to Law No. 04/L-125 on Health, Article 3, paragraph 1, subparagraph 1.28, defines the administrative organization within public health institutions defining the administration as a professional service. Also, Article 62, paragraph 6, of this law stipulates that all employees of HUCSK do not belong to the civil service, but are public servants. The complainants allege that the Law on Salaries in Public Sector violated the principle "same salary for same work", that resulted in a violation of the constitutional provision "Equality before the law". Finally, the complainants seek equal treatment in order not to be discriminated against in respect of the responsibility and work they perform in the

Institution of the University Clinical Center of Kosovo and the HUCSK.

Complaints from the Chamber of Nurses, Midwives and Other Health Professionals
(Chamber)

92. The Chamber alleged before the Ombudsperson that the challenged Law deepens the social gap in the Republic of Kosovo. Further, the Chamber notes that under the challenged Law, nurses, midwives and other health professionals are categorized by coefficient 2.2 without any analysis and without regard to any basic criteria for such categorization. According to Chamber, in this case the basic criterion, that of education, was not taken into account, when it is known that among these employees are those with doctoral degrees, master degrees, bachelor etc. The Chamber further notes that all employees are categorized with the same coefficient. According to Chamber, this law violates the universal values protected by the Constitution, which in Article 7 states that the constitutional order is based on the principle of freedom, peace, democracy, equality (emphasis added), respect for human rights and freedoms and the rule of law, non-discrimination; property rights, social justice. On this basis, this law seriously violates the principle of equality, is discriminatory and does not promote the principles of social justice, but deepens the social gap in our country.

Complaint from the Trade Union of Nurses, Midwives and Other Health Professionals

93. The trade union in question alleged before the Ombudsperson that the challenged law has divided nurses into three groups: the first group with a coefficient of 2.2 for primary care; second group with a coefficient of 2.25 for secondary and tertiary services; and the third group of physiotherapists with coefficient 3.2, although they have the same work, function, position, or grade as nurses, midwives, and other health professionals. The trade union considers that this division is contrary to the principle of equal pay set forth in Article 3, item 1.3, of the challenged Law, which implies that each salary beneficiary receives equal pay for work in the same function, position or grade, or comparable. Also, the trade union considers that the increase of the coefficient to 3.2 for all is important to avoid departure from Kosovo of nurses, given the large number of them who have applied for work visas in the EU countries.

Complaint from the Teacher Initiative Council of Grades 1-5

94. The Council in question alleged before the Ombudsperson that the challenged Law violates the principle *"same salary for same work"*, because teachers of grades 1-5 are not treated the same as teachers of grades 6-9. The Council claims that, according to the Annex to the challenged Law, the teachers of lower secondary schools 6-9 are categorized with a coefficient of 2.45, while teachers of lower secondary schools are categorized with a coefficient of 1-5 are categorized with a coefficient of 2.3. The Council claims that the same criteria were not taken into account in this case and were treated differently from the teachers in grades 6-9. The Council finally expresses dissatisfaction about this treatment, and I also do not know what criteria the Government and the Assembly have taken into account at the time they made this distinction in the regulation in the challenged Law.

Complaint from Radio Television of Kosovo (RTK)

95. The RTK alleged before the Ombudsperson that its inclusion in the challenged Law has violated its institutional, editorial and public broadcasting status to RTK. RTK states that, pursuant to Law No. 04/L-046 on Radio and Television of Kosovo, RTK, in the capacity of a Kosovo public broadcaster, has the status of an independent public institution, which provides services in the field of media activity. RTK claims to have received feedback from the European Broadcasting Union, which states that RTK's inclusion in the challenged Law is in contradiction with the Constitution and Law No. 04/L-046 on Radio Television of Kosovo, encouraging Kosovo authorities to adopt the new RTK law to ensure institutional and editorial autonomy, including the autonomy of human resources. RTK mentions the supremacy of the Constitution over laws and the fact that international agreements ratified by the Republic of Kosovo become part of the domestic legal system. In this regard, RTK refers to the recommendation of the Council of Europe No. R(96)10 regarding the guarantee of the independence of the public service broadcaster. Furthermore, RTK also refers to other international instruments that protect the institutional independence of Public Broadcasters in Europe, such as: Amsterdam Protocol from 1997, Council of Europe Document CoE2012/1, EBU Values and Standards on the Institutional and Editorial Independence of the Public Broadcaster.

Complaint from New Trade Union of Kosovo Energy Corporation

96. The Trade Union in question alleged before the Ombudsperson that the work of KEK workers differs from that of civil servants because KEK workers work in very difficult conditions, which is reflected in

their health condition and the fact that a considerable number of workers die without reaching retirement age. According to the KEK New Trade Union, the challenged law infringes on the free market economy and does not comply with the Law on Labor. KEK New Trade Union finally requests that the hazard of KEK activity be taken into account, and since KEK is the most profitable company in the country, it should be removed from the scope of the challenged Law and act independently.

Complaints from System, Transmission and Market Operator - KOSTT j.s.c.

97. KOSTT alleged before the Ombudsperson that Article 27 of the challenged Law is not in accordance with the Constitution, requesting the exclusion of the publicly-owned enterprise System, Transmission and Market Operator -KOSTT KOSTT j.s.c. from the scope of this law. KOSTT also recalls the principle of a free market economy expressed in Article 10 and Article 119 of the Constitution, reflected in Law No. 03/L-048 on Publicly Owned Enterprises. KOSTT also recalls the principles of independence and autonomy of publicly owned enterprises in terms of legal organization, decision-making, implementation of the principle of legality and the supervisory function of the activity of public enterprises by the relevant regulatory authorities, as expressed in Article 119 of the Constitution. KOSTT emphasizes that notions of independence of publicly owned enterprises, in accordance with the Constitution, are expressed in Law No. 03/L-048 on Public Financial Management, which distinguishes between autonomous publicly owned enterprises, such as KOSTT and other publicly owned enterprises and other agencies. KOSTT considers that limiting the salary (coefficient factors) for publicly owned enterprises, pursuant to Article 27 of the challenged law, limits and disables the provision of economic and motivational incentives for publicly owned employees in Kosovo, and as such is contrary to the Constitution. Furthermore, KOSTT claims that Article 27 of the challenged Law directly infringes KOSTT financial independence in determining the salaries of its employees. In this way, KOSTT considers that the availability of its human resources is limited in order to fulfill its legal duties and obligations under Law No. 05/L-081 on Electricity and to implement the obligations of the Republic of Kosovo in accordance with international agreements. KOSTT expresses concern that with the entry into force of the challenged law it will face the departure of its staff, as the salaries of the KOSTT employees will be reduced by 47%, and KOSTT will not be able to provide motivated staff compensation. KOSTT emphasizes that there should be special staff to meet specific technical and operational requirements, and the personnel of this company should be more

qualified than other companies in the energy sector. This is because there is a need for continuous interaction with transmission system operators in other countries and with regulators.

Complaint by the Independent Trade Union of KOSTT

98. KOSTT Independent Trade Union alleged before the Ombudsperson to be the only company in Kosovo that deals with the management of high voltage lines, so its work is very specific and with great responsibility. To perform its job in the energy market, KOSTT needs trained and experienced staff. According to the Independent Trade Union of KOSTT, the inclusion of KOSTT in the challenged law infringes KOSTT financial independence and poses a risk of dismissal of KOSTT professional staff. KOSTT Independent Trade Union considers that KOSTT employees are not civil servants, since KOSTT has financial independence.

Complaint from the Independent Trade Union Federation of Post and Telecommunications of Kosovo

99. Independent Trade Union Federation of Post and Telecommunications of Kosovo alleged before the Ombudsperson that Article 27 of the challenged Law will affect the Kosovo Telecom the most, consisting of engineers, lawyers, economists and specialist technicians. The complainant also alleges that Telecom of Kosovo is not financed by the budget of the Republic of Kosovo, but through a business plan that plans on an annual basis based on own source revenues and growth in the telecommunications market.

Complaint from the Information Society Agency within the Ministry of Public Administration (ICT)

100. The complainant alleged before the Ombudsperson that the Government has so far treated separately the positions in the field of ICT, but the challenged Law does not categorize the field of ICT. The complainant further states that this agency within the Ministry of Public Administration is a responsible institution in the field of Information and Communication Technology (ICT), which forms the basis of development for all other areas, e.g. education, health, economics, agriculture.

Complaint from Veton Çoçaj – certifier

101. Mr. Çoçaj alleged before the Ombudsperson, that the challenged Law was not drafted based on principle *"same work, same salary"*. In this

regard, he points out that in the Assembly of the Republic of Kosovo the position of a certifier is treated as a separate position and is classified by the coefficient 4.2, while in other institutions, ministries and agencies, the position of certifier does not appear at all, but is categorized as a professional executive framework and classified by the coefficient 2.35. Mr. Çoçaj further alleges that the workloads are greater in the ministry than in the Assembly and, according to this reasoning, he requests that there be equal treatment for all certifiers in the Republic of Kosovo.

Complaint by Pajtim Zogaj, inspector at the Cultural Heritage Inspectorate

102. Mr. Zogaj alleged before the Ombudsperson that the challenged Law violates the principle *"same salary for same work",* and Article 23 of the Universal Declaration of Human Rights has also been violated. Specifically, the complainant specifies that the challenged Law also regulates the issue of the allowances to the basic salary, which belongs to Kosovo Tax Administration officials, Kosovo Competition Authority investigators, Anti-Corruption Agency officials, but the same allowance is not foreseen for the inspectors of the Cultural Heritage Inspectorate, although the nature of the work is the same with the entities mentioned above. The complainant further alleges that on the basis of this determination the inspectors of the Cultural Heritage Inspectorate were discriminated against and were treated unequally by the provisions of the challenged Law.

Complaint by school psychologists and pedagogues

103. The complainants alleged before the Ombudsperson that the challenged Law treats them in an unequal manner compared to special school teachers and psychologists. The complainants point out that this law does not respect the principle of *"equal salary for the same work"*. They claim that their positioning should be similar to those of upper secondary teachers, with a coefficient of 2.6, or of the teachers of special schools with a coefficient of 2.5. The complainants further state that clinical psychologists at UCCK clinic have the same qualification and are categorized by coefficient 3.5. They emphasize that, even in this case, the law has discriminated against complainants because they also provide the same psychosocial services to people in need. The complainants also allege that teachers of upper secondary education were categorized by coefficient 2.6 (master grade), special educators and teachers of special schools are qualified by a coefficient 2.5 (master grade), teacher at the grade level 6 - 9 are qualified with a coefficient 2.45 (bachelor degree up to 240 credits), grade level

teachers 1 - 5 are qualified with a coefficient 2.3 (bachelor degree up to 180 credits), while the school psychologist is qualified with a coefficient 2.3 (master grade). This designation, according to the complainants, clearly demonstrates the unequal treatment of psychologists and pedagogues in schools. Therefore, based on the arguments presented above, the complainants (psychologists and pedagogues) seek equal and non-discriminatory treatment with the challenged Law and respect the principle *"same salary for same work",* a principle that is not currently taken into account by this law.

Complaint from Central Harmonization Unit for Internal Audit at the Ministry of Finance and Internal Auditors from central and local level

104. The Central Harmonization Unit for Internal Audit at the Ministry of Finance and the central and local Internal Auditors alleged before the Ombudsperson that they are not included in the challenged Law, however, the determination of their status and salaries is expected to be done by a sub-legal act, which will be approved by the Government in cooperation with the Ministry of Finance. The complainants express their concern that such an action would jeopardize their legal certainty and the financial viability of internal auditors. The complainants note that the fact that the challenged Law does not regulate the position and salary of internal auditors shows that this law did not respect equality before the law, as it left it open to some positions, such as the position of internal auditors, to be regulated by a sub-legal act, namely an administrative instruction which can be changed in a summary and quick procedure shows that the legal certainty of internal auditors is not the same as the legal certainty of the positions determined by the challenged Law. The complainants also allege that their positioning in the challenged Law will have a positive impact on determining their status and their salary at the law level. In this regard, the complainants point out that the challenged Law did not take into account the provisions of Law no. 06/L-021 on Public Internal Financial Control, which in Article 23, paragraph 2, clearly states: *"The salary for the staff of the Central Harmonization Unit and the Internal Audit Units shall be treated separately and should be harmonized with the salaries of the National Audit Office auditors."* Therefore, in view of all this, the Applicants allege that it is essential for their functioning that their position be determined by the Law on Salaries in Public Sector, and that their positioning be made in full regard to Article 23, paragraph 2, of the Law no. 06/L-021 on Public Internal Financial Control, according to which the salaries of the staff of the Central Harmonization Unit and of the Internal Audit units are treated separately and should be in line with the salaries of the auditors of the National Audit Office.

Complaints from health professionals/doctors employed in the Ministry of Health
(MoH)

105. The complainants stated before the Ombudsperson that among the health professionals there are doctors, dentists employed in the MoH. According to their claims the current provisions in the challenged law put them in the same categorization as civil servants and do not recognize university and specialist education when calculating salary. The complainants consider that they are discriminated against by the right to a dignified pay, according to the professional achievements and services they provide. The complainants further state that in order to be employed in the MoH, certain criteria had to be fulfilled, such as education in the field of medicine, and licensing as health workers and as a consequence, the same positions held by the MoH do not belong to civil servants under Law no. 03/L-149 on Civil Service (Article 4, paragraph 1), but are categorized as medical staff of the health system. The complainants allege that this spirit was not conveyed in the challenged Law because they were categorized as civil servants. The complainants further state that under Law No. 04/L-125 on Health, Article 69, a health professional is considered a doctor of medicine, a doctor of dentistry and a graduate pharmacist. The complainants base their claims on the opinions of the World Health Organization, according to which the health system is made up of organizations, people and actions whose primary purpose is to promote, recover and preserve health, and according to the World Bank, it is found that the health system consists not only of health institutions but also of the Ministry of Health, health funders and other organizations. The complainants eventually allege that the current provision in the challenged Law discriminates them from the right to salary as specialist doctors, with a coefficient 5, because it ranks them as civil servants with a much lower coefficient, not counting university and specialized education.

Complaints from engineers staff Regulatory Authority of *Electronic and Postal Communications (ARKEP)*

106. The complainants alleged before the Ombudsperson that, according to the challenged Law, ARKEP staff are not treated equally as other institutions. In this regard, they point out that engineers in some other institutions, such as the Civil Aviation Authority (CAA), the Air Navigation Services Agency (ANSA), are categorized with a much higher coefficient than the ARKEP engineers. According to them, this form of categorization is unequal, because the engineers of these

institutions are brought in unequal positions, when added to the fact that CAA and ANSA engineers are authorized by ARKEP to use the resources for electronic communications, which is very vital to the field of civil aviation and air navigation, and also conducts radio-monitoring measurements to identify interference, the occurrence of which may endanger communication security. For this reason they claim that they have to position themselves in the position "Expert 2", with coefficient 5.5 and "Expert 3", with coefficient 4.

Complaint from Water Services Regulation Authority (WSRA)

107. The WSRA, alleged before the Ombudsperson that under the challenged Law, the professional staff and WSRA staff is categorized at the same level as the level of civil servants. They point out that, given the specific nature of the job and job descriptions, it cannot be harmonized with the same positions in the sector of public service. The complainant expresses his concern that with the current definition of the challenged Law, there is a risk that the professional staff may be removed from the WSRA and reflect harmful to the institution. The WSRA further states that currently, the WSRA staff salaries are lower than the salaries of equivalent service provider positions which are regulated and supervised by the WSRA. Therefore, the categorization of WSRA staff, according to the complainant at the level of civil servants, would further deepen this distinction, which in turn impacts the devaluation of the work and authority of the WSRA staff towards service providers. Lastly, the complainant alleges that in all countries, the salaries of the regulators are higher than the institutions they regulate, which is not the case in Kosovo and the difference with this law will be much greater.

Complaint from the Trade Union of the University of Prishtina (UP)

108. The Trade Union of the UP, alleged before the Ombudsperson that the challenged Law is discriminatory and did not include the public promise of a linear increase of € 70 to all UP administration employees. According to the UP Trade Union, the challenged Law reduces the salaries of some key positions in the UP, for which the trade union considers to be unconstitutional and discriminatory as well, because a right acquired cannot be denied in this form. The UP Trade Union on this matter refers to Law No. 03/L-147 on Salaries of Civil Servants, namely Article 28, which states: "*Civil servants whose basic salary on implementation of this Law would be lower than their current basic salary as applicable prior to the entry into force of this Law, shall retain their current salary until their basic salary comes into compliance with the provisions of this Law, the provisions on the*

general classification of work positions in the Civil Service and the standards and procedures for the classification of each position in its relevant grade". Further, this trade union alleges that the challenged Law does not set the titles and coefficients for the UP administration and this may lead to discrimination in the event of the promotion of these coefficients and positions by the Government *ad-hoc* Committees. Also, the union states that this law does not specify the percentage of payment for fee (above the norm), which is specific in the case of universities. The UP trade union further claims that the main principles for adopting this law have been: principle of *"equality",* principle of *"same salary for the same work"* and principle of *"non-discrimination"*. On this issue, the trade union of UP points out that none of these principles in the case of UP has been respected and taken into account. Furthermore, the UP union claims that this law has created inequality between the UP employees and other institutions. For this the later has taken as an example the case of the certifier in the Assembly of the Republic of Kosovo, which is determined by a coefficient 4.2, while in other institutions this position has been certified significantly lower, despite the fact that they have a much higher budget. Further, the UP trade union claims that inequality has arisen in cases such as the driver in the political cabinets is determined by a coefficient 2.2, while the administrative officers at UP (who may have a master or doctor degree), may have the highest coefficient 2.35. Further, the position of administrative assistant and technical assistant in the Assembly of the Republic of Kosovo has a coefficient 2.8, while equivalent to this position or coefficient in the public service administration is the position of a head of division. 2). This trade union, based on the arguments presented above, requested the Ombudsperson to initiate in the Constitutional Court an assessment of compliance of the challenged Law with the Constitution, because this law, according to it, is unequal, it did not achieve the purpose of the same salary for the same job and resulted in discrimination between employees in the institutions of the Republic of Kosovo.

Applicant's final requests addressed to the Court

109. First, the Ombudsperson, in his capacity as Applicant, requested the Court to assess the constitutionality of the challenged Law, finding that the latter, *inter alia*: (i) does not reflect the principle of separation of powers, checks and balances among them, as defined by the Constitution; (ii) does not provide equal pay for equal work for all public sector employees, according to constitutional hierarchy, institutional responsibility and complexity at work; (iii) violates the

right to property; (iv) does not reflect the principles set out in the challenged Law itself in all its provisions and Annex 1 thereto..

110. Secondly, the Ombudsperson in his capacity as Applicant requested that the Court, with regard to the 35 individual complaints of various institutions and entities submitted to him and where allegations of unconstitutionality of the Law on Salaries were raised, "*assesses whether the challenged Law affects the legitimate interests of these complainants*".

Comments submitted by MPA in response to the allegations of the Ombudsperson

111. The MPA, in the capacity of the Ministry that proposed the challenged Law which was subsequently approved by the Government and voted by the Assembly, has submitted comments regarding the issues raised by the Ombudsperson in his referral, namely for the separation of powers; rule of law, equality before the law; property rights and public enterprises. The MPA has also submitted specific comments regarding some of the 35 individual complaints which were submitted to the Ombudsperson by various institutions and entities interested in the constitutional status of the challenged Law. All MPA comments, including those on individual complaints, will be presented by the Court below.

Comments regarding "separation of powers"

112. Regarding the violation of the separation of powers, check and balance among them, the MPA argues that the main allegation of the Ombudsperson is that the challenged Law should have taken into account this principle in terms of salaries both from a hierarchical and operational point of view. The Applicant in his Referral did not disclose how the issue of salaries should be regulated based on the principle of separation of powers and did not give a single indication of where the violation of the Constitution occurred by the challenged Law for which it is violated the principle of separation of powers. In general, as violations are presented the same regulation for all branches of power and the vesting of the Government with authorizations to regulate with sub-legal acts some procedures regarding salaries and allowances. Regarding this issue, we have given answers in letter no. 3664 of 29 November 2019 on Law No. 06/L-114 on Public Officials.

113. The allegation that the principle of separation of powers, their checks and balance was violated by the Law on Salaries, because the latter did

not take into account the special regulations regarding the rights and duties made by the special laws of many institutions, especially of the laws governing Independent Institutions - is too broad and not limited to the right to pay and as such is not true. This is best seen in the specific laws for Independent Institutions themselves, for example: Law No. 05/L-0 19 on Ombudsperson, in Article 34 in a specific way states that *"Salaries of Ombudsperson Institution shall be regulated under the applicable Law on the salaries from the Budget of the Republic of Kosovo"*; Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo*"*; Law No. 03/L-121 Law in Article 13 on salaries of legal advisors establishes that *"[...] Salaries of legal advisors shall be defined in accordance with applicable legislation*", whereas Article 15 on salaries of judges specifies that *"The remuneration of Constitutional Court judges shall be 1.3 times that of the judges of the Supreme Court of the Republic of Kosovo";* Law No. 04/L-44 on the Independent Media Commission in paragraph 4 of Article 45 establishes that *"Indemnification for the Chairperson and members of the IMC and members of the Appeals Board shall be set in accordance with the Law on salaries of senior officers",* while there is no other provision for the salaries of other staff in IMC; Law No. 05/L-055 on the General Auditor and the National Audit Office of the Republic of Kosovo, in paragraph 7 of Article 4 establishes that *"The salary level of Auditor General is determined by the respective law regulating salaries of senior public officials"* and there is no other provision regulating salaries for other staff in this institution. So all these laws, according to the MPA, not that they do not have any specific provisions as claimed, but rather refer that the issue of salaries should be regulated by a law on salaries and in this case, it is the challenged Law which was approved by the Assembly. The special law as the complainants claim, are not their own laws, because they regulate the establishment, organization and functioning of their institutions as independent institutions. Law on salaries so far as a special law that regulates the salaries of employees in the institutions of the Republic of Kosovo, except Law no. 03/L-147 on salaries of civil servants - has not existed in the legal system of Kosovo. So, the challenged Law is the only special law that regulates the salaries of all employees in the institutions of the Republic of Kosovo.

114. On the other hand, the challenged Law, just like other horizontal laws, aims to regulate the management of public money (Law on Public Procurement, Law on Public Financial Management, which have never been challenged so far), aims to regulate the payroll system and remunerations for functionaries and public officials who are paid from the Kosovo budget. In terms of reference and similarity to the case KO73/16, the MPA states that this case cannot be taken as the same

case with the request for constitutional review of the challenged Law. This is due to the fact that the subject of review in case KO73/16 was the constitutional review of the Administrative Circular no. 01/2016, issued by the MPA and not a law adopted by the Assembly which *"homogeneously aims to establish rules for the management of public money regarding the salaries of the functionaries and public officials"*.

115. With regard to the separation of powers, we recall that the essence of the issue raised before the Court by the Applicant is whether the challenged Law is in accordance with the Constitution. Article 4 of the Constitution defines the form of government, the separation of power between the three governing powers and the check and respective balance among them. In this respect, and insofar as it is relevant to the circumstances of the present case, the Constitution stipulates that the Assembly exercises legislative power (Article 4.2), and consequently issues laws, and in the issue raised has exercised its constitutional mandate by issuing the challenged Law. Otherwise, the law, as a general legal act that regulates certain social relations is limited in space and time. In the legal system of the country there is a need to issue new laws, to amend and supplement existing laws. Therefore, there is no constitutional legal impediment that, for the purpose of prevailing public interest, to regulate the legal environment by new legal legislation for the salaries in the public sector. In accordance with the case law of the ECtHR, it is not within its scope to replace public policies as defined by the legislator. The principle of separation of powers obliges the Court to respect the policy-making by the legislator. The legislature - because of its position and democratic legitimacy - is in a better position than the Court to determine and advance the country's economic and social policies (see, *mutatis mutandis*, case of ECtHR *Dubska and Krejzova v. Czech Republic*, applications no. 28859/11 and 28473/12, Judgment of 15 November 2016, paragraph 175 and references cited therein).

116. Article 4 of the Constitution sanctioned one of the most essential elements of the principle of the rule of law, which is mentioned in the preamble of the Constitution. In a democracy, as a form of government, the important principle of separation and balance of powers mainly aims to eliminate the risk of concentration of power in the hands of a certain body or persons, which practically carries with it the risk of its abuse. For this purpose, despite the fact that the state power in entirety is one and indivisible, within it there is a series of interactions and mutual relations that the Constitution creates between certain segments of it. So, basically, based on this principle, the three central powers should be exercised not only independently

but also in a balanced way. This is achieved through constitutional solutions that guarantee mutual control and sufficient balance between powers, without violating and without interfering with each other's competencies. (See the decision of the Constitutional Court of Albania, Decision no. 19, of 3 May 2007, V-19/07).

117. The MPA further states that the Applicant *inter alia* alleges that the challenged Law applies the same criteria to the authorities, institutions and bodies in the Republic of Kosovo, regardless of the order and separation of powers in accordance with the Constitution and the specifics of the constitutional status of entities of the public sector. In this aspect of the challenging, we consider that the Applicant has not presented which criteria are the same in the challenged Law and consequently if *"the same criteria applied"* we consider that it would be about discrimination or unequal treatment. At this point we consider that the Ombudsperson failed to prove before the Court what criteria he is talking about, bypassing the authority given to him by the Constitution to issue special laws that regulate the salaries of employees in the other two branches of government and of independent constitutional institutions (See, Opinion of the Venice Commission no. 598/2010 - Amicus curiae brief for the Constitutional Court of the "former Yugoslav Republic of Macedonia" on amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials (Adopted by the Venice Commission at its 85th Plenary Session, Venice, 17-18 December 2010). Recommendation (94) 12 of the Committee of Ministers of the Council of Europe states that judges' salaries and remunerations should be guaranteed by law (Principle 1.2b.ii). For more on the Judgment of the Constitutional Court of Croatia, point 9.1, states: The Constitutional Court states that the realization of the principle of the rule of law, as one of the highest values of the constitutional order of the Republic of Croatia and the basis for interpretation of the Constitution is unimaginable without an independent judiciary. The Constitution has given importance to the organization of state power, in accordance with the constitutional principle of separation of powers (legislative, judicial and executive) described in Article 4 of the Constitution, and guarantees the autonomy and independence of the judiciary (Article 115, paragraph 2 of the Constitution).

118. However, according to the MPA, the Constitution does not stipulate how will the salaries be determined for judges (or any other institution), nor the elements that make up the salary. In this context, the Constitutional Court of Croatia in the decision on inadmissibility of the Referral, regarding the Law on Salaries in Public Services No.

U-I-1489/2001, U-I-1490/2001, U-I-1570/2001, U-I-1571/2001 of 20 February 2002, underlined in point 13 that the law on salaries is a *lex specialis* and the legislator is authorized to determine the circle of officials to whom the law applies. The Court considered it necessary to emphasize in particular that the Croatian Parliament is authorized to decide independently on the regulation of economic, legal and political relations in the Republic of Croatia, including those related to the regulation of salaries. However, in regulating these relations, the legislator is obliged to respect the requirements set out in the Constitution, especially those derived from the principles of the rule of law and those that protect the constitutional values. When it comes to guarantees of material independence of judges, the legislative is particularly obliged to respect the fundamental constitutional principle of separation of powers as one of the elements of the rule of law. This is foreseen by the placement of judges at the highest level in Annex no. 1 of the challenged Law, also with regard to the Applicant himself, where his position was taken into account by the legislator (and the Auditor General) and placed at the highest level of the state hierarchy, based on the Opinion of the Venice Commission regarding the position of the Ombudsperson in the state hierarchy (See: Opinion on the Draft Law on Amendments to the Law on Ombudsman for the Human Rights in Bosnia and Herzegovina, adopted by the Venice Commission at its 60th Plenary Session, Venice 8-9 October 2004).

119. Finally, the MPA regarding the Applicant's allegation for separation of powers states that, while the principle of separation of powers determines the independence of the three governing powers, the principle of checks and balances determines their interdependence. The three governing powers cannot act in isolation from each other. Their interdependence, in addition to constitutional provisions, is also defined through the principles of cooperation, coordination, check and balance. The three governing powers relied on each other to provide the total public services needed in a democratic society. This is also emphasized by the main comments received from the Forum of the Venice Commission (paragraphs 62 to 73 of Judgment KO12/18, see, Applicant Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo, *"Constitutional review of the Decision of the Government of the Republic of Kosovo, no. 04/20, of 20 December 2017",* Judgment of 29 May 2018 (hereinafter: Judgment KO12/18), go in the direction of emphasizing that "*the issue of salaries in the public sector is regulated by law"* (paragraph 99 of Judgment KO12/18). Relevant laws mean adopted by Assemblies not by Governments. Further, financial compensation for the judicial power, as an essential aspect of the independence of the judiciary, needs to be

regulated by the legislative power through a democratic parliamentary procedure.

120. In this regard, the MPA emphasizes that the Constitutional Court of Croatia in its case law has not challenged the issuance of the law on salaries for the judiciary, reviewing the constitutionality of the Law on Salaries of Judges and Judicial Employees. Among other things, it found that: *"Consequently, a condition arises from the Constitution that all elements of the salaries of the judiciary should be regulated by the legislator in its law adopted in a democratic parliamentary procedure [...]"*. The salaries in independent institutions are also regulated by laws approved by the legislative body, such as in Albania, the Law on Salaries, Remuneration and structures of independent constitutional institutions and other institutions established by law (See, Decision no. 19/07 of the Constitutional Court of Albania, of 03 May 2007*)*. It is worth noting, according to the MPA, that in case *Centro Europa 7 S.R.L. and Di Stefano vs Italy* (see case of ECtHR *Centro Europa 7 S.R.L. and Di Stefano v. Italy,* application no. 38433/09, Judgment of 7 June 2012), the ECtHR held that the level of precision of the law in each case may not cover all possibilities and depends on the content of that law, the matter it covers and the status to which it refers. It follows that the law should sufficiently regulate those relations - which, according to the MPA, the challenged Law has undoubtedly these elements.

Comments regarding "rule of law"

121. With regard to the rule of law, the MPA argues that the need to amend the challenged Law has been mentioned in many of the Applicant's complaints. Concerning the principles of the rule of law under the Venice Commission (see point 78, p. 19 - Rule of Law Checklist CDL-AD (2016) 007, adopted by the Venice Commission at its 106th plenary session, Venice, 11-12 March 2016, hereinafter: Rule of Law Checklist), the rule of law requires the universal submission of all to the law. It means that the law must be applied equally and continuously. Equality is not merely a formal criterion, but should result in substantially equal treatment. To achieve this goal, differentiations may need to be tolerated and may even be required. For example, affirmative action may be a way of ensuring substantial equality in limited circumstances in order to correct the disadvantage or exclusion of the past. On this point, the MPA considers that the Ombudsperson in his request to the Constitutional Court did not prove that the challenged Law is not in accordance with the principles of the rule of law, which proves that he failed to specify his Referral under Article 29.3 of the Law on the Constitutional Court.

Comments regarding "equality before the law"

122. With regard to the second issue, which is mostly related to equality before the law, the MPA argues that the Applicant alleges that the challenged Law did not provide the same salary for the same work, creating divergent situations because in different institutions the same or comparable positions are assessed with different salary levels. It is true that one of the principles of the challenged Law is the principle "*equal pay for the same work*", which is embodied in finding the equivalence of salary for the functions and positions that are presented in Annex no. 1 of the challenged Law. Legal differences and discrimination is established only in the sense of ensuring the most effective salaries based on the separation of powers.

123. With regard to discrimination, the MPA states that it existed until the adoption of the challenged Law, arguing that the same positions in different institutions, such as certification officers for finance and procurement have earned different salaries, on the grounds that they work in independent institutions or *"in their jargon in specific institutions"*. MPA claims that there may be differences in salaries and this is not discriminatory, this is confirmed by Judgment KO12/18 on the constitutional review of the Decision of the Government of the Republic of Kosovo, no. 04/20, of 20 December 2017, in point 116 that defines: *"In this regard, the Court considers that the difference in salaries in itself does not create unequal treatment for the purposes of Article 3 and 7 of the Constitution. Consequently, the Applicants have not presented any convincing facts that the salaries foreseen by the Challenged Decision treat differently similar positions or situations and whether such difference in treatment does not have an objective and reasonable justification"* while in paragraph 118 "*The Court considers that the constitutional bodies are obliged to respect the competences of one-another during the exercise of their constitutional functions. Unclear situations as regards the exercise of the competences, as is the case under consideration, can be avoided in the future by the adoption of the respective laws on the Government and on the salaries of state functionaries"* has encouraged the Government and the Assembly to regulate salaries by law to avoid ambiguities in the exercise of powers, which has happened with the adoption of the Law challenged by the Assembly. The Court reiterated that the different treatment must pursue a legitimate aim and must have a reasonable relationship of proportionality, between the means employed and the aim sought to be realised (see the ECtHR case, *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, paragraph 33). In this regard, in

terms of equality before the law, respectively unfavorable treatment, it is worth mentioning that the legal doctrine clearly defines what is meant by "discrimination". It occurs in cases where the person is treated unfavorably as a result of comparing a person in a similar situation. A complaint about a "low" salary is not a claim of discrimination unless it is demonstrated that the salary is lower than the salary of someone hired to perform a similar task by the same employer. Consequently, a "comparator" is needed: i.e., a person in materially similar circumstances, with the existence of the main difference between two persons being the "protected cause".

124. According to the MPA, the Applicant has not presented convincing facts that the salaries provided by the challenged Law treat similar positions or situations differently and if this change in treatment does not have any objective and reasonable justification. In light of this, it can be seen that the allegations of the complainants submitted to the Ombudsperson are related to the equality with employees of other profiles, such as teachers of grades 1-5 claim to be equal to teachers of grades 6-9, police inspectors request to be equated with police officers, etc. Consequently, according to the MPA, in the circumstances of this case there is no question of unequal treatment or discrimination. In fact, according to the MPA, the trade unions do not seek the repeal of the Law on Salaries but ask the Court to "amend" the challenged Law and meet their requests for equality with other professions.

Comments regarding the "property right"

125. With regard to the violation of property rights, the MPA argues that the Ombudsperson's allegations focus entirely on the reduction of salaries paid to individuals and groups of individuals through the challenged Law. The MPA argument at this point is that it should be assessed whether the salaries of those individuals or groups of individuals are in line with the principle of equality and non-discrimination and in a fair and reasonable proportion to the same or comparable positions so far. Precedents in ECtHR cases *Kjartan Asmudsson v. Iceland*, application no. 60669/00, Judgment of 12 October 2004 (*Musk v. Ploland*) and *Hasani v. Croatia*, cited above, submitted by the Applicant, cannot be taken into account in the case of the constitutional review of the challenged Law, because the object of the trial in them was mainly in the right to retirement not the salaries which are essentially distinct cases for which the Constitutional Court has also expressed in Judgment KO12/18, namely paragraph 114 which states that: *"[...] Furthermore, the Court considers that the analogy of this decision with Case No. K0119/10 does not hold [Judgment dated 8 December 2011, Constitutional*

review of Article 14 paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on the Rights and Obligations of the Deputy, No. 03/L-11, of 4 June 2010]. This is so because in Case K0119/10 the Court did not assess the salaries of the deputies but their supplementary pensions, for which the Court considered that it created discrimination against other members of the society and pensioners in Kosovo, because the deputies would benefit substantial pensions from the state budget without their contribution, which was not the case with other members of the society".

126. In addition, the MPA adds that Article 46 of the Constitution and Article 1 of Protocol No. 1 to the ECHR should only be applied to existing assets of a person. Therefore, future benefit cannot be considered as an asset unless it has so far been obtained or is without any "doubt worthwhile". In addition, the hope of reviving long-extinguished property cannot be regarded as a possession; nor can a conditional claim which has lapsed as a result of the failure to fulfill the condition (see case *Gratzinger and Gratzinger v. Czech Republic* (Decision) [GC], appl. No. 39794/98, paragraph 69). However, in some circumstances, "*legitimate expectation*" of obtaining an "*asset*" may also enjoy the protection provided for in Article 46, and in conjunction with Article 1 of Protocol No. 1. Therefore, where the proprietary interest is in the nature of a claim for the person to whom is given that interest, it may be regarded to have "*legitimate expectation*" only where that interest has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it (See *Kopecky v. Slovakia* [GC], Appl. 44912/98, paragraph 52). However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts. Based on the foregoing, it follows that the doctrine of legitimate expectation is evoked only when it is evident from the circumstances of the case that the applicant does not have "existing assets" and is then examined as to whether the person has an "asset" against which he can claim that he has a legitimate expectation that he will be able to enjoy it. (See ECtHR judgment *Kopecký v. Slovakia*, of 28 September 2004, application no. 44912/98, paragraphs 40-42).

127. Specifically, this legitimate expectation from the challenged Law has to do with the categories of public officials who are expected to have a salary increase. In this respect, we recall that it can be inferred from the ECtHR case law that the doctrine of legitimate expectation is considered in the context of whether legitimate expectations rely on a legal act of the authorities (the basis of legitimate expectations) is

justified in the sense that it can assume that the law or norm will not subsequently be annulled (see *mutatis mutandis* ECtHR *Pine Valley Developments Ltd and Others v Ireland*). In itself, in accordance with ECtHR practice is not guaranteed that the legislator cannot change the law, especially if such a change is proportionate (see *mutatis mutandis* ECtHR *X v. Germany*, application no. 8410/78, Decision on Admissibility, of 13 December 1979).

Comments regarding "public enterprises"

128. 127. In this regard the MPA states that the Ombudsperson's allegation is whether public enterprises should be excluded from the challenged Law. According to the MPA, it is worth recalling the practice of other countries, where the principles regarding salaries and benefits in these entities are defined by law, such as the case of Bosnia and Herzegovina (see Law on Salaries and other material rights of members of the governing bodies of institutions of the Federation of Bosnia and Herzegovina and majority public enterprises owned by the Federation of Bosnia and Herzegovina, "Official Gazette of the Federation of B&H", no. 12/09); the case of Montenegro with the Law on Profits of Public Employees; the case of Croatia with the Law on Salaries in Public Services, the Law on Salary Bases in Public Services.

MPA comments regarding individual complaints received by the Ombudsperson from other institutions and interested parties

129. The MPA, in the capacity of the Ministry that had proposed the challenged Law which was subsequently approved by the Government and voted by the Assembly, in addition to comments on the allegations of the Ombudsperson, has also submitted specific comments regarding specific complaints which are submitted to the Ombudsperson by various institutions and entities interested in the status of constitutionality of the challenged Law.

130. In this regard, the Court notes that the MPA has not submitted any comments regarding the complaints filed with the Ombudsperson by: Veton Çoçaj - Certifier; Pajtim Zogaj, inspector at the Cultural Heritage Inspectorate; New Trade Union of Kosovo Energy Corporation, System, Transmission and Market Operator of Kosovo-KOSTT, Independent Trade Union of KOSTT, Independent Trade Union Federation of Post and Telecommunications of Kosovo; Independent Judicial Union of the Republic of Kosovo; Initiating council of teachers from grades 1-5; Radio Television of Kosovo.

131. In the following, the Court will present all the specific comments that the MPA has submitted regarding the individual complaints of other institutions and entities submitted to the Ombudsperson.

Central Election Commission (CEC)

132. The MPA considers that it makes no sense to maintain the existing situation created by sub-legal acts without legal basis and without the constitutional or legal authorization that gives the CEC the right to regulate by a sub-legal act of salaries and its components.

Kosovo Judicial Council, Kosovo Prosecutorial Council and Kosovo Prosecutors Association (KJC), (KPC) and (KPA)

133. With regard to the allegations of the KJC, KPC and HQ, the MPA stated that their requests have always been abstract and without any concrete proposal. MPA considers that the main key in determining the salary are the responsibilities and duties for the work/function performed within the principle of separation of powers. The MPA claims that the allegation of the KJC, that in this institution are not included some positions is not correct, because the latter, as in this request, has never shown which are those positions that are not included in the challenged Law. Regarding the ranking and determination of classes in the KPC but also in the KJC, the MPA stressed that there is no comment. Regarding the possibility of a staff increase in the KPC, no single reason has been given as to why this allowance should be provided. The allegation of the PA is not clear, which states that the salaries of prosecutors will be reduced from 1 January 2021, when according to paragraph 1 of Article 28 of the challenged Law this will be the same, until 31 December 2022. MPA emphasized that all elements were included in the basic salary based on the responsibilities of these positions and there was no need to adjust these positions with allowance.

Anti-Corruption Experts from the Special Prosecution of Kosovo (ACESPK)

134. The MPA claims that they did not provide sufficient arguments as to why these positions should be paid differently from other categories of officials in the Special Prosecution Office. However, the MPA states that the challenged Law has made a difference in this category, placing them in the category of experts because otherwise they had to be classified in the same or similar positions in the Anti-Corruption Agency.

Kosovo Police (KP)

135. According to the MPA, the allowance for market conditions is dedicated to positions or groups of positions for which the private market offers better conditions with at least 50% higher salary and which is reflected in the recruitment and retention of staff. Police officers cannot be given this allowance because they are not civil servants and that there is no police officer who can go into the private market, which would endanger the Kosovo Police by retaining and recruiting police officers.

Police Inspectorate of Kosovo (PIK))

136. The MPA argues that, although some PIK positions are not explicitly included in the challenged Law, they are found within the Annex to the challenged Law as general classes based on the status of the PIK as an executive agency and its structure. PIK enjoys the allowance according to paragraph 1 of Article 14 of the challenged Law, while the details of who are the beneficiaries and the amount of the allowance will be determined by sub-legal act according to paragraph 4 of Article 14 of the challenged Law.

Kosovo Forensic Agency (KFA)

137. The MPA states that KFA is a typical executive agency within the Ministry of Internal Affairs, therefore its staff is the same in terms of employment status as well as in terms of salaries. The grade system in the KFA is incorrect and is not the same as the grade system in the Kosovo Police. The element of danger mentioned is hypothetical because according to the MPA, no argument has been given as to why this category is endangered for life and health.

Anti-Corruption Agency (ACA)

138. The classification of the salary of the Director of ACA according to MPA is done taking into account the functions and responsibilities of this position and comparing it with other heads such as: the case with the Commissioner for Personal Data Protection as this agency has the same status as ACA. While for professional officials in the ACA are reserved two separate classes at the same professional level as for other independent agencies that are favored with other categories of civil servants. An allowance has also been arranged for ACA employees which is worth up to 20% of the basic salary.

Energy Regulatory Office (ERO)

139. According to the MPA, the ERO has the status of regulatory agency according to Law no. 06/L-113 on the Organization and Functioning of State Administration and Independent Agencies, consequently their staff also has the status of civil servant. There is no reason and argument as to why this agency should be excluded from the challenged Law. The allegation that ERO is not financed from the state budget and that this is confirmed by the Law on Budget Allocations of 2019, where this agency has a budget code specifying wages and salaries is not correct.

Civil Registration Agency (CRA)

140. The MPA claims that salaries in the CRA are the same as in any other executive agency, because according to the MPA, it is not possible to have differences between employees of agencies with the same status.

Civil Aviation Authority (CAA)

141. MPA alleges that for the CAA a differentiation has been made in relation to the salaries of other employees, which is more or less similar to the current salaries. The reduction was made mainly for managerial positions for which it was not possible to find a solution, because their salaries were much higher than the maximum coefficient 10, which is set by the challenged Law, e.g. the Chief Executive Officer of the CAA has a salary of 2860 euro, while according to the challenged Law the highest salary in the public sector is 2390 euro.

Air Navigation Services Agency (ANSA)

142. In relation to this agency, the MPA reasons that the same as in the CAA a differentiation of professionals has been made in ANSA. According to the MPA, there is no sense in the connection between the creation of revenues and the level of salaries and that no argument has been presented as to why the challenged Law violates the autonomy of ANSA. The allegation of dismissal of staff is an assumption unfounded on any evidence (e.g. number of resignations in the last 5 years).

Kosovo Civil Service Trade Union and Independent Trade Union of Kosovo Administration (KCSTU) (ITUKA)

143. With regard to this trade union, the MPA states that there is no specific comment, because the allegations raised are assumptions without any

concrete evidence in terms of the alleged unconstitutionality of the challenged Law.

Kosovo Academy of Sciences and Arts (KASA)

144. With regard to KASA, the MPA argues that the challenged Law has dealt only with the amount of salary and not the nature and purpose, because this is regulated by the KASA law itself.

Institute of Forensic Medicine (IFM)

145. The MPA considers that IFM did not correctly and accurately understand the challenged Law. This is due to the fact that, according to the MPA, the functional positions in IFM (mainly doctors) will be paid according to the salary classes of doctors, while the support staff the same as the UCCK staff.

Administration of the University Clinical Center (AUCC)

146. The employees in the UCC administration, according to the MPA, have the status of public service employees, while their salaries are set by comparing the nature of work which is completely the same as civil servants, e.g. work of financial officer in the UCC is the same as in a municipality or ministry.

Chamber and Trade Union of Nurses, Midwives and other health professionals

147. The MPA adds that the Chamber's allegation that the ranking should be made on the basis of education is incorrect, due to the fact that the challenged Law has determined the value of work in a concrete position and not the scientific degree that these categories have benefited. The union has mainly given proposals which after the adoption of the challenged Law are no longer relevant.

Information Society Agency (ISA)

148. The categorization of the ICT positions in the challenged Law, according to the MPA, is done so that for each class the respective coefficient is set.

School Psychologists and Pedagogues

149. According to the MPA, their categorization was made taking into account the nature of their work, and not the level or degree of education, as alleged.

Central Harmonization Unit for Internal Audit in the Ministry of Finance (CHU) and Internal Auditors

150. The MPA argues that the positions of the CHU and Internal Auditors are included in the challenged Law through the regular class system which will be classified according to a regular job classification process. It is not correct to state that the regulation of classification by sub-legal act by the Government, violates the rights of this category because the challenged law has authorized the Government to regulate the classification for all civil servants in the Republic of Kosovo.

Health professionals/doctors employed in the Ministry of Health (MoH)

151. Salaries for this category, according to the MPA, are categorized based on the nature and importance of the work performed by employees in the MoH, and not as claimed by the type of profession and the difficulty of education completed. Employees in the MoH are mainly charged with policy-making and administrative tasks, and not with the provision of services as happens e.g. with surgeons who provide surgical services to citizens, therefore the comparison is inaccurate and impossible.

Engineer staff at ARKEP

152. The MPA states that the allegations of ARKEP staff are more proposals which will be taken into account in the job classification.

Water Services Regulatory Authority (WSRA)

153. The MPA states that there is no doubt that the WSRA employees are not civil servants, therefore, their salaries are determined according to the same classes as all civil servants. The departure of staff is only an assumption and the same is not proven by any evidence.

Administration of the University of Prishtina (UP)

154. With regard to the UP administration, the MPA states that the challenged Law does not aim at the implementation of public promises, but aims to regulate the payroll system. The allegations of pay cuts are more assumptions than evidence-based facts. The referral in Article 28 of Law no. 03/L-147 on Salaries of Civil Servants

according to the MPA is not correct, as this article has never been implemented in practice. Payment of fees may be made in accordance with paragraph 4 of Article 16 of the challenged Law.

Responses received from the Ministry of Finance and Transfers, following the specific request of the Court addressed to this Ministry

155. The Court recalls the fact that it requested the Ministry of Finance and Transfers to answer some questions of the Court (see paragraphs 23 and 24 of this Judgment which reflect exactly all the Court's questions to the Ministry of Finance and Transfers). In this regard, the Court received answers which will be reflected in the following.

156. With regard to question (1) of the Court, the Ministry of Finance and Transfers responded: *"In the first question, you raised the issues for what positions and exactly how much the salary will be lowered, in what institutions, how much was the previous salary and how much would be with Law No. 06/L-111 on Salaries in the Public Sector (hereinafter: the Law), as well as the difference between the salary they currently receive and the salary they would receive under the Law. Regarding this question, we have presented table A in Excel format on CD. This table shows all the positions that are currently paid from the Budget of the Republic of Kosovo, institutions, current salary, salary according to the Law and the difference. For clarification, the current salary, the salary based according to the Law and the difference. For clarification, the current salary is the basis salary based on the coefficient, as well as the supplement on the basic salary (in cases when it is applied), and does not include any of the other current allowances. Therefore, the comparison is not made for the gross salary (basic salary and all allowances), but only for the basic salary"*.

157. In relation to question (2) of the Court, the Ministry of Finance and Transfers responded: *"In the second question you presented the issues for what positions and exactly how much the salary will be increased, in which institutions, how much was the previous salary and how much would be with the Law as well as the difference between the salary they currently receive and the salary they will receive with the Law. Regarding this question, we have presented table B in Excel format on CD. This table shows all the positions that are currently paid from the Budget of the Republic of Kosovo, institutions, current salary, salary according to the Law and the difference. For clarification, the current salary is the basic salary based on the coefficient as well as the supplement on the basic salary (in cases*

when it is applied), and does not include any of the other current supplements. Therefore, the comparison is not made for the gross salary (basic salary and all allowances), but only for the basic salary".

158. Regarding question (3) of the Court, the Ministry of Finance and Transfers responded: *"In the third question, you raised the issue regarding the positions that receive a salary according to the current system, but which is not defined by the Law on Salaries, etc. Regarding this question, we clarify that the salaries of the judges of the Constitutional Court, Judge, Prosecutor, Chairman of the Judicial Council and Chairman of the Prosecutorial Council, who are appointed by government decision, will remain intact until 31 December 2022 (Article 28 of the Law), thus are not subject to the new legal regulation for at least 2.5 years (depending on the time of implementation of the law). See Table 1."* [*Clarification of the Court:* the tables in question, some of them in Excel, are accessible to the Court but that it is impossible to reflect in this Judgment due to their volume. However, their relevant essence will be explained throughout this Judgment].

159. Further, follows the response of the Ministry of Finance and Transfers to question (3) of the Court, which states that neither for the Privatization Agency of Kosovo, the provisions of the law on the system of salaries, allowances, remunerations and Annex no. 1 of this Law are not subject to the new legal regulation until December 2022. The current salaries of the PAK are determined by internal acts and are presented in Table 2. Meanwhile, the new salaries in the PAK will be determined through the classification process according to the restrictions of given in Annex 1 of the Law. As the final status of the Privatization Agency of Kosovo is not known, their future salaries will be determined depending on their future status. Also, keep in mind that the salaries of the PAK Board are not included in the salary system, but are paid from the category of salaries and allowances, therefore they are not part of Table 2. [*Court's clarification*: the tables in question, some of them in Excel, are accessible to the Court but that it is impossible to reflect on this Judgment due to their volume. However, their relevant essence will be explained throughout this Judgment].

160. In this context, the Ministry of Finance and Transfers states in its response to question (3) of the Court that it should be clarified that *"despite the fact that the positions/categories are defined in a broad sense in the Law, the difficulty of determining the salary for the positions which are not directly undefined is evident. Such are about*

23% of the positions (out of 206 unique positions, 47 positions need classification, of which 27 positions require classification and reorganization, while the other 20 positions can be defined by the reorganization process), or about 42% of employees from the list of current salaries for which a classification is required to determine the salary. Consequently, the second additional document required in your letter (after questions 1-7) cannot be provided at this stage, as such a document with the list of all employees by position could not be compiled for the reasons of above, but the same can be offered only after the completion of the process of classification and reorganization of institutions."

161. In relation to question (4) of the Court, the Ministry of Finance and Transfers answered: *"In the fourth question you raised the issues what positions exactly will be paid from the Budget of the Republic of Kosovo, what positions and what institutions are exactly excluded by the Law. Regarding this question, we clarify that with the start of the implementation of the Law from the state budget will be paid all the positions that are in table no. 1 of this Law, in addition to position no. 29 (General Director of Public Broadcaster - RTK) ". Further, the answer follows: "the provisions of Article 28 of this Law on the system of salaries, allowances, rewards and Annex no. 1 of the Law do not apply to public officials with special status: Judge of the Constitutional Court, Judge, Prosecutor, Chairman of the Judicial Council and Chairman of the Prosecutorial Council until 31 December 2022 (see Table 1), and the provisions of Article 29 for the Agency Privatization of Kosovo for the system of salaries, allowances, rewards and annex number 1 of this law is not implemented until 31 December 2022 (see Table 2). As to what positions and institutions are excluded from the Law, we clarify that the general provisions of this law, in Article 1, paragraph 1.1, define: the system of salaries and remunerations for public officials and officials who are paid from the state budget, except the Kosovo Security Force - KSF (see salaries in the KSF in Table 3) and Kosovo Intelligence Agency - KIA (see salaries in KIA in Table 4)". [Clarification of the Court:* the tables in question, some of them in Excel, are accessible to the Court but that it is impossible to reflect in this Judgment due to their volume. However, their relevant essence will be explained throughout this Judgment].

162. The Ministry of Finance and Transfers, in its answers to question (4) of the Court, also stated that *"it should be borne in mind that the rewards according to Article 25 of Law no. 05/L-038 on the Academy of Sciences and Arts of Kosovo, members of the Academy, full members and correspondence, within Annex No. 1 of the Law (ordinal numbers 43 and 51), are not salaries (compensation for*

work), and the same are set directly as wages, and not as rewards through equivalence. However, these rewards are paid through the Treasury payroll system, and this practical/operational adjustment has been over the years."

163. Regarding question five (5) of the Court, the Ministry of Finance and Transfers answered: *"In the fifth question you raised the issue of salaries for employees of public enterprises. Regarding this question, we clarify that the Law, in Article 27 - Competence for determining salaries in publicly owned enterprises, regulates the issue of competence to set the level of salaries for employees of public enterprises (POEs), whether they are central POEs or local POEs, always when those POEs are over 50% owned by the state or municipality/municipalities. In cases when POEs are central, namely owned by the state, then according to Article 27, paragraph 1 of the Law, the collegial governing bodies of POEs, that is the boards of directors of POEs have the competence to approve the salary levels of their employees within the minimum coefficient and the maximum coefficient 7, according to the value of the coefficient determined by Article 23 paragraph 1 of the Law. Also, according to the same article and paragraph, it is the boards of directors of POEs that are authorized to approve the measure of performance allowance, but not more than one monthly salary per year, after the publication of the positive annual financial result, and after approval by the Inter-Ministerial Committee for publicly owned enterprises. In cases when certain POEs operate with loss or if they are subsidized by the state, then according to Article 27, paragraph 2 of the Law, it is the Government of Kosovo that upon the proposal of the Inter-Ministerial Committee for Public Enterprises, by special acts, adopts the level of salaries of the employees of these POEs, within the frameworks defined by this Law, namely within the minimum coefficient and the maximum coefficient 7. In the case of local public enterprises, according to Article 27 paragraph 3 of the Law, is the Municipal Committee of Shareholders for public enterprises, which determines the salary levels of their employees, within the minimum coefficient and the maximum coefficient 5, according to the value of the coefficient determined by Article 23 paragraph 1 of the Law. The salaries of the employees of all central and local public enterprises are paid from the revenues generated by the business of these POEs. Furthermore, we emphasize that public enterprises are not budget organizations that receive direct budget allocations from the Budget Law of the Republic of Kosovo, and the payment of their salaries is not made by the Treasury payroll system*".

164. With regard to question six (6) of the Court, the Ministry of Finance and Transfers replied: "In question six you have raised the issues of whether all public sector salaries are regulated solely and exclusively by Law and Annex no. 1 of this Law, or there are salaries which will be determined by sub-legal acts of the Government, etc. Regarding this question, we clarify the following: The Law regulates the salaries of public officials and public officials paid from the state budget, except for the categories that are mentioned in point 4 of your request. Who is a public official and public functionary is determined by Law no. 06/L-114 on Public Officials (hereinafter LPO). Thus, salaries for public officials and functionaries are set by law (directly or indirectly) and cannot be set by sub-legal act. But, the sub-legal acts have a wide margin to set specifics and criteria for this indirect definition. Thus, for all positions (about 42%) that are not direct positions, the Law authorizes the Government by sub-legal act to approve the applicable classes, special administration groups and others as described below, which are subject to the classification process and reorganization, which will eventually result in a corresponding salary for each employee, based on table 1 of this law. The Law also regulates the salaries of employees in public enterprises with capital over 50% of the state (Article 27 of Law No. 06/L-111) in terms of determining the competence (collegial bodies) and the limits of how much their salaries can be but not the concrete classes for each position. More concrete explanations are given in answer no. 5.

165. Further, regarding the allegation of the lack of direct definition for some existing positions that are in employment and how salaries will be set for such positions, we provide the following explanations, the Law on Salaries in Annex no. 1 defines two salary determination systems.

166. The first system is the direct determination of salaries for positions which by nature are separate positions, e.g. president, minister, deputy, doctor, etc. Since these positions are unique and small in volume, it is estimated that they are defined directly by law without the need for a classification process. However, there have been exceptions to this rule, when civil service positions are defined as direct positions, although they are not unique (for example some of positions no. 79, 92, 93 in the Civil Service). The same happens in the Assembly of Kosovo where positions from 109-132 are regulated directly by Law. What are the positions defined directly we have explained in tables A and B in Excel format on CD. (Clarification: these tables are accessible to the Court).

167. The second system is the indirect determination of salaries, which means that the Law determines only the main classes, therefore a classification process is needed. This system applies mainly to the salaries of civil servants where Article 5 paragraph 3 of the Law stipulates *"Classification of a specific position of civil service according to paragraph 2 of this Article is done based on the rules for evaluation and classification of job positions, according to the provisions for classification of positions of civil service in accordance with the legislation on public official. The class to which a certain position belongs is determined explicitly in the regulation on internal organisation of the institution adopted according to the Law on Organisation and Functioning of State Administration and Independent Agencies"*. From this paragraph we can understand that to classify a certain position which is defined according to Annex no. 1 (paragraph 2 of Article 5) certain legal conditions must be met:

> 1. The classification and evaluation of a certain position is made according to the evaluation and classification of the rules defined in the legislation for the public official; and
> 2. The class that belongs to a certain position should be explicitly defined in the regulation for the internal organization of the institution according to the Law on the Organization and Functioning of the State Administration and Independent Agencies.

168. When it comes to the first condition, the LPO in Article 33 regulates the classification of jobs while paragraph 2 defines the main categories in the civil service which are:

> 1. Senior managerial category, which includes these positions: general secretary, executive director and deputy director of an executive agency and equivalent positions;
> 2. Mid-level managerial category includes these positions: director of department and positions equivalent to it;
> 3. Low-level managerial category includes these positions: head of division and positions equivalent to it; and
> 4. Professional category which includes professional officers.

169. Paragraph 3 of Article 33 of the LPO stipulates that each of the categories may have one or more classes based on the different level of complexity of work and general requirements (knowledge, skills and capacities) necessary for performing such duties. Complexity of work is a combination of relevance, decision making discretion, difficulty and risk in the performance of works in specific position. Any position

of civil service is classified as part of a specific class based on the performance process.

170. Paragraph 5 of Article 33 of the Law authorizes the Government that upon the proposal of the responsible ministry of public administration, by a sub-legal act adopts:

> 1. applicable classes for each category and titles for each class;
> 2. special administration groups;
> 3. general job description for each category, class and group, including general requirements for admission to each category, class and group; and
> 4. detailed rules, procedures, standards and methodology for assessment and classification of a position into a certain class or group according to this Article.

171. This sub-legal act has been prepared by the Ministry responsible for Public Administration and contains all the elements defined in this paragraph including the methodology of evaluation of a certain position, but the same could not be approved by the Government due to the suspension measure. determined by the Constitutional Court against LPO.

172. With regard to the second condition, the class (defined according to the rules of LPO explained above) belonging to a defined position must be explicitly defined by the regulation on the internal organization of the institution at the same time this is a requirement of Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies, in paragraph 1.2 of Article 18 which stipulates *that detailed organizational chart of the institution, including also the class of each job position and group of positions of professional category in accordance with provisions for the classification in the civil service according to the law on public officials.*

173. Regarding the detailed procedures and standards on how the regulation for internal organization of an institution is made, the Government upon the proposal of the Ministry of Public Administration has approved the Regulation (QRK) no. 01/2020 on Standards of Internal Organization, Systematization of Jobs and Cooperation in Institutions of State Administration and Independent Agencies which with a concrete example reflects in Annex no. 1, how to decide the class of a certain position.

174. As can be understood, the Law is organically related to the LPO and the Law on the Organization and Functioning of the State Administration and Independent Agencies, therefore the classification of jobs should be done according to this logic. The Law can be fully implemented only after the above conditions are met.

175. Regarding question seven (7) of the Court, the Ministry of Finance and Transfers replied: "In question seven you have raised the issue of whether the Government has approved all sub-legal acts mentioned in the challenged Law, etc. Regarding this question we give the explanation as follows:

> 7.1. Sub-legal act regarding the allowances and compensation of the employee of the Administration of the Assembly of the Republic of Kosovo - Article 4 paragraph 4 of the Law states as follows: Allowance and compensation of the employee of the Administration of the Assembly of the Republic of Kosovo shall be regulated by this Law and by special act adopted by the Presidency of the Assembly of the Republic of Kosovo. The Assembly is responsible for this sub-legal act.
> 7.2. Sub-legal act regarding the equivalence of the position with the grade - Article 5 paragraph 4 of the Law states: In the case of civil servants with special status, for whom according to the Law on Public Officials applies the system of personal grades, basic salary of public official is determined by the Salary Class to which the grade belongs, according to Annex No. 1 attached and integral part of this Law, Article 5 paragraph 5 of the Law states: In the case of civil servants with special status according to paragraph 4, article 5, the Government of Kosovo, upon proposal of minister responsible for public administration and minister responsible for category of employees where the personal grades system applies, adopts with a sub-legal act, equivalence of the position with grade. For this sub-legal act is responsible the minister responsible for public administration and the minister responsible for categories of employees where is applicable personal grading system, Draft has not been prepared yet.
> 7.3, Sub-legal act regarding the allowance for market conditions - Article 6 paragraph 3 of the Law states: Types of Positions and relevant professions for which the allowance for market conditions is received, value and procedures for receiving it are approved with a sub-legal act of Government of Kosovo, upon the proposal of responsible ministry for public administration and ministry responsible for finances. The benefit of allowance for market conditions is reviewed on annual basis by the Government, Article 6 paragraph 4 of the Law states: Following the adoption of sub-

legal act by the Government according to paragraph 3 of this Article, benefit of allowance for market conditions is approved by the ministry responsible for public administration and ministry responsible for finance, upon justified proposal of respective institution. For this sub-legal act is responsible the ministry responsible for public administration and the ministry responsible for finance, Draft of sub-legal act that regulates this issue (Draft Regulation No. XX / 2019 on Allowance on the Basic Salary of Civil Servants and Cabinet Officers and Remuneration of Officials and Public Functionaries) was prepared by the working group and went through the stages of public consultation, but failed to proceed for approval by the Government.

7.5, Sub-legal act regarding the special allowance of civil servants - Article 8 paragraph 1 of the Law states: Special allowance over the basic salary shall be received by officials of Tax Administration and investigation inspectors of the Kosovo Competition Authority, guardians at the correction service and fire-fighters in dangerous operations, Article 8 paragraph 3 of the Law states: The list of positions or position group benefiting special allowances, rules for receiving and value of the allowance shall be determined with a sub-legal act of Government, at the proposal of the ministry responsible for public administration and ministry responsible for finances, Article 8 paragraph 4 of the Law states: Civil servants in the Anti-Corruption Agency, who exercise functions of the Agency, shall receive allowance up to twenty percent (20%) on the basic salary. For this sub-legal act is responsible the ministry responsible for public administration and the ministry responsible for finance, Draft of sub-legal act that regulates this issue (Draft Regulation No., XX / 2019 on Allowances over the Basic Salary of Civil Servants and Cabinet Officers and Officials' Remunerations and Public Functionaries) is prepared by the working group and has gone through the stages of public consultation, but has not been processed for approval by the Government.

7.6 Sub-legal act regarding the allowance or compensation for overtime work - Article 9 paragraph 5 of the Law states: Government adopts with a sub-legal act detailed conditions for allowance and compensations for overtime work according to this Article. The Government is responsible for this sub-legal act. The draft of the sub-legal act regulating this issue: (Draft Regulation No. XX/2019 on Allowances over Basic Salary of Civil Servants and Cabinet Officers and Remunerations of Public Officials and Functionaries) has been prepared by the working group and has gone through the stages of public consultation, but failed to proceed for approval by the Government.

7.7. The sub-legal act on the special allowance for public functionaries-Article 12 paragraph 1 of the Law states: Deputies may receive special allowance over the basic salary. Special allowance, from paragraph 1 of this Article, shall be given to the deputy for parliamentary function: President of the Assembly, Vice President of the Assembly, Chairperson of the parliamentary committee, deputy chairperson of the parliamentary committee and head of the parliamentary group. Article 12 paragraph 4 of the Law states: Criteria and procedures for allowances and compensation from paragraphs 1 and 2 of this Article shall, upon the proposal of the relevant parliamentary Committee on budget and finance, defined with a regulation by Presidency of Assembly of the Republic of Kosovo, Article 12 paragraph 6 of the Law states: Allowance and compensation for the political staff of the Assembly of the Republic of Kosovo shall be regulated by a special act adopted by the Presidency of the Assembly of the Republic of Kosovo. The Assembly is responsible for this sub-legal act.

7.8. Sub-legal act on the special allowance for the public functionary with special status - Article 14 paragraph 1 of the Law states: Police officers shall benefit a special allowance for those tasks they perform in the sectors or special operations with a risk for the life, Article 14 paragraph 3 of the Law states: Police inspectorate, customs officers and officials of the Tax Administration shall benefit an allowance up to twenty percent (20%) of the basic salary, Article 14 paragraph 4 of the law states: . List of positions of police officers, police inspectorate, customs officers and officials of the Tax Administration that benefit a special allowance, rules for the benefit and value of the allowance shall be determined by sub-legal act of the Government, upon the proposal of the Ministry responsible for internal affairs and Ministry responsible for finances. The Government is responsible for this sub-legal act upon the proposal of the ministry responsible for internal affairs and ministry responsible for finance, Government of the Republic of Kosovo by Decision no. 13/115 dated 17.12,2019, has approved the Regulation on Special Allowance to Salary for Risk for Police Officers and Employees of the Police Inspectorate of Kosovo. The decision states that this regulation is implemented with the entry into force of Law No. 06/L-111 on Salaries in the Public Sector. This sub-legal act was approved without the Budget Impact Assessment of the Budget Department in the Ministry of Finance and Transfers, as required by the applicable public finance legislation. Also, the Ministry of Finance was not a member of the working group. Attached to this letter is the decision of the Government and the Regulation in question.

7.9. The sub-legal act on the special allowance for Cabinet employees - Article 15 paragraph 3 of the Law states: In addition to basic salary, cabinet employee, with the exception of political advisor, may benefit a special allowance which cannot exceed twenty percent (20%) of the basic salary, Article 15 paragraph 4 of the Law states: Criteria and procedures for benefiting the allowance according to paragraph 3 of this Article are regulated with a sub-legal act approved by the Government. The Government is responsible for this sub-legal act. The draft of sub-legal act regulating this issue (Draft Regulation No. XX/2019 on Allowances over Basic Salary to Civil Servants and Cabinet Officers and Remunerations of Public Officials and Functionaries) has been prepared by the working group and has gone through the stages of public consultation, but has not been processed for approval by the Government.

7:10. Sub-legal act on the allowance for difficult/harmful working conditions - Article 17 paragraph 1 of the Law states: Allowance for difficult/harmful working conditions is compensation for the work in conditions that are harmful for health, Article 17 paragraph 4 of the Law states: Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for health and ministry responsible for finances, adopts, with a sub-legal act, groups of positions which benefit allowance for difficult/harmful working conditions, detailed conditions for benefiting and its value. The Government is responsible for this sub-legal act upon the proposal of the Minister responsible for public administration, the ministry responsible for health and the ministry responsible for finance, the draft of sub-legal act that regulates this issue (Draft Regulation No. XX/2019 on Allowance over Basic Salary for Conditions of Harmful Working Condition, Overtime Allowances and Special Allowances for Health System Employees) was prepared by the working group and went through the stages of public consultation, but failed to proceed for approval by the Government.

7.11. Sub-legal act on the performance allowance for the employee of the pre-university education system-Article 18 paragraph 1 of the Law states: Professional employees of pre-university education system who show special results at work are entitled to receive performance allowance, Article 18 paragraph 2 of the Law states: Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for education and ministry responsible for finances, adopts, with a sub-legal act, rules for allowance according to paragraph 1 of this Article, detailed conditions for benefiting and its value. The Government is responsible for this sub-legal act upon the proposal

of the Minister responsible for public administration, the ministry responsible for education and the ministry responsible for finance. The draft sub-legal act that regulates this issue (Draft Regulation No. XX/2019 on Allowances over the Basic Salary of Public Servants and Administrative and Support Officers in the Pre-University and University Education System) has been prepared by the working group and has gone through public consultation stages, but has not been processed for approval by the Government.

7.12. Sub-legal act on special allowance for employees of university education - Article 19 paragraph 1 of the Law states: University professors performing functions of: Rector, Vice-Rector, Dean and Vice-Dean as well as Head of the Department benefit a special allowance for exercising relevant function, Article 19 paragraph 2 of the Law states: University professors may, for mentoring graduation thesis for all study levels (bachelor, master and PhD), also benefit a special allowance, ten percent (10%) of the basic salary, Article 19 paragraph 4 of the Law states: Government of Republic of Kosovo, upon proposal of the ministry responsible for public administration, ministry responsible for education and ministry responsible for finances, adopts, with a sub-legal act, rules for allowance according to paragraphs 1 and 2 of this Article, detailed conditions for benefiting allowances and their value. The Government is responsible for this sub-legal act upon the proposal of the Minister responsible for public administration, the ministry responsible for education and the ministry responsible for finance, the draft sub-legal act that regulates this issue (Draft Regulation No. XX/2019 on Allowances over the Basic Salary of Public Servants and Administrative and Support Officials in the Pre-University and University Education System) was prepared by the working group and went through the stages of public consultation, but failed to proceed for approval by the Government.

7.13 Sub-legal act for the special allowance for the employees of health system -Article 20 paragraph 1 of the Law states: Health professionals in UHCSK and MFMC that exercise managing functions and that are not part of Annex 1 of this Law shall benefit a special allowance for exercising the relevant function, Article 20 paragraph 3 of the Law states: Professional employees of health system performing their duty in some specialized professions, in rare areas or in remote locations benefit a special allowance, Article 20 paragraph 5 of the Law states: Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for health and ministry responsible for finances, adopts, with a sub-legal act, group of positions, rules for allowance according to this Article, detailed

conditions for benefiting and its value. The Government is responsible for this sub-legal act upon the proposal of the Minister responsible for public administration, the ministry responsible for health and the ministry responsible for finance. Allowances over the Basic Salary for Difficult and Harmful Working Conditions, Overtime Allowances and Special Allowances for Employees of Health System) was prepared by the working group and went through the stages of public consultation, but failed to be processed for approval by the Government.

7.14 Sub-legal act on payment as salary up to twenty percent (20%) in cases when the public functionary, public functionary with special status, public official and university academic staff, who receive the basic salary according to Annex 1 of the Law on Salaries, are also engaged with work in another public institution. Article 21 paragraph 5 of the Law states: Public functionary, public functionary with special status, public official and university academic staff receiving the basic salary according to Annex 1 of this Law, if they get engaged to work in another public institution, when allowed under the special law, shall receive a payment, as a salary up to twenty percent (20%) for the engagement in that institution. Article 21 paragraph 6 of the Law states: Government of Republic of Kosovo upon proposal of the responsible ministry for public administration and ministry responsible for finance shall, by a sub-legal act, adopt payment terms, amount and procedure for additional engagement according to paragraph 5 of this Article. The Government is responsible for the sub-legal act regarding the conditions, amount and procedure of payment for additional engagement according to paragraph 50 of Article 21 upon the proposal of the Minister responsible for public administration and the ministry responsible for finance. The draft sub-legal act that regulates this issue (Draft Regulation No. XX/2019 on Additional Engagement and Calculation of Salaries and Work Experience) has been prepared by the working group and has gone through the stages of public consultation, but has not managed to proceed for approval by the Government.

7.15 Sub-legal act for calculating work experience - Article 21 paragraph 8 of the Law states: *Government of Republic of Kosovo* upon proposal of the ministry responsible for public administration and ministry responsible for finance shall, by a sub-legal act, adopt rules for calculation of work experience under paragraph 7 of Article 21 for the sub-legal act related to the calculation of work experience, the Government is responsible upon the proposal of the minister responsible for public administration and the ministry responsible for finance. Draft sub-legal act that regulates this issue (Draft Regulation No. XX/2019

for Additional Engagement and Calculation of Salaries and Work Experience) has been prepared by the working group and has gone through the stages of public consultation, but has not been processed for approval by the Government.

7:16. Sub-legal act on calculation of salary and payment of salaries - Article 22 paragraph 5 of the Law states: Government of Republic of Kosovo shall, by a sub-legal act, upon the proposal of the minister responsible for public administration and ministry responsible for finance, adopt detailed rules for implementation of Article 22 regarding the calculation of salary and payment of salaries. The Government is responsible for the rules related to the calculation of salary and payment of salaries upon the proposal of the Minister responsible for public administration and the ministry responsible for finance. The draft of these rules according to the requirements of this article has not yet been prepared, but there are current rules which are in force.

7.17. Sub-legal act regarding travel reimbursement and representation costs. Article 25 paragraph 1 of the Law states: Public officials and functionaries are entitled to compensations for expenses incurred for official travel and stay abroad. Article 25 paragraph 2 of the Law states: Public officials and functionaries shall, during the exercise of official duty, be entitled to compensation for expenses incurred for representation. Article 25 paragraph 3 of the Law states: Conditions, method, value of compensation and procedure for benefiting the compensation under paragraph 1 and 2 of this Article is adopted by a sub-legal act of the Government of Kosovo, upon proposal of responsible minister for public administration and responsible ministry for finances. For the sub-legal act regarding the compensation for travel and representation costs the Government is responsible upon the proposal of the minister responsible for public administration and the ministry responsible for finance. The draft sub-legal act that regulates this issue (Draft Regulation No. XX/2019 on Allowances to the Basic Salary of Civil Servants and Cabinet Employees and Remunerations of Public Officials and Functionaries) has been prepared by the working group and has gone through the stages of public consultation, but has not been processed for approval by the Government.

7:18. Sub-legal act regarding the compensations for the employees of the diplomatic service who exercise their duty abroad-Article 26 paragraph 1 of the Law states: The staff of diplomatic service performing their duty abroad shall receive the following compensations: compensation for living costs in the country where activity is performed, compensation for children education expenses, compensation for relocation of family belongings and

compensation for traveling to home country. Article 26 paragraph 2 of the Law states: Conditions, method and procedure for benefiting the compensation according to paragraph 1 of this Article and relevant amount are adopted by a sub-legal act of the Government, upon proposal of responsible minister for foreign affairs and Ministry of Finance. The Ministry of Foreign Affairs has prepared a draft for the sub-legal act regarding the compensation for the employees of the diplomatic service who exercise their duties abroad.

As can be seen in the explanations given in point 7, most of the sub-legal acts mentioned in the Law have been drafted and have gone through all stages of public consultation, but could not be processed for approval by the Government because in that time Government has been resigned and due to the suspension measure of the Constitutional Court against the Law.

Item 1 (after 7 questions) requires the final list of salaries distributed by the Ministry of Finance and Transfers for March 2020 for all employees at the level of the Republic of Kosovo. As this list is voluminous, with all the details and for all employees (March) it is submitted in Excel format via CD.

In point 2 (after 7 questions), it is required to submit the list of salaries that would be disbursed by the Ministry of Finance and Transfers if the Law were to be implemented. The answer is as follows: In the current situation as explained in the answers to questions (1-7), it turns out that without the regulation for classification and without the reorganization of institutions it is impossible to determine the salary for each employee, namely it is not possible to compile the list of salaries that would be disbursed by law for over 80 thousand beneficiaries. Consequently, even if the Law were in force, it could not be fully and immediately implemented. Note: The tables and lists requested by the Constitutional Court were sent in Excel format via CO.

8. Based on the last paragraph of your letter, you requested that the Ministry of Finance and Transfers provide you with other important information. We appreciate that the following information and assessments can assist you in your decision making, as follows:

8.1. Based on a preliminary estimate of the cost of the Law (estimate that has changed since the first draft of the Law until approval by the Assembly), with the level of coefficients and the value of the coefficient determined by this law (239), the salary invoice according definition of Law no. 03/L-048 on Public Financial Management and Accountability, supplemented and amended will exceed the allowed limit (fiscal rule of salaries), Article 22/C Restriction of budget increase for salaries and

allowances), which would constitute a breach of the fiscal rule, with reflections on the deficit (as ongoing current expenditures) as well as the need for continued deficit financing. There are also a series of allowances that the Law provides, and that would further aggravate the situation regarding the financing of this Law. In this context, it should be borne in mind that Article 81 of the Law on Public Financial Management and Accountability, has provided a provision of its legal superiority over other laws, in matters related to the management of public money and we consider that it should be assessed whether it is in accordance with the principles set out for public money in Article 120 of the Constitution of the Republic of Kosovo.

8.2. In view of the provisions of Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies, we notice horizontal provisions and the same criteria in the organization of the state administration, namely the Office of the Prime Minister, ministerial systems (ministry, executive agency and administration of public services) and regulatory agencies. Specifically, this Law on Ministerial Systems prescribes in the same way the criteria for establishing executive agencies, departments or divisions. On the other hand, the different drafting of salaries for the heads or staff of these structures in some cases according to the provisions of the Law, among others, we consider it should be assessed in accordance with the principles set out in Article 120 of the Constitution of the Republic of Kosovo regarding public money. We also consider that a similar assessment should be made for some categories of financial officials relevant to the financial management and control process (e.g. internal auditors) who do not have special treatment and are not defined as separate positions".

RELEVANT PROVISIONS OF THE CONSTITUTION, INTERNATIONAL CONVENTIONS, LAWS OF THE REPUBLIC OF KOSOVO AND SUB-LEGAL ACTS

Regarding the allegations of violation referred by the Applicant

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 3
[Equality Before the Law]

[...]

2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of

the rights of and participation by all Communities and their members.

Article 7
[Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

[...]

Article 10
[Economy]

A market economy with free competition is the basis of the economic order of the Republic of Kosovo.

Article 21
[General Principles]

1.Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.

2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.

3. Everyone must respect the human rights and fundamental freedoms of others.

4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.

Article 22
[Direct Applicability of International Agreements and Instruments]

Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

(1) Universal Declaration of Human Rights;

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

(3) International Covenant on Civil and Political Rights and its Protocols;

(4) Council of Europe Framework Convention for the Protection of National Minorities;

(5) Convention on the Elimination of All Forms of Racial Discrimination;
(6) Convention on the Elimination of All Forms of Discrimination Against Women;
(7) Convention on the Rights of the Child;
(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Article 23
[Human Dignity]

Human dignity is inviolable and is the basis of all human rights and fundamental freedoms.

Article 24
[Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

Article 46
[Protection of Property]

1. The right to own property is guaranteed.
2. Use of property is regulated by law in accordance with the public interest.
3. No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.
[...]

Article 55
[Limitations on Fundamental Rights and Freedoms]

1. Fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.
2. Fundamental rights and freedoms guaranteed by this Constitution may be limited to the extent necessary for the fulfillment of the purpose of the limitation in an open and democratic society.
3. Fundamental rights and freedoms guaranteed by this Constitution may not be limited for purposes other than those for which they were provided.
4. In cases of limitations of human rights or the interpretation of those limitations; all public authorities, and in particular courts, shall pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved and the review of the possibility of achieving the purpose with a lesser limitation.
5. The limitation of fundamental rights and freedoms guaranteed by this Constitution shall in no way deny the essence of the guaranteed right.

Article 58
[Responsibilities of the State]

1. The Republic of Kosovo ensures appropriate conditions enabling communities, and their members to preserve, protect and develop their identities. The Government shall particularly support cultural initiatives from communities and their members, including through financial assistance.
2. The Republic of Kosovo shall promote a spirit of tolerance, dialogue and support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.
3. The Republic of Kosovo shall take all necessary measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their national, ethnic, cultural, linguistic or religious identity.
4. The Republic of Kosovo shall adopt adequate measures as may be necessary to promote, in all areas of economic, social, political and cultural life, full and effective equality among members of communities. Such measures shall not be considered to be an act of discrimination.
5. The Republic of Kosovo shall promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo. The Republic of Kosovo shall have a special duty to ensure an effective protection of the entirety of

sites and monuments of cultural and religious significance to the communities.
6. The Republic of Kosovo shall take effective actions against all those undermining the enjoyment of the rights of members of Communities. The Republic of Kosovo shall refrain from policies or practices aimed at assimilation of persons belonging to Communities against their will, and shall protect these persons from any action aimed at such assimilation.
7. The Republic of Kosovo ensures, on a non-discriminatory basis, that all communities and their members may exercise their rights specified in this Constitution.

Article 102
[General Principles of the Judicial System]

1. Judicial power in the Republic of Kosovo is exercised by the courts.
2. The judicial power is unique, independent, fair, apolitical and impartial and ensures equal access to the courts.
3. Courts shall adjudicate based on the Constitution and the law.
4. Judges shall be independent and impartial in exercising their functions.
5. The right to appeal a judicial decision is guaranteed unless otherwise provided by law. The right to extraordinary legal remedies is regulated by law. The law may allow the right to refer a case directly to the Supreme Court, in which case there would be no right of appeal.

Article 109
[State Prosecutor]

1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.
2. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.
3. The organization, competencies and duties of the State Prosecutor shall be defined by law.
4. The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality.
5. The mandate for prosecutors shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.
6. Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.

7. The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment.

Article 119
[General Principles]

1. The Republic of Kosovo shall ensure a favorable legal environment for a market economy, freedom of economic activity and safeguards for private and public property.
2. The Republic of Kosovo shall ensure equal legal rights for all domestic and foreign investors and enterprises.
3. Actions limiting free competition through the establishment or abuse of a dominant position or practices restricting competition are prohibited, unless explicitly allowed by law.
4. The Republic of Kosovo promotes the welfare of all of its citizens by fostering sustainable economic development.
5. The Republic of Kosovo shall establish independent market regulators where the market alone cannot sufficiently protect the public interest.
6. A foreign investor is guaranteed the right to freely transfer profit and invested capital outside the country in accordance with the law.
7. Consumer protection is guaranteed in accordance with the law.
8. Every person is required to pay taxes and other contributions as provided by law.
9. The Republic of Kosovo shall exercise its ownership function over any enterprise it controls consistently with the public interest, with a view to maximizing the long-term value of the enterprise.
10. Public service obligation may be imposed on such enterprises in accordance with the law, which shall also provide for a fair compensation.

Article 142
[Independent Agencies]

1. Independent agencies of the Republic of Kosovo are institutions established by the Assembly based on the respective laws that regulate their establishment, operation and competencies. Independent agencies exercise their functions independently from any other body or authority in the Republic of Kosovo.
2. Independent agencies have their own budget that shall be administered independently in accordance with the law.
3. Every organ, institution or other entity exercising legal authority in the Republic of Kosovo is bound to cooperate with and respond

to the requests of the independent agencies during the exercise of their legal competencies in a manner provided by law.

Article 130
[Civilian Aviation Authority]

1. The Civilian Aviation Authority of the Republic of Kosovo shall regulate civilian aviation activities in the Republic of Kosovo and shall be a provider of air navigation services as provided by law.
2. The Civilian Aviation Authority shall fully cooperate with relevant international and local authorities as provided by law.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1
[Protection of property] of Protocol No. 1 to the ECHR

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

[...]

Article 14
[Prohibition of discrimination]

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.2000

The Member States Of The Council Of Europe, signatory hereto,
Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law; Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"); Reaffirming that the principle of nondiscrimination does not prevent States Parties from taking measures in order to promote full and effective

equality, provided that there is an objective and reasonable justification for those measures:

Article 1
[General prohibition of discrimination]

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

UNIVERSAL DECLARATION ON HUMAN RIGHTS

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

REGARDING THE CONSTITUTIONAL COMPETENCIES OF THE GOVERNMENT AND THE ASSEMBLY FOR LAWMAKING

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 65
[Competencies of the Assembly]

The Assembly of the Republic of Kosovo:
(1) adopts laws, resolutions and other general acts; [...]

Article 76
[Rules of Procedure]

The Rules of Procedure of the Assembly are adopted by two thirds (2/3) vote of all its deputies and shall determine the internal organization and method of work for the Assembly.

Article 79
[Legislative Initiative]

The initiative to propose laws may be taken by the President of the Republic of Kosovo from his/her scope of authority, the Government, deputies of the Assembly or at least ten thousand citizens as provided by law.

Article 93
[Competencies of the Government]

The Government has the following competencies:

[...]

(3) proposes draft laws and other acts to the Assembly;

[...]

CHALLENGED SPECIFIC PROVISIONS OF THE LAW ON SALARIES

Article 4
[Salary of civil servant]

4. Allowance and compensation of the employee of the Administration of the Assembly of the Republic of Kosovo shall be regulated by this Law and by special act adopted by the Presidency of the Assembly of the Republic of Kosovo.

5. Regulation by special act, according to paragraph 4 of this Article, shall be done based on the nature and specific conditions of the work of the Assembly of the Republic of Kosovo.

Article 5
[Basic salary of civil servant]

5. In the case of civil servants with special status, according to paragraph 4 of this Article, Government of Kosovo, upon proposal of minister responsible for public administration and minister responsible for category of employees where the personal grades system applies, adopts with a sub-legal act, equivalence of the position with grade.

Article 6
[Allowance for market conditions]

4. Following the adoption of sub-legal act by the Government according to paragraph 3 of this Article, benefit of allowance for market conditions is approved by the ministry responsible for public administration and ministry responsible for finance, upon justified proposal of respective institution.

Article 7
[Performance allowance]

5. Government of Kosovo, upon proposal of the responsible ministry for public administration and ministry responsible for finances, adopts with a sub-legal act the measure and procedure for receiving performance allowance.

Article 8
[Special allowances of civil servants]

3. The list of positions or position group benefiting special allowances, rules for receiving and value of the allowance shall be determined with a sub-legal act of Government, at the proposal of the ministry responsible for public administration and ministry responsible for finances.

Article 9
[Overtime allowance or compensation for overtime work]

5. Government adopts with a sub-legal act detailed conditions for allowance and compensations for overtime work according to this Article.

Article 14
[Special allowance for the public functionary with special status]

1. Police officers shall benefit a special allowance for those tasks they perform in the sectors or special operations with a risk for the life.
2. Special allowance, according to paragraph 1 of this Article, cannot be higher than forty percent (40%) of the basic salary, according to Annex 1 of this Law.
3. Police inspectorate, customs officers and officials of the Tax Administration shall benefit an allowance up to twenty percent (20%) of the basic salary.
4. List of positions of police officers, police inspectorate, customs officers and officials of the Tax Administration that benefit a special allowance, rules for the benefit and value of the allowance shall be determined by sub-legal act of the Government, upon the proposal of the Ministry responsible for internal affairs and Ministry responsible for finances.

Article 15
[Salary of the cabinet employee]

4. Criteria and procedures for benefiting the allowance according to paragraph 3 of this Article are regulated with a sub-legal act approved by the Government.

Article 17
[Allowance for difficult/ harmful working conditions]

4. Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for health and ministry responsible for finances, adopts, with a sub-legal act, groups of positions which benefit allowance for difficult/harmful working conditions, detailed conditions for benefiting and its value.

Article 18
[Performance allowance for employee of pre-university education system]

2. Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for education and ministry responsible for finances, adopts, with a sub-legal act, rules for allowance according to paragraph 1 of this Article, detailed conditions for benefiting and its value.

Article 19
[Special allowance for employee of university education]

4. Government of Republic of Kosovo, upon proposal of the ministry responsible for public administration, ministry responsible for education and ministry responsible for finances, adopts, with a sub-legal act, rules for allowance according to paragraphs 1 and 2 of this Article, detailed conditions for benefiting allowances and their value.

Article 20
[Special allowance for employee of health system]

5. Government of Republic of Kosovo, upon proposal of the minister responsible for public administration, ministry responsible for health and ministry responsible for finances, adopts, with a sub-legal act, group of positions, rules for allowance according to this Article, detailed conditions for benefiting and its value.

Article 21
[Calculation of basic salary]

8. Government of Republic of Kosovo upon proposal of the ministry responsible for public administration and ministry responsible for finance shall, by a sub-legal act, adopt rules for calculation of work experience under paragraph 7 of this Article.

Article 22
[Calculation and payment]

5. Government of Republic of Kosovo shall, by a sub-legal act, upon the proposal of the minister responsible for public administration and ministry responsible for finance, adopt detailed rules for implementation of this Article.

Article 23
[Setting the coefficient value and the fund for allowance]

5. The Fund according to paragraph 4 of this Article shall be allocated by the responsible ministry of finance to the budget organizations only in accordance with this Law and sub-legal acts adopted based on this Law.

Article 25
[Compensation for travels and representation costs]

3. Conditions, method, value of compensation and procedure for benefiting the compensation under paragraph 1 and 2 of this Article is adopted by a sub-legal act of the Government of Kosovo, upon proposal of responsible minister for public administration and responsible ministry for finances.

Article 26
[Compensation for diplomatic service staff performing their duty abroad]

2. Conditions, method and procedure for benefiting the compensation according to paragraph 1 of this Article and relevant amount are adopted by a sub-legal act of the Government, upon proposal of responsible minister for foreign affairs and Ministry of Finance.

Article 29
[No title]

Provisions of this Law for the system of salaries, allowances, remunerations and Annex 1 of this Law shall not apply to Privatization Agency of Kosovo until 31 December 2022.

Article 33
[Abrogation]

1. Upon entry into force of this Law, there shall be abrogated:
   1.1. Law No.03/L-147 on Salaries of Civil Servant;
   1.2. Law No.03/L-03/L001 on the Benefits to Former High Officials, amended and supplemented by the Law No. 04/L-038;
   1.3. Article 11, paragraph 2 of the Law No.03/L-094 on the President of the Republic of Kosovo;
   1.4. Article 15 of the Law No.03/L-121 on Constitutional Court of the Republic of Kosovo;
   1.5. Article 9 of the Law No.03/L-159 on Anti-Corruption Agency;
   1.6. Article 35, paragraphs 1 and 2 of the Law No.06/L-054 on Courts;
   1.7. Article 21, paragraph 1, sub-paragraph 1.1 to 1.10 of the Law No.03/|L-225 on State Prosecutor;
   1.8. Article 18, paragraph 1 of the Law No.06/L-055 on Kosovo Judicial Council, as well as every legal provision and sub-legal act that regulates the issue of salary, compensations, allowances and remunerations.

SPECIFIC PROVISIONS OF OTHER LAWS REPEALED BY ARTICLE 33 [ABROGATION] OF THE CHALLENGED LAW

Article 11, paragraph 2 of Law No. 03/L-094 for the President of the Republic of Kosovo;

Article 11
Salary of the President of Republic

1. Salary of the President of Republic of Kosovo shall be the highest among the state institutions of Republic of Kosovo.
2. Salary of the President of Republic shall always be at least twenty five percent (25%) higher than the general income of the President of the Assembly of Republic of Kosovo and of the other institutional leaders.

Article 15 of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo;

Article 15
Remuneration of Judges

The remuneration of Constitutional Court judges shall be 1.3 times that of the judges of the Supreme Court of the Republic of Kosovo.

Article 9 of Law No. 03/L-159 on the Anti-Corruption Agency;

Article 9
Salary of Director

Director of the Agency has a salary at the salary level of the President of the Parliamentary Committee of the Assembly of Kosovo.

Article 35 paragraphs 1 and 2 of Law No. 06/L-054 on Courts;

Article 35
Salary and Judicial Compensation

1. During their terms of office, judges shall receive the following salaries:
   1.1. the President of the Supreme Court shall receive a salary not less than that of the Prime Minister of the Republic of Kosovo;
   1.2. judges of the Supreme Court shall receive a salary equivalent to ninety percent (90%) of the salary of the President of the Supreme Court;
   1.3. the President of the Court of Appeals shall receive a salary equivalent to that of a judge of the Supreme Court of Kosovo;
   1.4. all other judges of the Court of Appeals shall receive a salary equivalent to ninety percent (90%) of the salary of the President of the Court of Appeals;
   1.5. the President of a Basic Court shall receive a salary equivalent to the salary of a judge of the Court of Appeals;
   1.6. the Supervising Judge of a Branch of the Basic Court shall receive a salary equivalent to ninety-five percent (95%) of the salary of the President of a Basic Court;
   1.7. all judges of the Basic Court shall receive a salary equivalent to eighty (80%) percent of the President of the Basic Court
2. The salary of a judge shall not be reduced during the term of office to which the judge is appointed, except as a disciplinary sanction imposed under the authority of the Kosovo Judicial Council.
3. Judges are entitled to annual leave in accordance to the Law on Labour.

Article 21, paragraph 1, sub-paragraphs 1.1 until 1.10 of Law No. 03/L-225 on the State Prosecutor;

Article 21
Compensation of State Prosecutors

1. During the period of service, state prosecutors will be entitled to the following basic salaries:

1.1. The Chief State Prosecutor shall receive a salary equivalent to that of the President of the Supreme Court.

1.2. Prosecutors permanently appointed to the Office of the Chief State Prosecutor shall receive a salary equivalent to ninety percent (90%) of the salary of the Chief State Prosecutor.

1.3. The Chief Prosecutor of the Special Prosecution Office shall receive a salary equivalent to ninety-five percent (95%) of the salary of the Chief State Prosecutor.

1.4. Prosecutors permanently appointed to the Special Prosecution Office shall receive a salary equivalent to the salary of the prosecutors in the Office of Chief State Prosecutor.

1.5. The Chief Prosecutor of the Appellate Prosecution Office shall receive a salary equivalent to that of the president of the Court of Appeals. 1.6. Prosecutors permanently appointed to the Appellate Prosecution Office shall receive a salary equivalent to ninety percent (90%) of the salary of the Chief Prosecutor of the Appellate Prosecution Office.

1.7. The Chief Prosecutors of Basic Prosecution Offices shall receive a salary equivalent to the salary of presidents of the Basic Courts.

1.8. Each prosecutor permanently appointed to the Basic Prosecution Office shall receive a base salary of not less than seventy percent (70%) of the salary of the Chief Prosecutor of a Basic Prosecution Office. The Council shall promulgate a schedule for additional compensation that recognizes the unique responsibilities of prosecutors appearing before the Serious Crimes Department of the Basic Court; but in no case shall the sum of the base salary and the additional compensation exceed ninety percent (90%) of the salary of the Chief Prosecutor of a Basic Prosecution Office.

1.9. In addition to their basic remuneration, every prosecutor will be entitled to additional compensation for other services as provided for by law or the rules issued by Kosovo Prosecutorial Council.

1.10. Regardless of any other provision of the law, the salary of prosecutors will not be reduced during their term of service unless it is imposed as sanction by the Council or the Council's Disciplinary Committee upon a determination that the prosecutor has engaged in misconduct or has committed a criminal offence.

1.11. State Prosecutors are entitled to annual leave in an amount equal to civil servants, but in no case fewer than twenty (20) days of paid annual leave per year.

Article 18, paragraph 1 of Law No. 06/L-055 on Kosovo Judicial Council;

Article 18
The salary of the Chair and the Council members

1. During their term of office, the Chair and the members of the Council appointed for full time, shall receive their salaries as follows:
   1.1. The Chair receives a salary equivalent to the salary of the President of the Supreme Court.
   1.2. The Vice-Chair and the full time members shall receive a salary equivalent to the salary of the judge of the Supreme Court.
2. The non-judge members of the Council who are part time members are entitled to compensation for their work as members of the Council. The Council will adopt the compensation scheme.
3. During their term of office, the Chair and judge members as full time members shall only accept the salary provided for by Law, except for reimbursement of reasonable and necessary expenditures related to the exercise of their duties, as defined in paragraph 5. of this Article.
4. Chair and the Vice-Chair, upon expiry of their term, shall receive the compensation of the initial position within the court where they will return.
5. The Chair, the Vice-Chair and the members of the Council shall not be entitled to exercise any other public or professional duty for which they are rewarded with payment, except for teaching in higher education institutions.
6. The Chair, the Vice-Chair and the members of the Council may engage in scientific, cultural, academic and other activities which do not contradict their functions and legislation in force.

Admissibility of the Referral

176. In order to decide regarding the Applicants' Referral, the Court must first examine whether the admissibility criteria established in the Constitution and further specified in the Law and the Rules of Procedure have been met.

177. In this regard, the Court refers to the relevant provisions of the Constitution, the Law and the Rules of Procedure, according to which the Ombudsperson can appear as an Applicant before this Court:

Constitution of the Republic of Kosovo

Article 113
[Jurisdiction and Authorized Parties]

[…]
2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(3) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
[…]

Article 135
[Ombudsperson Reporting]

[…]

4. *The Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.*

Law on Constitutional Court

CHAPTER III
Special procedures

Article 29
[Accuracy of the Referral]

"1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.

2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;

3. A referral shall specify the objections put forward against the constitutionality of the contested act".

Rules of Procedure of the Constitutional Court

VII. Special Provisions on the Procedures under Article 113 of the Constitution

Rule 67
[Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act .

178. In the following, the Court will assess: (i) whether the Referral was filed by an authorized party, as set out in subparagraph (1) of paragraph 2 of Article 113 of the Constitution and paragraph 1 of Article 29 of the Law; (ii) the nature of the challenged act, (iii) the specification of the Referral, as required by paragraphs 2 and 3 of Article 29 of the Law and items (2) and (3) of Rule 67 of the Rules of Procedure; and (iv) if the Referral is filed within a period of six (6) months after the entry into force of the challenged act, as defined in Article 30 of the Law and item (4) of Rule 67 of the Rules of Procedure.

(x) Regarding the Authorized Party and the challenged act

179. The Ombudsperson, pursuant to Article 113.2 (1) of the Constitution is authorized to raise before the Court the issue of compliance with the Constitution of (i) laws; (ii) decrees of the President; (iii) decrees of the Prime Minister; and (iv) Government regulations. Article 29 of the Law specifies that the Ombudsperson is an authorized party before the Court and Rule 67 of the Rules of Procedure refers to the respective articles, cited above, of the Constitution and the Law.

180. In terms of the circumstances of the present case, the Court notes that the Ombudsperson, in his capacity as Applicant, before the Court challenges the constitutionality of Law No. 06/L-111 on Salaries in Public Sector, namely a “law” approved by the Assembly.

181. Therefore, the Court finds that there is a Referral before the Court by the Ombudsperson, who based on the above-mentioned Articles of the Constitution, the Law and the Rules of Procedure, is a party authorized

to bring before the Court, *inter alia*, the issue of compatibility of "*laws*" with the Constitution. Therefore, the Ombudsperson is an authorized party and challenges an act which he has a constitutional authority to challenge.

(xi) Regarding the specification of the Referral and specification of the objections

182. The Court recalls that Article 29 of the Law and Rule 67 of the Rules of Procedure stipulate that the Referral raised in the context of Article 113.2 (1) of the Constitution must specify (i) whether the entire of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution; and (ii) specify the objections raised against the constitutionality of the challenged act.

183. With regard to the first criterion of specification of the Referral, the Court notes that the Ombudsperson challenges the constitutionality of the Law on Salaries in its entirety, alleging that it is not in accordance with paragraph 2 of Article 3 [Equality Before the Law], Article 4 [Form of Government and Separation of Power], paragraph 1 of Article 7 [Values], Article 10 [Economy], Article 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 24 [Equality Before the Law], Article 46 [Protection of Property], Article 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State] , paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], Article 119 [General Principles], paragraphs 1 and 2 of Article 142 [Independent Agencies], Article 130 [Civil Aviation Authority] of the Constitution; Article 1 (Protection of Property) of Protocol no. 1 of the ECHR and paragraph 2 of Article 23 of the UDHR. In addition to challenging the constitutionality of the challenged Law in its entirety, the Ombudsperson also challenges in particular the constitutionality of the following articles of this Law on Salaries: Articles 4.4; 4.5; 5.5; 6.4; 7.5; 8; 8.3; 9.5; 14; 14.4; 15.4; 17.4; 18.2; 19.4; 20.5; 21.8; 22.5; 23.5; 25.3; 26.2; 29; 33, claiming that the latter are incompatible with the constitutional principles of *"separation of powers"*.

184. Therefore, the Court finds that the Ombudsperson has specified that he challenges the act in its entirety and that he has presented his objections regarding the complete unconstitutionality of the challenged act.

185. However, the Court also notes that, in addition to the allegations of the constitutionality of the Law on Salaries in its entirety and in particular aspects regarding the constitutional principle of separation of powers, the Ombudsperson has also forwarded to the Court: (i) thirty five (35) complaints of various institutions and entities interested in the constitutionality of the challenged Law; and, (ii) some files and requests received by the Ombudsperson from several trade unions, municipalities and educational institutions (see paragraph 197 of this Judgment reflecting communications with the Ombudsperson regarding these documents; as well as paragraphs 71-108 and 110 of this Judgment which reflects the essence of the 35 complaints in question).

186. In this regard, the Court first recalls that on 23 January 2020, the Ombudsperson forwarded to the Court several requests addressed to the Ombudsperson Institution - relating to a request by several unions for the revocation of the interim measure decided by the Court regarding the Law on Salaries. The Ombudsperson forwarded those letters to the Court, for the notification of the Court, without specifying and clarifying what he requests from the Court. Consequently, through an official letter (see paragraph 16 of this Judgment), the Court has already notified the Ombudsperson that *"the only party in case KO219/19 is the Ombudsperson Institution, as a party that has filed a referral with the Constitutional Court requesting a thorough assessment of the constitutionality of the said Law and its entire suspension"* and that all other parties *"including the aforementioned trade unions [...]may only have the status of an interested party but not a "party" within the meaning of the aforementioned provisions of the Rules of Procedure* [talking about authorized parties]."

187. The Court further clarified to the Ombudsperson that the grounds of all documents, requests or complaints submitted to the Ombudsperson Institution should first be examined by the Ombudsperson Institution itself and the latter should "*decide what step want to take in relation to those requests",* always taking into account the constitutional competencies of this Institution to challenge the acts before this Court. If the Institution of the Ombudsperson considers that any active action should be taken in relation to the requests/ complaints it receives, then the Ombudsperson *"must file a specific and reasoned referral, in accordance with the relevant constitutional and legal provisions, and with the necessary clarifications what concrete action is required to be taken by the Constitutional Court."* Finally, in the letter addressed to the Ombudsperson, the Court emphasized that: "*to set the Constitutional Court in motion, it is not sufficient to simply forward*

the requests of other interested parties without the necessary clarification regarding the documents and files submitted to the Court".

188. The same logic and line of reasoning is applied by the Court for 35 individual complaints submitted to the Ombudsperson (for his assessment) - and then forwarded to the Court by the Ombudsperson as part of the case file KO219/19. Regarding these individual complaints of various institutions and entities, the Ombudsperson requests the Court to *"assess whether the challenged Law affects the legitimate interests of these complainants",* without accurately specifying the objections and his position regarding these complaints.

189. In this respect, the Court clarifies that the Ombudsperson constitutional competence to challenge, *inter alia*, "laws" of the Assembly through Article 113.2 (1) of the Constitution - does not mean that the Ombudsperson can simply forward to the Constitutional Court the complaints submitted for assessment to the Ombudsperson, with the request that the Constitutional Court assess whether or not there is a violation of the Constitution. On the contrary, any complaint or request that the Ombudsperson decides to support in order to challenge a law or other act before the Constitutional Court - must be justified in such a way as to clearly understand the objection, position and request of the Ombudsperson to the Constitutional Court. On the contrary, namely, the mere forwarding of complaints or requests by the Ombudsperson to the Court without relevant reasoning, could mean that the Ombudsperson can simply serve as a mediator who forwards to the Court for assessment the requests of third parties without the obligation to justify and argue the objections of the constitutional level, but to justify and substantiate the same. Such a scenario is clearly not the purpose of the constitutional competence provided for in Article 113.2 (1) of the Constitution for the Ombudsperson. In fact, the purpose of this competence is to enable the Ombudsperson to exercise his constitutional role to *"monitor, defend and protect the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities"* (see Article 132.1 of the Constitution) - challenging the constitutionality of a law of the Assembly or other act under the jurisdiction provided by Article 113 of the Constitution.

190. Consequently, in assessing the constitutionality of the challenged Law, the Court will focus only on the specified and substantiated allegations and objections of the Ombudsperson regarding the unconstitutionality of the challenged Law, by not entering an individual assessment of 35 complaints submitted to the

Ombudsperson and forwarded to the Court without any supporting arguments about the position of the Ombudsperson on those complaints.

191. Having said that, the Court finds that the Applicant before the Court challenges the Law on Salaries in its entirety, and consequently, the Applicant's Referral (i) specifies the challenged act which it considers to be contrary to the Constitution; and (ii) specifies the objections raised regarding the constitutionality of the challenged act in terms of separation of powers, legal certainty, equality before the law and protection of property - as established in Article 29 of the Law and Rule 76 of the Rules of Procedure.

(xii) Regarding the deadline

192. The Court recalls that Article 30 [Deadlines] of the Law and Rule 67 (4) of the Rules of Procedure stipulate that the Referral submitted based on Article 113.2 (1) of the Constitution must be filed within a period of 6 (six) months after the entry into force of the challenged act.

193. In this context, the Court notes that the challenged Law entered into force on 1 December 2019, while it was challenged in the Court on 5 December 2019, and consequently, it was submitted to the Court within the time limit set out in the abovementioned provisions.

(xiii) Conclusion regarding the admissibility of the Referral

194. The Court finds that the Applicant: (i) is an authorized party before the Court; (ii) challenges an act which he has the right to challenge; (iii) has specified that he challenges the challenged Law in its entirety; (iv) has filed constitutional objections against the challenged act; and, (v) has challenged the act within the prescribed time limit.

195. Therefore, the Court declares the Referral admissible and will further examine its merits.

MERITS OF THE REFERRAL

I. Introduction

196. The Court first recalls that the Applicant, namely the Ombudsperson, challenges the constitutionality of the Law on Salaries, claiming that the latter is not in accordance with paragraph 2 of Article 3 [Equality Before the Law], Article 4 [Form of Government and Separation of

Power], paragraph 1 of Article 7 [Values], Article 10 [Economy], Article 21 [General Principles], paragraph 1 of Article 22 [Direct Applicability of International Agreements and Instruments], Article 23 [Human Dignity], Article 24 [Equality Before the Law], Article 46 [Protection of Property], Article 55 [Limitations on Fundamental Rights and Freedoms], paragraphs 3 and 7 of Article 58 [Responsibilities of the State], paragraph 2 of Article 102 [General Principles of the Judicial System], paragraph 1 of Article 109 [State Prosecutor], Article 119 [General Principles], paragraphs 1 and 2 of Article 142 [Independent Agencies], Article 130 [Civilian Aviation Authority] of the Constitution, Article 1 Protection of property) of Protocol No. 1 of the ECHR, and paragraph 2 of Article 23 of the UDHR.

197. The Court also recalls that the Applicant, namely the Ombudsperson, in addition to his allegations relating to: (i) the separation of powers; (ii) rule of law and legal certainty; (iii) equality before the law; and, (iv) the protection of property, has submitted as part of the case file KO219/19 thirty-five (35) individual complaints submitted to the Ombudsperson Institution by various institutions and entities interested in the constitutionality of the challenged Law. Also, the Ombudsperson has forwarded to the Court, for the information of the latter, some requests/files that he has received from various trade unions. Regarding all these, in the part of the admissibility assessment, the Court has already concluded that the Ombudsperson has not clarified his position and that any referral submitted to the Court must be justified on the basis of constitutional objections and specify what specifically requires from the Court. Consequently, the Court has already concluded that the complaints in question, although considered as part of the file, in the absence of a reasoning and position regarding them by the Ombudsperson, ca not enter their assessment, one by one. The complainants in question are not authorized parties before this Court; whereas, the Ombudsperson did not justify nor express his position regarding those complaints submitted to the Court. The latter, for the rest and priority of the Ombudsman's referral - which is mainly related to allegations of violation of the principle of "separation of powers", has already confirmed that the Referral submitted by the Ombudsperson meets all the admissibility requirements for review on merits.

198. Having said that, the Court notes that the scope of this Referral and respectively the constitutional issue contained in this Judgment is the compatibility with the Constitution of the challenged Law, namely the assessment of whether the latter violates the principle of separation of powers guaranteed by Articles 4 and 7. in conjunction with Articles 102, 108.1, 109, 115 of the Constitution, not respecting the

constitutional guarantees of one branch of power, namely the judiciary; and, not respecting the constitutional guarantees of the Independent Institutions reflected in the relevant articles of Chapter XII of the Constitution.

199. For the purpose of assessing the constitutionality of the challenged Law in the light of allegations and objections for violation of the principle of "separation of powers", the Court will first present: (i) the substance of the Ombudsperson allegations; (ii) the substance of the MPA objections; (iii) the substance of the responses and comments of the Ministry of Finance and Transfers; (iv) the general principles applicable to the circumstances of the present case derived from the respective articles of the Constitution and the case law of the Constitutional Court in Judgments KO73/16 and KO171/18; answers received from the Venice Commission Forum; Relevant Opinions of the Venice Commission together with other case law suggested by the Venice Commission Liaison Office; and (v) the application of the principles in question in the circumstances of the present case where the "Response of the Court" regarding the constitutionality of the challenged Law will be presented.

200. The Court will also address the issue of (i) other Applicant's allegations of unconstitutionality of the challenged Law; (ii) the interim measure; and, at the very end, present (iv) the "Conclusions of the Court" and (iii) the relevant "enacting clause".

201. Before addressing the abovementioned issues, the Court deems it necessary to emphasize an important fact regarding the referral under review. This has to do with the fact that the act challenged by the Ombudsperson, in addition to having an effect on about 80,000 (eighty thousand) employees receiving salaries from the state budget, the same has an effect on all judges of the Constitutional Court. In this respect, aware of the effect of the challenged act, the Court recalls the general international principles that in cases where the entire body of the Constitutional Court is affected in the same and equal way by the act which it must assess, it is impossible to exclude all judges as there would be no other alternative authority left that could assess the constitutionality of a particular act. In this regard, it should be noted that the possibility of exclusion of judges should not result in the inability of the Court to reach a decision. It must be ensured that the Constitutional Court, as the guarantor of the Constitution, continues to function as a democratic institution. The Venice Commission has already stated that: "The authorization of the Court derives from the necessity to make sure that no law is exempt from constitutional review, including laws that relate to the position of judges".

Consequently, the Court recognizes the fact that it is affected by the challenged Law but that there is no other authority in the Republic of Kosovo that can assess the constitutionality of the challenged Law. (see Opinion no. 524/2009 of the Venice Commission on the Law on the Cleanliness of the Figure of High Functionaries of Public Administration and Elected Persons in Albania, approved by the Venice Commission at the 80th Plenary Session, paragraph 142 (Venice 9-10 October 2009); see *mutatis mutandis,* case no. KI108/16 Applicants, Bojana Ivković, Marija Perić and Miro Jaredić, *Request for constitutional review of the Decision No. 2016-COS-0488, issued by the Acting Head of the European Union Rule of Law Mission in Kosovo, dated 22 July 2016*, Resolution on Inadmissibility of the Constitutional Court of the Republic of Kosovo, of 16 November 2016, paragraph 34).

II. Compliance of the challenged Law with the principle of "separation of powers" and of "legal certainty", namely Articles 4, 7, 102, 108.1, 109, 115 of the Constitution and the respective Articles of Chapter XII of the Constitution

The substance of the Applicant's allegations

202. The Court recalls that essentially with regard to the separation of powers, the Applicant alleges that the Law on Salaries is unconstitutional for the following reasons:: (i) *"does not properly ensure the separation of powers"*, as defined by Article 4 of the Constitution because even in matters of salaries the principle of separation of powers must be preserved; (ii) does not make a clear distinction between the three powers which are separate and balanced among themselves and between the independent institutions which are expressly established as such by the Constitution; (iii) makes an unconstitutional interference with the principle of separation of powers due to the fact that the challenged Law has given *"the right to issue sub-legal acts only to the Government and in certain cases to the Assembly*", thus ignoring the constitutional requirement to respect the principle of separation of powers; (iv) is unconstitutional because the legal regulation according to which only the Government, and in certain cases the Assembly, can issue sub-legal acts for all other public institutions, which *"in addition to having an impact on organizational, functional and financial independence, it also interferes with the control and balancing mechanism, which is the guarantor of the democratic functioning of the state";* (v) *"applies the same criteria"* for all public authorities, institutions and other bodies in the Republic of Kosovo *"regardless of the order and separation of*

powers in accordance with the Constitution and the specifics of the constitutional status of public sector entities"; (vi) violates the principle of separation of powers as it *"does not take into account the fact that many institutions, in particular independent institutions, have their own laws that contain specific provisions, which specifically regulate the rights and obligations of the employees of these institutions";* (vii) according to Chapter XII of the Constitution *"The Constitution and relevant laws require guarantees for the adequate treatment of independent branches of power, and, moreover, require guarantees for institutional, organizational and financial independence for the independent institutions defined by Chapter XII of the Constitution, as well as for the Constitutional Court itself"* – the principles, according to the Ombudsperson, have not been respected.

203. Therefore, the Applicant requests the Court to declare the challenged Law unconstitutional in its entirety.

The essence of the MPA objections

204. The Court recalls that the substance of the MPA's objections regarding the separation of powers consists in arguments that the Law on Salaries is not unconstitutional for the following reasons: (i) The Ombudsperson did not disclose how the issue of salaries should be regulated and did not give a single indication of where the violation of the Constitution by the challenged Law was committed; (ii) that this case cannot be taken as the similar with case KO73/16, because in the latter the Court has assessed the constitutionality of an Administrative Circular and not a law adopted by the Assembly which *"homogeneously aims to establish rules for the management of public money regarding the salaries of the functionaries and public officials";* (iii) the Constitution stipulates that the Assembly exercises legislative power so that with the issuance of the challenged Law, the Assembly has exercised its constitutional mandate; (iv) there are no constitutional or legal obstacles for the purpose of public interest to regulate the legal environment for public sector salaries with the new legislation; (v) in accordance with the case law of the ECtHR, it is not within the scope of the Constitutional Court to replace the public policies set by the legislator and that the principle of separation of powers obliges the Court to respect the setting of policies by the legislator; (vi) the legislator, namely the Assembly, due to its position and democratic legitimacy is in a better position than the Court to determine and advance the economic and social policies of the country; (vii) the three central powers must be exercised not only independently but also in a balanced way and that this is achieved

through the constitutional solutions that guarantee mutual control and sufficient balance among powers, without violating and interfering with the competencies of one another; (viii) the Constitution does not stipulate how salaries will be determined for judges (or any other institution) nor the elements that make up the salary, but that the Assembly in regulating these relations is obliged to respect the requirements established in the Constitution, especially those deriving from the principles of the rule of law and those that protect constitutional values; (ix) when it comes to guarantees of the material independence of judges, the legislative is particularly obliged to respect the basic constitutional principle of separation of powers as one of the elements of the rule of law; (x) while the principle of separation of powers determines the independence of the three governing powers, the principle of controls and balances determines their interdependence so that the three governing powers cannot act in isolation from each other; (xi) their interdependence, in addition to constitutional provisions, is also defined through the principles of cooperation, coordination, check and balance.

205. Therefore, the MPA requests the Court to declare the challenged Law constitutional in its entirety.

The essence of the answers and comments of the Ministry of Finance and Transfers

206. The Court recalls that the Ministry of Finance and Transfers answered to 7 questions of the Court, thus submitting some of the documents and comparisons requested by the Court (see paragraphs 23 and 24 of this Judgment for questions of the Court; paragraphs 155-175 of this Judgment for responses received). In essence, in the responses submitted to the Court, the Ministry of Finance and Transfers stated the following: (i) notwithstanding the positions/categories defined in the broadest sense in the challenged Law, *"the difficulty of determining the salary for the positions which are not directly undefined is evident";* (ii) for around **42%** of employees from the current payroll is required prior classification for determination of salary and given that **not for all positions the salary is known**, the second additional document requested by the Court cannot be provided at this stage, as such a document with the list of all employees by position could not be compiled for the above reasons, but the same can only be provided after the realization of the process of classification and reorganization of institutions; (iii) in response to the Court's question as to what positions were exactly excluded from the challenged Law, the Ministry of Finance stated that with the commencement of the implementation of the Law from the state

budget all positions will be paid in Annex no. 1 of the challenged Law, except for the exemptions for the judiciary and the PAK (until 2022) and the general provision of Article 1, sub-paragraph 1.1 which stipulates that: "*the system of salaries and remunerations for Public Officials and Functionaries who are paid from the state budget, excluding"* Kosovo Security Force (KSF) and the Kosovo Intelligence Agency (KIA); (iv) salaries for public officials and functionaries are set by Law (directly or indirectly) and cannot be set by sub-legal act - however *"sub-legal acts have a wide margin to set specifics and criteria for this indirect definition*"; (v) for all positions (about 42%) that are not direct positions, the challenged Law *"authorizes the Government by sub-legal act to approve the applicable classes, special administration groups and others as described below, which are subject to the process of classification and reorganization, which will ultimately result in an appropriate salary for each employee*", based on Annex 1 of the challenged Law; (vi) the challenged Law in Annex no. 1 defines two salary determination systems; (vii) The first system, is **direct determination of salaries** for positions which by nature are separate positions, e.g. president, minister, deputy, doctor, etc. and since these positions are unique and scanty in volume it is estimated that they should be defined directly by law without the need for a classification process. However, there have been exceptions to this rule, when civil service positions are defined as direct positions, although they are not unique (for example some of positions no. 79, 92, 93 in the Civil Service). The same happens in the Assembly of Kosovo where positions from 109-132 are regulated directly by Law. What are the positions defined directly we have explained in tables A and B in Excel format on CD. (Clarification: these tables are accessible to the Court); (viii) The second system, is **indirect determination of salaries** which means that by the challenged Law *"only the main classes are assigned so a classification process is needed"*. This system applies mainly to the salaries of civil servants where Article 5.3 of the challenged Law stipulates that *"Classification of a specific position of civil service according to paragraph 2 of this Article is done based on the rules for evaluation and classification of job positions, according to the provisions for classification of positions of civil service in accordance with the legislation on public official. The class to which a certain position belongs is determined explicitly in the regulation on internal organisation of the institution adopted according to the Law on Organisation and Functioning of State Administration and Independent Agencies"*. From this paragraph we can understand that to classify a certain position which is defined according to Annex no. 1 (paragraph 2 of Article 5) of the challenged Law, certain legal conditions must be met: (1) The classification and evaluation of a certain position is done according to the evaluation and

classification of the rules set out in the legislation on the public official; and (2) The class belonging to a certain position should be explicitly defined in the regulation on the internal organization of the institution according to the Law on the Organization and Functioning of the State Administration and Independent Agencies; (ix) Article 33.5 of the Law on Salaries authorizes the Government, upon the proposal of the MPA, by sub-legal act to approve: (1) the classes applicable to each category and the designations in each class; (2) special administration groups; (3) the general job description for each category, class and group, including general admission requirements for each category, class and group; and (4) the detailed rules, procedures, standards, and methodology for evaluating and classifying a particular position in a particular class or group under this Article; (x) the sub-legal act referred to in point above was stated to have been prepared by the MPA and contains all the elements set out in this paragraph including the methodology for the evaluation of a particular position, but the same could not be approved by the Government due to the suspension measure imposed by the Constitutional Court on the Law on Public Officials; (xi) The challenged Law is organically related to the Law on Public Officials and the Law on the Organization and Functioning of State Administration and Independent Agencies, therefore the classification of jobs should be done with this logic; the law can be fully implemented only after the abovementioned conditions are met; (xii) out of a total of eighteen (18) bylaws that would have to be approved by the Assembly and the Government so far only one (1) sub-legal act has been adopted; (xiii) even this single sub-legal act that has been adopted, was in fact approved without assessing the budgetary impact of the budget department in the Ministry of Finance and Transfers, as required by applicable public finance legislation and the Ministry of Finance was not a member of the working group; (xiv) the Assembly is responsible for the preparation of two sub-legal acts of the challenged Law; while eleven (11) other sub-legal acts were prepared by working groups and went through the stages of public consultation, but did not reach/could not be processed for approval to the Government because at that time the Government resigned and due to the suspension measure of the Constitutional Court against the challenged Law; (xv) The Ministry of Finance and Transfers emphasized that in the current situation it turns out that *"without having the regulation for classification as well as without carrying out the reorganization of the institutions* ***it is impossible to determine the salary for each employee****, thus, it is not possible to compile the list of salaries that would be disbursed by law for over 80 thousand beneficiaries*" [Clarification: The Court had specifically requested the Ministry of Finance and Transfers to submit two documents to the Court - a document showing current salaries and

another document showing what salaries would be like if the challenged Law were to be implemented].

207. Consequently, in the end the Ministry of Finance and Transfers emphasized that the Court should consider the following four aspects: (i) even if the challenged Law ***"is in force, the latter could not be fully and immediately implemented"***; (ii) "*based on a preliminary estimate of the cost of the Law (estimate that has changed since the first draft of the Law until approval by the Assembly), with the level of coefficients and the value of the coefficient determined by this law (239), the salary invoice according to the definition of Law no. 03/L-048 on Public Financial Management and Accountability, supplemented and amended* ***will exceed the allowed limit*** *(fiscal rule of salaries), Article 22/C Restriction of budget increase for salaries and allowances), which would constitute a breach of the fiscal rule, with reflections on the deficit (as ongoing current expenditures) as well as the need for continued deficit financing. There are also a series of allowances that the Law provides, and that would further aggravate the situation regarding the financing of this Law. In this context, it should be borne in mind that Article 81 of the Law on Public Financial Management and Accountability, has provided a provision of its legal superiority over other laws, in matters related to the management of public money and we consider that it should be assessed whether it is in accordance with the principles set out for public money in Article 120 of the Constitution of the Republic of Kosovo;* (iii) *in view of the provisions of Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies, we notice horizontal provisions and the same criteria in the organization of the state administration, namely the Office of the Prime Minister, ministerial systems (ministry, executive agency and administration of public services) and regulatory agencies. Specifically, this Law on Ministerial Systems prescribes in the same way the criteria for establishing executive agencies, departments or divisions. On the other hand, the different drafting of salaries for the heads or staff of these structures in some cases according to the provisions of the Law, among others, we consider it should be assessed in accordance with the principles set out in Article 120 of the Constitution of the Republic of Kosovo regarding public money;* (iv) *we also consider that a similar assessment should be made for some categories of financial officials relevant to the financial management and control process (e.g. internal auditors) who do not have special treatment and are not defined as separate positions*".

General principles

208. To elaborate in detail the general principles relevant to the circumstances of the present case, the Court will further present: (1) the general principles under the Constitution of the Republic of Kosovo and the case law of the Constitutional Court in matters comparable to the constitutional issue of the circumstances of the present case; (2) responses received from the Venice Commission Forum; (3) Relevant Opinions of the Venice Commission and other decisions of the various courts - on the proposal of the Venice Commission.

Relevant principles according to the Constitution of the Republic of Kosovo and case law of the Constitutional Court

Relevant principles according to the Constitution of the Republic of Kosovo

209. Among the basic values embodied in the Constitution on which the constitutional order of the Republic of Kosovo is based, among others, are also "separation of powers" and "rule of law" (See Article 7 of the Constitution). The functioning of the democratic state in the Republic of Kosovo is based on the constitutional principle of separation of powers and checks and balances (See Article 4 of the Constitution). Based on Article 4 of the Constitution concerning the form of government and the separation of powers: (i) the Assembly exercises legislative power; (ii) the Government is responsible for implementation of laws and state and policies and is subject to parliamentarian control; and (iii) the Judiciary is unique and independent and exercised by courts. These three powers constitute the classic triangle of separation of powers. The relationship between the "three powers" is based on the principle of separation of powers and check and balance among them. Separation of powers as a fundamental principle of the highest constitutional level is embodied in the spirit of the Constitution of the country and as such is non-negotiable (see cases of the Court: KO72/20, Applicant *Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo, paragraph* 351; KO43/19, Applicant *Albulena Haxhiu, Driton Selmanaj and thirty other deputies of the Assembly of the Republic of Kosovo,* Judgment of 27 June 2019, paragraph 72; KO98/11, Applicant *Government of the Republic of Kosovo,* Judgment of 20 September 2011, paragraph 44).

210. The Constitution has dedicated a separate chapter to each of the three classical branches of the separation of powers. Legislative power is regulated through Chapter IV of the Constitution, entitled: *"Assembly of the Republic of Kosovo"*. Executive power is regulated through

Chapter V of the Constitution, entitled: *"Government of the Republic of Kosovo"*. Judicial power is regulated through Chapter VII of the Constitution, entitled: *"Justice System"*. The three above-mentioned chapters of the Constitution set out the general principles as well as the duties and responsibilities of each power. In addition, it provides for mechanisms of check and balance among them that form the core of how these powers should control and balance each other without creating any unconstitutional "interference", "dependence" or "subordination" between them that could potentially affect the independence of one or the other power. For example, the Assembly checks and balances the Government through a vote of confidence/no-confidence; the justice system holds "responsible" the Government but also the Assembly through the control of the legality and constitutionality of their decision-making, etc. The emphasis here is precisely on the term *"unconstitutional"* when it comes to interference, dependence and subordination between the three powers. This is due to the fact that it is well known that in order to perform their public duties, the powers in question do not operate in a vacuum and without any interaction between them. No doubt their actions affect other powers and that is perfectly normal. However, the logic of the principle of separation of powers is that such influence should in no way create an interfering or dependent or subordination relationship that could result in a loss of independence to act as a free and uninfluenced power. This is the essence of the constitutional balance that the Constitution has established and that is required to be maintained in any interactive instance between independent powers.

211. In addition to the three classical powers, a special place in the system of separation of powers has the Constitutional Court, as an institution responsible for the final guarantee of constitutionality at the national level; and the President, as a representative of the unity of the people and a guarantor of the democratic functioning of the institution (see Judgment KO72 / 20, paragraph 351). To both of these public institutions, the Constitutional Court and the President, has been dedicated by the Constitution a separate chapter, Chapters V and VIII, respectively - which describe their special status and competencies under the Constitution. Neither of these two institutions are part of the chapters of the classical separation of powers, but both are specifically listed in Article 4 of the Constitution which describes the "Form of Government and Separation of Power" at the level of the Republic of Kosovo. This constitutional solution deserves to be noted as a special part of the constitutional system of the Republic of Kosovo.

212. Furthermore, the Constitution has recognized a special and important status and role in the conduct of public state duties also to the Independent Institutions referred to in Chapter XII of the Constitution, which have been singled out as such not without reason. This chapter includes: (i) the Ombudsperson (Articles 132, 133, 134 and 135 of the Constitution); (ii) the Auditor- General of Kosovo (Articles 136, 137 and 138 of the Constitution); (iii) Central Election Commission (Article 139 of the Constitution); (iv) Central Bank of Kosovo (Article 140 of the Constitution); (v) Independent Media Commission (Article 141 of the Constitution); and (vi) Independent Agencies (Article 142 of the Constitution).

213. As an essential premise, it should be noted and clarified that none of these independent institutions referred to in Chapter XII of the Constitution are part of the classical powers defined under Article 4 of the Constitution. Having said that, there is no doubt that these institutions have a special status under the Constitution since the drafters of the latter have considered that a special Chapter with a special constitutional regulation should be dedicated to them. Reading the above provisions for each independent institution referred to in Chapter XII leads to the conclusion that they are not identical with each other in terms of public responsibilities and duties entrusted to them. Each of those institutions has its own specifics, depending on the public task entrusted to it. However, a common denominator of all the institutions referred to in Chapter XII is that they are independent institutions "in the exercise" of their public duties and that such a constitutional arrangement should be taken into account by all public actors at the level of Republic of Kosovo - in cases when legislative initiatives are created that can create "interference" within their independence at the constitutional level.

214. Unlike the institutions referred to in points (i), (ii), (iii), (iv) and (v) which are institutions established by the Constitution specifically; the Independent Agencies referred to in point (vi) "*are institutions established by the Assembly, based on the respective laws that regulate their establishment, operation and competencies*" (see, *mutatis mutandis*, Judgment KO171/18, paragraph 156). This difference needs to be evidenced as such what it is, for an important reason. This is because the five Independent Institutions referred to in points (i), (ii), (iii), (iv) and (v) were established as such on the occasion of the voting and entry into force of the existing Constitution by the legislator, namely the Assembly; whereas, the Independent Agencies were not established as such in the case of the voting of the existing Constitution by the legislator, namely the Assembly - but are agencies for the creation of which the Constitution gives the Assembly

the right to create and extinguish them, by law , depending on the needs that may arise in public and social life. In contrast to the fact that the Assembly may establish and extinguish "*by law*" Independent Agencies; the Assembly can never extinguish "*by law*" any of the five independent institutions mentioned above. Those five independent institutions were created by the Constitution and can be amended, modified, supplemented, only by the Constitution, through the amendment of the latter. This is the main difference between the Independent Institutions referred to in Chapter XII of the Constitution - which should be taken into account as such whenever actions are taken that affect them.

215. In this regard, it is important to emphasize that the word "Independent" referring to these institutions should not be understood as a constitutional competence to act in isolation and vacuum from other powers defined by the Constitution. The word "Independent" should be understood as a constitutional guarantee for the exercise and performance of public duties independently and uninfluenced, in terms of decision-making, by other powers. This does not mean that the Government and the Assembly cannot supplement and change the applicable legal regulations for the activity of these institutions - as long as it is amended in accordance with their guarantees of the constitutional level.

216. The Court recalls at the end, that all powers *"[...] without exception, be they part of the classical triangle of separation of powers, or other important part of the structure of the state, have a constitutional obligation to co-operate with each other for the common good and in the best interest of all citizens of the Republic of Kosovo. All these powers have the obligation to perform their public duties in order to implement the values and principles on which the Republic of Kosovo is built to function"* (see Judgment KO72/20, paragraph 353).

217. These public duties also include the obligation of each power, while performing its constitutional duties, to take care of respecting the independence of the power to which it creates "interference". The latter must be measured, controlled, balanced, and confirmed in advance, in *bona fide* terms, as "constitutional interference" before any action is taken to execute the intended interference - which could potentially be permissible. For example, the Government and the Assembly, although having the competence to propose and vote on laws, respectively, which could also affect the judiciary, as a third power; they [the Government and the Assembly] must ensure that during the drafting of their legal initiatives and until their finalization by a vote of the Assembly, the constitutional independence of the sister

power, namely the judiciary, is preserved. The Government and the Assembly must show the same care and sensitivity for the other state actors whom the Constitution has provided with constitutional guarantees of functional, organizational and budgetary independence. Guaranteeing and ensuring the constitutionality of the initiatives of the Government and the Assembly should be an essential part of the activity of these two powers.

218. The principle of legal certainty and that of predictability are inherent features of a law and an integral part of the constitutional principle of the rule of law. Legal certainty is one of the main pillars of the rule of law and requires, among other things, that the rules be clear and precise, and aim to ensure that legal situations and relationships remain predictable. Predictability first of all requires that the legal norm be formulated with sufficient precision and clarity, so as to enable individuals and legal entities to regulate their behavior in accordance with it. Individuals and other legal entities need to know exactly how and to what extent they are affected by a particular legal norm and how a new legal norm changes their previous status or status provided by another legal norm. Public authorities, when drafting laws, should take into account these basic principles of the rule of law - as important parts of the constitutional system of the Republic of Kosovo.

219. In light of the above, the Court will now recall its case-law in which, in fact, several times these general principles of separation of powers have already been emphasized. The case law of the Constitutional Court through which certain articles of the Constitution are interpreted is mandatory for all public institutions and individuals in the Republic of Kosovo. As such, in addition to the Constitution, the case law of the Constitutional Court, cited in this Judgment and in other decisions of the Court, must be embodied in any legal initiative that can be turned into national law.

Case law of the Constitutional Court - Judgments KO73/16 and KO171/18

220. The reasoning of the Court in case KO73/16 (see extensively paragraphs 61-96; while below cited only some of those paragraphs), which is directly relevant, at the level of principles, to the circumstances of the particular case - in terms of separation of powers and respect for the constitutional guarantees of institutional independence, emphasizes:

"61. As provided by Article 4 [Form of Government and Separation of Powers] of the Constitution, Kosovo is a democratic Republic based

on the principle of separation of powers and checks and balances among them. Accordingly the Assembly exercises the legislative power, the Government - the executive power and the judiciary - the judicial power. Outside them are the other state institutions, inter alia the Office of the Ombudsperson and the Constitutional Court.

62. The Court notes that the Office of the Ombudsperson and the Constitutional Court are granted with detailed and extensive constitutional regulation, compared to the other independent institutions according to Chapter XII. This is why the Court will deal more extensively with these two institutions, but underlines that the constitutional independence is as well and as equally applicable to the other independent institutions. The Court also notes that the other independent institutions have different mandate and authority, as stipulated by the Constitution, and the specificity of their constitutional status must be respected accordingly. It is the duty of the Government in its entirety to take into account this reasoning. [...]

65. As noted by the Court, the Applicant and the Constitutional Court are not part of the legislative, executive and the regular judiciary. The same applies for the other independent institutions enumerated in Chapter XII of the Constitution. [...]

87. The Court considers that the MPA approach that there must be put in place classification and categorization of jobs and salaries under the principle "equal pay for equal work" must be interpreted differently and applied in a differentiated manner with respect to the Applicant and the Court in particular. A technical and a unifying approach disregards their constitutionally defined role and authority and thus touches upon their independence accorded to them by the Constitution and further developed by their organic Laws and Rules of Procedure.

88. The personnel working in the Ombudsperson Institution and the Court have different work responsibilities compared to similar positions in other institutions and this explicit differentiation is reflected in their job descriptions and remuneration and is to be preserved.

89. Moreover, the functional and organizational independence of the Applicant [The Ombudsperson] *and the Court is invariably linked with, and entails their financial and budgetary independence according to the Constitution and the respective organic laws. The challenged Administrative Circular does not respect adequately, or to the necessary degree, their three-fold independence*

organizational, functional and financial and the specificity of the work of their staff.

[…]

97. The Court considers that the independent institutions envisaged in Chapter XII of the Constitution, and particularly the Applicant and the Court are situated outside of the three branches of the government, and as such, they are not and cannot be involved in the interplay of the division of power and checks and balances that characterizes the three branches of government. Accordingly they have a specific constitutional status that must be respected by the governing authorities.

98. The Court reiterates that the Applicant and the Court, in particular, assist the three branches of government in ensuring the rule of law, the protection of fundamental human rights and the supremacy of the Constitution, which makes them specialized and uniquely independent institutions.

100. The Court agrees that the Government has a constitutional prerogative and duty to be the policymaker of the State, including the classification and categorization of job positions. But the Court opines that it could not be expected that the staff of the constitutionally independent institutions should conform in an identical manner to the system of recruitment, job classification, categorization and remuneration provided for by a legal act of general nature of the Government, or any act of the executive branch, without first taking into due account the specificities and uniqueness of the institutions in question. Therefore the Court finds that the Administrative Circular in its entirety violates the provisions of the Constitution as stipulated in Chapter VIII [Constitutional Court] and Chapter XII [Independent Institutions].”

221. Reasoning of the Court in case KO171/18 (see extensively paragraphs 117-137; while below cited only some of those paragraphs), which is directly relevant, at the level of principles, to the circumstances of the present case - in terms of separation of powers and respect for the constitutional guarantees of institutional independence, emphasizes:

“144. The Court recalls once again that according to the Constitution and the special laws on the staff of independent constitutional institutions, the rules of civil service apply unless they do not violate their independence. This also means the laws that regulate the oversight of the implementation of these laws such as the challenged

Law. However, as it derives from the Constitution and the special laws, the independent institutions, in particular, the Applicant and the Court, are authorized to issue regulations, orders and other legal acts to regulate the specifics regarding the employment relationship of staff which differ from the general norms set by other laws, including the challenged Law, in such a way as to ensure their functional and organizational independence. These special norms should be respected by all institutions including the Board.

145. Therefore, the Court considers that, in the implementation of the challenged law, the functions and the specific authority of the independent constitutional institutions is to be recognized, inter alia, in the issuance and application of their internal rules to protect their independence as established in the Constitution and special laws, to the extent necessary to protect their organizational, functional and budgetary independence, as required by the principles outlined above, including the internal rules of these institutions and the specifics of the work of their staff.

146. The Court therefore concludes that the competencies of the Board envisaged by the challenged Law apply to the independent constitutional institutions, as long as this does not affect their independence guaranteed by the Constitution, and that this independence is reflected in the issuance of internal acts of these institutions, based on their competences foreseen by the Constitution and special laws, to protect their independence. [...]

157. The Court notes that the independent agencies established under Article 142 of the Constitution do not have the same status as that of the independent constitutional institutions expressly mentioned in Chapter XII of the Constitution. This is because the establishment, role and status of the independent constitutional institutions is expressly regulated by Chapter XII of the Constitution, due to the importance and the specifics of the constitutional powers they exercise. However the role, status and competencies of independent agencies are regulated by law approved by Assembly based on the criteria set forth in Article 142 of the Constitution.

158. Chapter XII of the Constitution does not authorize the Assembly of Kosovo to establish by law other independent constitutional institutions with the same status of independent institutions included in Chapter XII, but only independent agencies giving the powers established in Article 142 of the Constitution.

159. Therefore, the Court considers that the Board cannot be categorized as an independent institution under the Chapter XII of the Constitution."

Answers received from the Forum of the Venice Commission

222. As reflected in the proceedings before the Court, the latter addressed some specific questions to the Forum of the Venice Commission. The Court received a total of ten (10) responses, the content of which will be reflected below.

Contribution submitted by the Constitutional Court of Croatia

223. The Constitutional Court of Croatia noted that the regulation of the salary system in Croatia is such that the salaries of public officials are regulated by several laws. In this regard, they emphasized that: (i) The Law on the Rights and Obligations of State Officials regulates the salaries of state officials as follows: the President of the Republic of Croatia, the President and the Deputy President of the Croatian Parliament; Members of the Croatian Parliament; Prime Minister and Members of the Government of the Republic of Croatia (Ministers); President, Vice-President and Judges of the Constitutional Court of the Republic of Croatia; Chairman, Deputy Chairman and Members of the State Election Commission of the Republic of Croatia; state secretaries; General Director of Police; General Director of Tax Administration; General Director of Customs; The Auditor General of the State and his or her deputies; Secretary of the Croatian Parliament; Secretary General of the Republic of Croatia; Director of the Croatian Pension Insurance Institute; Director of the Croatian Institute for Health Insurance; Director of the Croatian Employment Institute; Chairman of the National Council for Minorities; state officials in the Office of the President of the Republic of Croatia, etc. Further, (ii) the Law on Salaries of Judges and Other officials of Judiciary regulates the salaries of judges (including court presidents), as well as prosecutors and deputy prosecutors. Finally, through (iii) the Law on Civil Servants regulates the salaries of civil servants employed in the central and local bodies of state power; local servants serving in local bodies and districts; public servants employed in public services financed by central bodies; and public servants serving in institutions funded by local state government bodies (nursing schools, libraries, museums, etc.).

Contribution submitted by the Federal Constitutional Court of Germany

224. The Federal Constitutional Court of Germany stated that the issue of salary is of great importance and as such belongs to the democratically elected legislature to decide on manner of regulation. Therefore, the salaries of civil servants and members of the judiciary are regulated by law. So far, in the response is stated, that the principle of separation of powers has not been an issue in the context of law on salaries. The Federal Constitutional Court applies a strict standard of review regarding the laws on the salaries of civil servants and members of the judiciary. The Federal Constitutional Court attaches great importance to the financial and personal independence of the individual member of the judiciary or individual civil servant. In a decision of 2015, the Federal Constitutional Court found that the independence of the judiciary must also be ensured by the salaries of judges. Recently, there do not appear to be any cases where salaries have been reduced for civil servants or members of the judiciary who were already in service. In 2018, the Federal Constitutional Court decided on the initial salary of civil servants and members of the judiciary. In order to consolidate the state budget, the Land of Baden-Württemberg reduced the initial salary of some groups of civil servants and members of the judiciary. The Federal Constitutional Court found that this was unconstitutional as it violated the principle of alimony. In addition to salary, special payments or salary suspension are also subject to review by the Federal Constitutional Court in case of dispute.

Contribution submitted by the Supreme Court of Mexico

225. The Supreme Court of Mexico explained that the "federal law of state workers" stipulates that the Executive, the Legislative and the Judiciary (Powers of Federation) will determine the levels of salaries for their workers. This means that each power, individually, can determine how much to pay their public servants. However, it should be noted that there are some constitutional limitations on the power to set the salaries of public servants. Under the Mexican Constitution, no public servant can receive a salary higher than that assigned to the President of Mexico nor equal to or higher than his superior in the hierarchy. The case law of the Supreme Court of Mexico has established that the principle of separation of powers has imposed three prohibitions: no interference, no dependency, and no subordination. In that way, none of the State powers can take actions that imply interference in the sphere of competencies of the other power, which would cause the dependence of one branch or which would claim the subordination of an autonomous body. The Supreme Court has also explained that the autonomy of public power does not mean exclusion from the legal system. In other words, the Supreme Court has recognized the right of the Legislative to regulate certain

aspects of autonomous bodies and other branches if the laws in question do not constitute interference, dependence and subordination.

Contribution submitted by the Constitutional Court of Moldova

226. The Constitutional Court of Moldova regarding the salary system of civil servants, explained, among other things, that the determination of differentiated salary levels for the section "Secretariat of the Constitutional Court", in relation to the sections of legislative and executive power, affects the principles of separation and cooperation of state power and equality defined by the Constitution. Also regarding the salaries of civil servants employed in the courts as well as for judges, the Constitutional Court explained how, in principle, the judiciary in the exercise of their duties benefit from the support of specialized workers, who guarantee the judiciary an institutional activity effective in the interest of the litigating party. Regarding the independence of the Constitutional Court, the Constitutional Court of Moldova explained that the Constitutional Court is a pillar of democracy and the rule of law, which contributes to the proper functioning of public power within the constitutional relationship of separation, balance, cooperation and check of state powers. To ensure the supremacy of the Constitution and the separation of powers, it is necessary for the Constitutional Court to exercise its function independently of any other public authority. One of the guarantees of the independence of the Constitutional Court is the provision of functional and financial independence of the scope of constitutional jurisdiction. Regarding the reduction of salaries in the public sector, it was explained that the reduction of salaries can occur only under conditions of an objectively existing economic and financial crisis, officially recognized, in case of correct reduction of all or most of the salary categories of budget employees, in accordance with the principle of solidarity. In addition, even in these conditions, the legislator is obliged to take into account the features and importance of the judicial system, so as not to affect the principle of independence of judges.

Contribution submitted by the Constitutional Court of Slovakia

227. The Constitutional Court of Slovakia explained that three conditions must be met at the same time in order for the salary reduction to be constitutional: (i) the reduction is sufficiently justified by the country's difficult economic situation, is proportionate to the economic situation and does not jeopardize the standard living of judges; (ii) the reduction is temporary and lasts only as long as necessary; (ii) the

legislator has not acted arbitrarily in enforcing the reduction. The Constitutional Court of Slovakia further explained that the salary of judges is not expressly regulated by the Constitution but that the principle that the salaries of judges may be reduced only in exceptional circumstances and only to the extent necessary and the time required can be concluded from the various constitutional principles such as separation of powers, equality of branches of state power, judicial independence and proportionality.

Contribution submitted by the Constitutional Court of Poland

228. The Constitutional Tribunal of Poland explained that in its case law it has been emphasized that the principle of separation and balance between the legislative, executive and judicial branches does not imply the isolation of powers and the absence of mutual dependence. This derives from the principle of prohibition of interference in the sphere of powers that fall within the specific competence of each of the branches of state power. Therefore, the formation of the salary system of judges by the legislative branch violates the constitutional principle of the three branches and the balance of power, insofar as the system in question would establish a correlation between the salary in question and the exercise of the exclusive power of the courts. The Tribunal further explained that it had outlined the limits that the legislative and executive branches could not exceed in determining the manner of judges' salary, which are: (i) the remuneration of judges should be determined in a manner which excludes any discretion - in terms of this professional group as a whole, by the executive branch, but also in terms of individual judges, whose salary level cannot be based on the individual evaluation of their work; (ii) the amount of a judge's salary - including a judge who has just started his or her service as a district court judge - should significantly exceed the average salary in the public sector; (iii) in the long run, judges' salaries should tend to increase, not to a lesser extent than the average salary in the public sector; (iv) in the event of a difficult financial situation of the State, the salary of judges should be protected against changes with excessive damage to a higher degree than the salary of all officials and other public sector employees; (v) it is unacceptable, from a normative point of view, to reduce the amount of a judge's salary, except in situations of exceeding the national debt limit.

Contribution submitted by the Supreme Court of Sweden

229. The Supreme Court of Sweden explained that like other courts in Sweden, the Supreme Court receives an annual fund from the Swedish State Court Administration (SSCA). SSCA is an independent state

authority that reports to the Government and is responsible for the overall coordination of matters relating to the Swedish courts. In other words, SSCA presents the draft budget to the Government for each year, which then submits a proposal to Parliament. The latter makes the final decision regarding the budget. SSCA distributes the allocated funds after the dialogue with the courts. The final word on the individual salaries of judges remains with the president of the respective court. The salaries of high-ranking judges, such as Supreme Court judges, are set by the Director General of the SSCA.

Contribution submitted by the Constitutional Court of Malta

230. The Constitutional Court explained that in Malta the salaries of judges are protected by the Constitution and can in no way be reduced.

Contribution submitted by the Constitutional Court of North Macedonia

231. The Constitutional Court of North Macedonia explained that there is no constitutional provision that explicitly authorizes the Assembly to regulate public sector salaries. However, the Constitution of North Macedonia grants the Assembly the general authority to adopt laws in order to regulate relations in all spheres of social life. In addition, paragraph 5 of Article 32 of the Constitution of North Macedonia stipulates that the exercise of employees' rights and their status are regulated by law and collective agreements. In February 2014, the Assembly approved the Law on Public Sector Employees, which entered into force in February 2015 where Article 1 states: "This law regulates the general principles, job classification, registrations, types of employment, etc. . general rights, duties and obligations, movement, as well as other general issues related to public sector employees. Article 2 defines the scope of this law: (i) public sector employers (hereinafter: institutions), in accordance with this law, are: bodies of state and local authorities and other state bodies established in accordance with the Constitution and law; and institutions that carry out activities in the field of education, science, health, culture, labor, social protection and child protection, sports, as well as other activities of public interest defined by law, and organized as agencies, funds, public institutions, and public enterprises established by the Republic of North Macedonia or the municipalities, the City of Skopje, as well as the municipalities in the City of Skopje; (ii) public sector employees are persons who are employed by any of the employers referred to in paragraph 1 of this Article; and (iii) officials, respectively, persons who have been mandated to perform a function in the presidential, parliamentary or local elections, persons who have been given the mandate to hold an office in the executive or judicial

authority, by election or appointment made by the Assembly of North Macedonia or by local government bodies, as well as other persons who, in accordance with the law, are elected or appointed to perform a task by the holders of legislative, executive or judicial authority, within the meaning of this law , are not considered public sector employees".

Contribution submitted by the Constitutional Court of South Africa

232. The Constitutional Court of South Africa explained that in the "*Van Rooyen*" case it assessed the impact of salaries on judicial independence and separation of powers. The Constitutional Court of South Africa reviewed Article 12 of Law no. 90 of the 1993 Magistrates, which deals with the determination of the salaries of magistrates, and which requires the Minister of Justice to determine the salaries of magistrates in consultation with the Magistrates Commission and with the consent of the Minister of Finance. The High Court found that this provision allowed the salaries of magistrates to be determined by the executive. This, together with the fact that there are no guarantees against reduction of salaries, meant that magistrates could be open to manipulation. Therefore, the High Court found that Article 12 was contrary to the Constitution. However, the Constitutional Court dismissed this decision. It considered that the Magistrates Commission is a diversified body, composed of members of the legislature, the executive, magistrates and persons from the legal profession, and is chaired by a judge. Furthermore, although magistrates do not have the same constitutional protection from salary cuts as judges, in that their salaries may be reduced by Parliament, the Minister of Justice requested to consult with the Magistrates Commission and the Minister of Finance before determining their salaries. This means that, by law, magistrate salaries must be reviewed at regular intervals. Therefore, the Court decided that, if care is taken to protect against possible abuse of power, Article 12 is not contrary to judicial independence. Moreover, in case "*De Lange*", the Constitutional Court noted that judicial independence requires the security of the mandate and a fundamental degree of financial security from arbitrary interference by the executive. However, the Constitutional Court found that "it was unconvinced" that the criterion of "financial security from arbitrary interference by the executive" was equally valid for public service officials. The independence of certain institutions is determined by the Constitution itself. These include the judiciary, the prosecuting authority, and state institutions that "strengthen constitutional democracy in the Republic" such as the Public Defence, the South African Human Rights Commission, and the Auditor General. The independence of other institutions, such as the

Independent Police Investigation Directorate, the Judicial Inspectorate for Correctional Services, and the Priority Crime Investigation Directorate, is guaranteed by legislation, or is considered to be implied by the Constitution. Therefore, any interference with the independence of these institutions (budgetary or otherwise) would be unconstitutional. However, the remuneration and categorization of the job position in other public institutions, whose independence is not explicitly or implicitly guaranteed by the Constitution, can be controlled and limited by Parliament. After all, the Parliament has the right to enact any legislation that is in line with the Constitution, and accordingly is empowered to regulate salaries, budgets and job categorization to the extent permitted by the Constitution.

Conclusion regarding the answers of the Venice Commission Forum

233. In light of the responses received from the Venice Commission Forum, the Court concludes that the common denominator of the practice elaborated above is that: (i) there is no single possible system of salary regulation in the public sector ; (ii) most countries regulate salaries through different laws and at the same time apply different methods by regulating this issue either through specific laws for specific sectors or through some more concentrated legal regulation; (iii) the Assembly, as a legislative body, has the organic competence and right to issue any kind of legislation on the regulation of salaries in the public sector, provided that it is in accordance with the Constitution and constitutional principles of the respective country; (iv) the Assembly, as a legislative body and as a representative of the elected people, is in the best position to adopt laws aimed at regulating relations in all spheres of social life, including the salary sector; (v) judicial independence requires a fundamental degree of financial security from arbitrary interference by the executive or other branches of power; (vi) the principle of separation of powers and balance between the legislative, executive and judicial branches does not imply the isolation of powers and the absence of mutual dependence; however, it means avoiding situations under which unconstitutional "interference", "dependence" or "subordination" can be created between independent powers; (viii) the creation of a conditional correlation between salary and the exercise of the power of the courts is a violation of the constitutional principle of separation of powers; (ix) the reduction of the salaries of the judiciary can occur only under conditions of a pronounced economic and financial crisis and which, moreover, must be officially recognized as such; (x) ensuring functional and financial independence is part of the necessary

constitutional guarantees; (xi) the principle of separation of powers means that there should be no interference, dependence or subordination between the powers and that none of the powers can take actions that imply interference in the sphere of competences of the other power, which would potentially cause unconstitutional dependence of one branch to another.

Relevant opinions of the Venice Commission and other decisions of the various courts recommended for consideration by the Court

234. The Court recalls that all the Opinions of the Venice Commission and the decisions of the various European courts, regional and wider, which will be elaborated below are documents recommended by the liaison officers of the Venice Commission at the request of the Court addressed to the latter. (See "Proceedings before the Court" which reflects the communication of the Court with the Venice Commission and the latter's recommendations to the Court, paragraphs 12 and 15-19 of this Judgment). The Court has analyzed all the suggested documentation and in the following will present all the Opinions and decisions relevant to the present case.

Opinion CDL-AD(2010)038, "Amicus curiae brief" for the Constitutional Court of North Macedonia on amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials approved by the Venice Commission at its 85th plenary session, 17-18 December 2010

235. The abovementioned opinion was issued by the Venice Commission on issues related to the salary and remuneration system of elected and appointed officials in Macedonia as well as judicial officials (judges of regular courts, public prosecutors, members of the Judicial Council and the Council of Prosecutors). The Venice Commission was asked to answer two questions, namely: (i) whether the rule or prohibition on reducing the salaries of judges is valid in times of crisis, and (ii) if so, is this prohibition also valid for judges of the Constitutional Court.

236. The first question was answered by the Venice Commission: *"11. Recommendation (94) 12 of the Committee of Ministers of the Council of Europe states that judges' remuneration should be guaranteed by law (Principle I.2b.ii) and be "commensurate with the dignity of their profession and burden of responsibilities" (Principle III.1.b). Likewise, according to the Venice Commission, 'the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference. […] The level of remuneration should be*

determined in the light of the social conditions in the country and compared to the level of remuneration of higher civil servants. The remuneration should be based on a general standard and rely on objective and transparent criteria. [...] 14. Likewise, the UN Human Rights Committee has indicated that member states should take specific measures guaranteeing the independence of judges and protecting judges from any form of political influence in their decision-making, inter alia, by establishing judges remuneration (International Covenant on Civil and Political Rights, Article 14, General Comment No. 32, para 19). 15. However, as for any guarantee of judicial independence, the mentioned guarantee is not an end in itself: it pursues the aim to ensure proper, qualified and impartial administration of justice, and the implementation of the right to a fair trial".

237. To the second question, the Venice Commission answered: *"24. According to the Venice Commission, however, it is clear that the principle of the independence of the courts also applies to the Constitutional Court [...]Article 108 of the Constitution provides that "the Constitutional Court of the Republic of Macedonia is a body of the Republic protecting constitutionality and legality". [...]As the Constitutional Court of Lithuania has declared: the fact that "the Constitutional Court has the constitutional power to interpret the Constitution and to make decisions which are binding on all law-making and law-applying institutions, leaves no doubt that the Constitutional Court is an institution exercising state power. [...]In conclusion: judicial independence is an inherent element of constitutional courts [...] 27. Therefore, it is not compatible with the position of the Constitutional Court that it is considered as anything other than a court to which the principle of judicial independence is applicable. The conclusion must be, therefore, that if the legislator was guided by the principle of judicial independence as implying that salaries of judges may not even be reduced in the situation of crises, than that same principle must likewise be applied to the members of the Constitutional Court".*

Opinion CDL-AD (2002)008, on the status and rank of the Ombudsman Institution in the Federation of Bosnia and Herzegovina, 17 May 2002

238. The Venice Commission had accepted a request from the Ombudsperson of the Federation of Bosnia and Herzegovina for an opinion, asking among other things: "*Whether the rank and status of the Ombudsman of the Federation of Bosnia and Herzegovina should be equated with the rank and status of senior civil servants or independent judges of ordinary courts?*"

239. After reviewing the legal framework of countries such as Norway, Sweden, Malta, Croatia, the Netherlands, France, Estonia, Belgium and others regarding the status and rank of the Ombudsperson, the Venice Commission in the relevant part of the response determined: *"16. The responses demonstrate that there are a variety of ways of establishing the status of the Ombudsman. Different countries or regional entities equate3 the Ombudsman's status with that of civil servants, judges, ministers or members of parliament, for example. 17. However, irrespective of the status which the Ombudsman is assimilated to, in the countries and regional entities which responded, the Ombudsman institutions are given an appropriately high rank, which is reflected in salary levels. […] 18. The rank and salary level are of crucial importance in order to guarantee the Ombudsman's independence and to enable him or her to properly carry out the functions with which he or she has been entrusted. […] 28. In conclusion, in the light of the analysis of the Constitution of the Federation of Bosnia and Herzegovina and relevant legislation, it is clear that, in the Federation of Bosnia and Herzegovina, a choice has been made in favour of equating the status of the Ombudsmen with that of ordinary judges, the rank with that of the President of the Supreme Court and the salary accordingly. 29. This choice is fully in conformity with European standards and, as shown by the responses received from Ombudsmen in different countries and regional entities, is the position in a number of other European countries. Indeed, it is a choice which unequivocally guarantees the independence of the Ombudsmen. 30. The Commission is therefore of the opinion that in the current legal context of Bosnia and Herzegovina, the Ombudsmen of the Federation of Bosnia and Herzegovina should be equated with judges of ordinary courts".*

Principles of Venice on the Protection and Promotion of the Ombudsman Institution CDL-AD (2019) 005-e, approved by the Venice Commission at its 118th plenary session, Venice, 15-16 March 2019

240. The so-called "Venice Principles" for the protection and promotion of the Ombudsperson Institution were approved by the Venice Commission in 2019. The relevant part, for the circumstances of the present case, of these Principles provides as follows:

"21. Sufficient and independent budgetary resources shall be secured to the Ombudsman institution. The law shall provide that the budgetary allocation of funds to the Ombudsman institution must be adequate to the need to ensure full, independent and effective discharge of its responsibilities and functions. The Ombudsman shall

be consulted and shall be asked to present a draft budget for the coming financial year. The adopted budget for the institution shall not be reduced during the financial year, unless the reduction generally applies to other State institutions. The independent financial audit of the Ombudsman's budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.

22. The Ombudsman Institution shall have sufficient staff and appropriate structural flexibility. The Institution may include one or more deputies, appointed by the Ombudsman. The Ombudsman shall be able to recruit his or her staff".

Rule of Law Checklist, CDL-AD (2016)007-e, adopted by the Venice Commission at its 106th plenary session, Venice, 11-12 March 2016

241. Rule of Law Checklist approved by the Venice Commission in 2016, in its relevant part in terms of the circumstances of the present case provides as follows:

"74. The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.
75. The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.
[...]
83. Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law
79 Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressur.
85. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals".

Judgment of the European Court of Justice (ECJ) in the case with reference number ECJ-2018-1-003

242. In this case of the ECJ, the Portuguese legislator had issued a law on "management of salaries" in the public sector in which case the salary of judges of the Court of Financial Control (*Tribunal de Contas/Court of Auditors*) was reduced. In view of these circumstances, the referring court had raised the issue before the ECJ as to whether the domestic legislation of Portugal complied with the principle of judicial independence, which, in its view, derives from the second subparagraph of Article 19.1 of the Treaty on European Union hereinafter: TEU) and Article 47 of the EU Charter of Fundamental Rights and ECtHR case law. The latter responded by reasoning that: *"The European Court of Justice noted that the guarantee of independence, which is inherent in the task of adjudication, is a criterion not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice [...] but also at the level of the Member States as regards national courts. [...] The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that is independent of outside interference or pressure that may impair the independent judgment of its members and influence their decisions".*

Judgment of the Constitutional Court of Portugal in case with reference number POR-2015-3-018

243. In this case, the Constitutional Court of Portugal dealt with the constitutionality of the norms of a law setting out the normal working hours of public sector workers at eight (8) hours per day and forty (40) hours per week, in which case the rate in force was changed, according to which a working day may not exceed seven (7) hours and a working week thirty-five (35) hours. The Applicants requested a constitutional review alleging that this increase in normal working hours was unconstitutional. The Constitutional Court of Portugal reasoned: *"[...] The Constitution does not contain any rule that creates guarantees that wages cannot be reduced per se. The Court stated that it is aware that increasing the normal number of working hours may create additional costs for workers (transport, care for the elderly and minors, etc.), but the greatest damage they suffer as a result of the norms has to do with the time they have available to themselves, their families as well as the exercise of a range of other fundamental rights [...].The court considered that the actual loss of salary was limited to*

the salary earned working overtime. The court appreciated this fact, given the effective pay cuts that the public sector workers sector has suffered in recent years. However, the Court held that overtime pay was not included in the qualitative concept of pay, and thus the constitutional guarantee that wages could not be reduced was not valid. From the above, the Court found that the reduction in the amounts of money that are effectively accepted as payment for overtime work was not a decisive element that would make a norm unconstitutional". In this case, the Constitutional Court of Portugal did not find a violation on the basis of the abovementioned reasons.

Judgment of the Constitutional Court of Portugal in case with reference number POR- 2013-1-006

244. In this case, the Constitutional Court of Portugal dealt with the constitutionality of the various norms contained in the Law on the State Budget for 2013. The claim was that a different treatment for public sector staff could not continue to be justified by the idea that the reduction measures of salaries are more effective than other possible cost-sharing alternatives. The Constitutional Court of Portugal reasoned: *"This is the third year in a row in which this reduction of remuneration paid in the field of public employment legal relationship has been in force, and in this regard the Budget Law of 2013 simply maintained the norms and reductions set in its predecessors. The court recalled its previous jurisdiction, in which it said that the rule under which wages cannot be reduced is not an absolute rule, but rather an infra-constitutional rule. The only absolute prohibition is that neither a public employer nor a private employer can arbitrarily reduce the salary, unless a legal norm allows it. Further, in the reasoning it was stated that*: "*The Court* [Constitutional of Portugal] *supported its previous position (Decision no. 396/2011) for arguing that pay reductions for public sector employees are contrary to the principle of equality, because they only target people who work for the state and the other public - legal entities and do not apply to workers who are paid to provide subordinate work in the private sector or collaborators, self-employed or anyone else earning income from other sources. It concluded that there are legitimate grounds for this differentiation, both because no evidence was presented to dismiss the position that only wage cuts are able to guarantee a safe and immediate reduction in the share of public spending, and because where it is about this objective, people who are paid from public funds are not in the same position as other citizens. For these reasons, the Court considered that the additional sacrifice required from this category of persons for a transitional period does not constitute an unjustifiably unequal*

treatment". In this case, the Constitutional Court of Portugal did not find a violation on the basis of the abovementioned reasons.

Judgment of the Constitutional Court of Portugal in the case with reference number POR-2012-2-011

245. In this case, the Portuguese legislator had provided a measure to suspend payments for the month of Christmas (13th salary) and the month of holidays (14th salary) in the years 2012-2014, as for persons receiving salaries from public entities, as well as for those who receive a pension through the public social security system. The allegation against this measure was based on the fact that there should be limits to the difference between the amount of sacrifice made by persons affected by this measure and the sacrifice of those who were not affected by this measure and that the inequality caused by the change in situation should have been the subject of a degree of proportionality. The very difficult economic situation and the need to adopt measures to deal with it did not mean that the legislator was no longer subject to the obligation to respect the fundamental rights and the main structural principles of the rule of law, or the principle of proportional equality.

246. The Constitutional Court of Portugal reasoned that: *"[…] the nature of these and any other equivalent payments of the 13th and 14th months was no different from that of the forms of wages which had been reduced in 2011* [year] *- reductions which the Court had refused to declare unconstitutional (Decision no. 396/11 of 21 September 2011). The law states that the nature of Christmas and holiday remunerations is that of payment for work done and that they are part of the employee's annual remuneration, regardless of whether they are paid under private law or public law regime"*. Further, it was pointed out that: "*The Court recalled that the principle of equality in relation to the fair distribution of public costs, as a specific manifestation of the principle of equality, is a necessary legislative parameter which the legislator must take into account when deciding to reduce the public deficit in order to protect itself from the solvency of the state. The sustainability of public finances is of interest to all; everyone should, to the extent that they are able to do so, contribute to the burden of adjustments that need to be made to maintain that sustainability. The fact that the measures contained in the norms before the Court were not universal means that the sacrifices were not distributed equally among all citizens, in proportion to their individual financial ability. Additional efforts were required exclusively from certain categories of citizens. Legal equality is always a proportional equality; any inequality justified by a change*

in situations cannot be immune from the judgment of proportionality. The Court stated that the change in treatment in this case was so substantial and significant that the reasons relating to the advanced efficiency of the measure were not valid enough to justify it, especially since alternative solutions could have been decided". In this case, the Constitutional Court of Portugal found a violation on the basis of the abovementioned reasons.

Judgment of the Supreme Court of Cyprus in case with reference number CYP-2014-2-001

247. The origin of the above case was the Law that decided to reduce the salaries of judges, as part of the country's austerity measures. The complainants, judges in the Republic of Cyprus, requested the Supreme Court of Cyprus to review the provisions of the relevant laws as administrative actions reducing the salaries of judges were invalid. The complainants claimed that compensation for judges could only be reduced by a general tax law that affects all taxpayers in the country without discrimination. The Supreme Court of Cyprus reasoned: *"[...] the legislative power that passed the challenged Law did not invoke such a necessity in order to justify its promulgation. Nevertheless, in order to successfully invoke the Doctrine of Necessity, in accordance with well-established case-law, there must be an absolute necessity to safeguard the continuation of the effective functioning of the State. The Supreme Court disagreed with the attorney general's argument such need existed, that is to include a relatively small number of persons (the Judges) to share the burden caused by the country's adverse financial situation. This need is not more important than the need to safeguard the independence and impartiality of the Judiciary, which is the obvious purpose of the provisions of Article 158.3 of the Constitution, and a matter of supreme importance in terms of public interest. [...] Therefore, it* [the challenged Law] amounts *to an impermissible, adverse reduction of the judges' compensation (remuneration), and in contravention to the clear provisions of Article 158.3 of the Constitution".* In this case, the Supreme Court of Cyprus found violations on the basis of the abovementioned reasons.

Judgment of the Constitutional Court of Slovenia in the case with reference number SLO-2009-3-006

248. The subject of review before the Constitutional Court of Slovenia were several regulations governing the salary position of judges. The essential question in this case was that of the constitutional position of the judiciary and judges, and within these frameworks the question

of determining the guarantees which are provided by the Constitution in relation to the other two branches of power. The Constitutional Court of Slovenia reasoned that: "*Protection against the reduction of the salary of the individual judge, as such is intended to ensure its stability and consequently the independence of a judge, should be understood as protection against any interference that may cause a reduction of the judge's salary, which the judge expects in reasonably with the taking over the duty. Thus, not only the basic salaries of judges are those that are protected from reduction, but also all the payments to which judges are entitled due to the performance of judicial duties. Consideration of the consistency of regulations providing for additional payment of judges for performance at work, with the principle of independence of judges set out in Article 125 of the Constitution cannot be carried out because the challenged provisions are insufficiently defined and legally unclear*". Therefore, the Constitutional Court of Slovenia found a violation by finding that the challenged legal regulation was in violation of Article 2 of the Slovenian Constitution.

Judgment of the Constitutional Tribunal of Poland in case with reference number POL-2001-H-001

249. A certain law set limits on the salaries of the managers of some state units as well as of the entities of local self-government. The law in question also limited the number of supervisory boards to state-owned or local government companies. The Confederation of Polish Employers challenged the constitutionality of the above-mentioned restrictions before the Constitutional Tribunal. The latter, in the reasoning of its decision emphasized: *"The principle of minimum wage for work [...] is of a more general character. [...] Article 65.4 of the Constitution, stipulates that it is the duty of the legislator to determine in the statute the minimum remuneration for meeting the primary needs of life. Not only does the legislator have the right to fulfill the tasks set out in it with constitutional provisions, but the legislator may also adopt, with due regard for the law, rules governing other areas of social life, including the level of remuneration for work. However, the discretion of the legislator is limited by Article 2 of the Constitution which defines the principle of social justice, which requires that the salary be adequate and meet the reasonable needs of an individual. According to Article 2 of the Constitution, the new provisions may not surprise the persons affected. The provisions in question entered into force "on the first day of the month following one month from the date of publication". Furthermore, an additional three months were provided for the adjustment of those whose wages were reduced. As a result, such*

persons were not surprised by the changes and the principle of citizens' trust in the state and its laws was not violated". In this case, the Constitutional Court of Poland did not find a violation on the grounds set out above.

Judgment of the Supreme Court of Canada in case with reference number - CAN-1997-3-005

250. Some Canadian provinces have enacted legislation to reduce the salaries of their court judges and public sector employees - a reduction that was challenged under Article 11.d of the Canadian Charter of Rights and Freedoms.

251. The Supreme Court of Canada stated that: *"[...] wage cuts were unconstitutional. Financial security, one of the essential characteristics of judicial independence, has an individual and institutional dimension. The institutional dimension of financial security has three components. First, as a general principle, Article 11.d of the Charter allows the salaries of provincial court judges to be reduced, increased or froze, or as part of a general economic measure affecting the salaries of all or some of the persons awarded from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility or emergence of political interference through economic manipulation, a body, such as a commission, should be involved in the judiciary and other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes or freezes in judicial remuneration. This objective will be achieved by assigning this body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Therefore, the provinces are under a constitutional obligation to establish bodies that are independent, effective and objective. [...] Comprehensive measures that substantially affect any person paid from the public purse are prima facie rational, while a measure directed only at judges may require a more complete explanation. Second, under no circumstances is the judiciary allowed - not only collectively through representative organizations, but also as individuals - to engage in salary negotiations with the executive or representatives of the legislature. Such negotiation would be in fundamental conflict with judicial independence. Third, any reduction of the judicial remuneration cannot receive those salaries below the basic minimum level of remuneration required for the office of judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be assessed as sensitive to political pressure through economic manipulation. To*

protect against the possibility of government inaction being used as a tool for economic manipulation, allowing judges' salaries to fall due to inflation, and in order to protect themselves from the possibility of judicial salaries falling below the appropriate minimum required by judicial independence, the body must meet if a certain period of time has elapsed since its last report, in order to take into account the adequacy of judges in light of the cost of living and other important factors. Components of the institutional dimension of energy evaluation should not be observed in cases of emergency of their service and be added by unusual circumstances. Here, wage cuts were unconstitutional because they were made by governments of [Provinces] *without reliance on an independent, objective and effective process for determining judicial remuneration and because the government of* [another Province] *failed to respect the independent, effective and objective process of awarding judicial compensation which was already operating in that province"*. In this case, the Supreme Court of Canada found a violation on the basis of the abovementioned reasoning.

Conclusion on the Opinions of the Venice Commission and the decisions of other courts

252. In the light of the Opinions and decisions suggested by the Liaison Office of the Venice Commission, the Court concludes that the common denominator of the research documentation proposed consists in that: (i) the independence of the judiciary, as one of the branches of the state power, means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, especially by the executive branch - this criterion is considered to be an integral part of the fundamental democratic principle of separation of powers; (ii) sufficient resources are essential to guarantee judicial independence from other state institutions and from private parties - so that the judiciary can perform its duties with integrity and effectiveness, thus ensuring public trust in justice and rule of law; (iii) budget cuts by the executive are an example of how the resources of the judiciary can be put under excessive and unwanted pressure; (iv) the concept of independence presupposes, in particular, that the body in question exercises its judicial functions completely in an autonomous manner, without being subject to any hierarchical restriction or subordination to any other body and without accepting orders or instructions from any source; (v) the remuneration of judges should be guaranteed by law and be proportionate with the dignity of their profession and the burden of responsibility and that the judge's salary may not be reduced during the term (except in exceptional situations of economic hardship); (vi)

the level of remuneration should be determined in the light of the social conditions in the country and compared with the level of remuneration of senior civil servants; (vii) the Ombudsperson should rightly be given a high rank which is also reflected in the respective remuneration; (viii) the state must provide sufficient and independent budgetary resources for the Institution of the Ombudsperson and the latter must be sufficient against the need to ensure the full, independent and effective performance of its responsibilities and functions; (ix) the Ombudsperson Institution must have sufficient staff and appropriate structural flexibility and must be able to recruit his or her staff; (x) there is no rule that provides an absolute guarantee that public sector salaries cannot be reduced *per se* - but that the salary reduction must be justified; (xi) there is a single absolute prohibition in terms of salary reduction according to which neither a public employer nor a private employer can arbitrarily reduce salaries, unless a legal norm allows it; (xii) reductions of the salaries of public sector employees are contrary to the principle of equality when they target only certain persons; (xiii) the principle of equality in relation to the fair distribution of public costs, as a specific manifestation of the principle of equality, is a necessary legislative parameter which the legislator must take into account when deciding to reduce the public deficit in order to protect itself from the solvency of the state; (xiv) the sustainability of public finances is in the interest of all and consequently everyone should, to the extent that they are able to do so, contribute to the burden of adjustments that need to be made to maintain that sustainability in times of crisis; (xv) sacrifices in times of crisis resulting in reductions of salaries which are not universal and are not evenly distributed among all citizens, in proportion to their individual financial ability - are not considered to be compatible with the concepts of distribution of burden between salary beneficiaries in a state; (xvi) protection from the reduction of a judge's salary, as such, is intended to ensure the stability and consequently independence of the judge and should be understood as protection against any interference that may cause a reduction in the judge's salary that the judge expects reasonably with the assignment; (xiii) the Assembly as legislator is called upon to regulate various social spheres, including the level of remuneration for work; however the legislator's discretion is limited to the salary being adequate and meeting the reasonable needs of an individual; (xvii) the new provisions issued by the legislator may not surprise the persons affected, and in cases where they know exactly what awaits them under the new legislation - certain courts have found no violations; (xviii) financial security is one of the essential characteristics of judicial independence; (xix) comprehensive measures that substantially affect any person paid from the public budget are *prima facie* rational, while a measure

aimed only at judges [or only for a certain group] may require a more complete explanation.

RESPONSE OF THE COURT – *regarding the compliance of the challenged Law with the principle of separation of powers, namely Articles 4 and 7 in conjunction with Articles 102, 108.1, 109, 110, 115 of the Constitution and the respective Articles of Chapter XII of the Constitution*

253. The Court recalls the fact that the Ombudsperson challenged the constitutionality of the Law on Salaries, in its entirety, under the substantive allegations that it violates the principle of "separation of power" and the principle of "legal certainty", part of the rule of law principle. The MPA, in the capacity of the proposing Ministry within the Government, opposed the allegations of the Ombudsperson; whereas the Ministry of Finance and Transfers as a Ministry that would execute the challenged Law has responded extensively to the Court's questions highlighting some potential shortcomings to be assessed by the Court and some important aspects of the difficulty and impossibility of immediate implementation of the Law in question in practice (see, substance of the Applicant's allegations; comments of the MPA and the Ministry of Finance and Transfers).

254. As defined above, the constitutional question to which the Court must answer is whether the challenged Law (i) violates the principle of separation of powers guaranteed by the Constitution in relation to the judiciary; and whether the challenged Law (ii) violates "institutional, organizational and functional" independence of Independent Institutions referred to in Chapters VIII and XII of the Constitution.

255. Basic principles deriving from the Constitution, domestic and international case law, as well as the Opinions of the Venice Commission regarding the "separation of powers" and the significance of this principle for the power of the judiciary, have already been extensively elaborated above. The Court invokes all those principles in the spirit of which it will assess the challenged Law in terms of constitutionality.

256. Therefore, pursuant to the abovementioned principles and in order to assess allegations of violations of the principle of separation of powers to the detriment of the Judiciary and Independent Institutions, in the following the Court will: (i) analyze specific and relevant provisions of the challenged Law; (ii) specify the exceptions made for the other two branches of power, namely the Legislative and the Executive - thus analyzing the specific competencies given only to the Government and the Assembly; (iii) points out other exceptions made by the challenged

Law, including the non-involvement of some institutions in the legal regulation of the challenged Law; and (iv) examine whether the principles on which the challenged Law is supposed to have been drafted have been complied with. Finally, the Court will present its conclusion.

257. Prior to this assessment, two important preliminary parentheses. One for the Assembly; the other for the Constitutional Court.

258. First, the Court highlights the key constitutional competence of the Assembly for legislation at the national level. The Assembly, as a legislative power, *"in addition to the Constitution and the obligation to exercise legislative power in accordance with the Constitution, [...]is not subject to any other authority"* (see Judgment of the Court KO72/20, paragraph 352). In the context of the circumstances of the present case, it is consequently indisputable the authorization of the Assembly to exercise its competence to "adopt laws" (see Article 65.1 of the Constitution) to regulate salaries in the public sector according to a certain policy chosen by the Assembly itself. The latter has full authority to choose the best and most appropriate modality that considers that in terms of public policy fits the payroll system for the Republic of Kosovo. The only limitation that the Assembly has in legislation is to respect the legislative procedures and to vote laws that are in accordance with the Constitution and the values and principles proclaimed therein.

259. Second, the Court emphasizes the fact that in all cases where an Assembly Law is challenged before the Constitutional Court by authorized parties, the focus of the assessment is always respect for constitutional norms and human rights and freedoms - and never the assessment of public policy selection, which has led to the adoption of a particular Law. The Court has already emphasized in its case law that in reviewing the constitutionality of a Law, it never assesses whether it is a law based on good public policy or not (see Court cases: Judgment KO73 / 16, paragraph 52; Judgment KO72 / 20, cited above, paragraph 357; KO12/18, applicant *Albulena Haxhiu and 30 other deputies of the Assembly of the Republic of Kosovo*, Judgment of 11 June 2018, paragraph 117). Such an assessment is not within the competence of the Constitutional Court and consequently the analysis of the constitutionality of a Law always focuses only on the constitutional aspect of the particular Law. The competence of the Court in the present case is to assess, *in abstracto*, whether the challenged Law is constitutional or not and depending on the answer - to seal its constitutionality or to repeal it, or a part of it, as unconstitutional. It is clear that the Constitutional Court does not act

ex officio in reviewing the constitutionality of laws. The constitutionality of all laws in force in the Republic of Kosovo is presumed as such as long as it is not challenged before the Constitutional Court by authorized parties. The Assembly is considered to have issued a constitutional law by the time such a law or part of the law is not deemed unconstitutional by the Court.

260. Having said that, the Court returns to the assessment of the specific provisions of the challenged Law.

261. The challenged law contains a total of 10 chapters, with a total of 34 articles and two annexes named as "Annex no. 1" and "Annex no. 2". In the following, the Court will elaborate on some of the articles that are relevant to the overall assessment of the constitutionality of the challenged Law - not entering the articles that do not relate to the Court's key analysis. For each of these articles, the Court will present its arguments and observations of the constitutional aspect.

262. Article 1 of the Law on Salaries defines the purpose and scope of the challenged Law. According to this article, the Law on Salaries has three purposes. The first goal is to determine: *"the system of salaries and remunerations for Public Officials and Functionaries who are paid from the state budget, excluding KIA* [Kosovo Intelligence Agency] *and KSF* [Kosovo Security Force]". The second purpose of the challenged Law is to determine *"rules for determining salaries for employees of publicly owned enterprises in Kosovo"*. The third purpose is to determine the *"criteria for transitional salary and other benefits after the end of the function of public functionary and public functionary with special status, as well as for former high official that is realizing the rights according to the relevant Law"*.

263. In this regard, the Court notes that in the same article where the legislator as the primary purpose of the Law has provided for the harmonization of the system of salaries and remunerations for all those paid from the state budget - an exception has been made for KIA and KSF. Recall that these exceptions were not proposed by the Government as proposers of the Law but were added as amendments to the Assembly. In fact, the Government, even in the preparatory documents of the challenged Law, had repeatedly emphasized the purpose of a comprehensive "*homogenization*" of all salaries paid from the state budget. Meanwhile, with this amendment of the proposed Draft Law, the legislator has determined that although KIA and KSF are paid from the state budget, their salaries will not be determined by the Law on Salaries but through other legislation applicable to them. Reason for this exception - does not appear to have

been given. The amendment in question was proposed by the Functional Committee of the Assembly, but the Court failed to find any legitimate reason on the basis of which this kind of differentiation or this complete exclusion was explained for these two institutions that are financed directly from the state budget. For some other exceptions the legislator has considered that the rationale should be specifically mentioned in the Law - such as e.g. the stated reasonableness of the exceptions made for officials of the Assembly and for deputies.

264. Moreover, these two institutions are not the only exceptions that the challenged Law has made contrary to the very purpose of the Law. The Ombudsperson states, for example, that the Central Bank of Kosovo as one of the Independent Institutions listed in Chapter XII of the Constitution does not appear anywhere in the challenged Law. The reasons for this are not known. It is not excluded that there may be others excluded, either in institutional terms or in terms of specific positions. It is unclear to the Court how these exemptions granted by this Law, expressly or implicitly, have contributed to the primary purpose of the Law to regulate the system of salaries and remunerations for all public officials and functionaries, paid from the budget of state. This is not to say that the Assembly is not allowed to make exceptions - but the Assembly cannot make arbitrary and unreasonable exceptions that could cause confusion, dissatisfaction and inequality of treatment among those paid from the state budget.

265. Furthermore, the Court has also noted that the purpose of the Law is to harmonize salaries at the public sector level on the basis of the so-called principle **"same pay for same work"**. Regarding this "principle", the Court first refers to the response received by the Venice Commission to the Court's request, stating that "*due to the lack of applicable international standards"* in relation to the principle *"same pay for same work",* in the area covered by the Law in question, there is no way to provide an *Amicus Curiae* (see paragraph 15 of this Judgment).

266. The Court notes that at the general level, the lack of a clear definition of the principle of "equal pay for equal work" and "work of equal value", including a clear indication of the evaluation criteria for comparing different jobs in different institutions, is an obvious shortcoming that has produced a lot of dissatisfaction, confusion and complaints. To assess whether a particular employee of a particular public institution is performing work of equal value, a number of factors must be taken into account including the nature of the work, the institution in which the task is performed, the relevant education and training required, and other working conditions. Consequently, in

defining and implementing the principle of "equal pay for equal work" and "work of equal value" in the local context, the legislator must take into account the features of the constitutional system of the Republic of Kosovo and take care to ensure and guarantee their incorporation in the context of the functional, organizational and budgetary independence of the classical powers as well as the Independent Institutions defined in the Constitution.

267. Consequently, the Court finds that the challenged Law openly contradicts the very purpose for which it is claimed to have been issued. Therefore, the exceptions made go against the very purpose of the Law and create unreasonable, unproven and arbitrary differentiations.

268. Article 3 of the Law on Salaries cites a total of six principles according to which it is stated that salaries determined by the challenged Law are based. The first principle is that of *"lawfulness"* where it is emphasized that: "salaries of recipients are determined only in accordance with this Law and sub-legal acts authorized and issued for its implementation". The second principle is that of *"fairness"* where it is stated that: *"the salary level should be a fair reward for the complexity of work and contribution of individual in the performance of the organisation"*. The third principle is that of *"equal pay"*, where it is stated that: *"every salary recipient shall receive equal pay for the work in the same or comparable function, position or grade"*. The fourth principle is that of *"transparency"*, where it is emphasized that: *"the procedure for determined the salary, its level, and administration of salary system should be transparent and open to public, while not falling in contradiction with the protection of personal data according to applicable legislation"*. The fifth principle is that of *"non-discrimination"*, where it is stated that *"no salary recipient shall be discriminated in salary, as defined in the law on the protection from discrimination"*. The sixth principle is that of *"predictability"*, where it is stated that *"salary level determined under this law cannot be lowered, unless in an extraordinary situation of financial difficulties and only according to the law."*

269. The Court notes in particular that the legislator considered the principle of **"predictability"** regulating that the level of salary determined by the Law on Salaries "*cannot be reduced, except in an emergency situation of financial difficulties and only by law*." More specifically in application of this principle, in Article 24 [Lowering of salary level] of the Law on Salaries, the legislator has provided that the salary level determined according to the challenged Law *"can be lowered"* only *"by Law"* and in *"extraordinary situations of financial*

difficulties." However, the legislator does not seem to have considered this principle important for those persons who already receive salaries from the state budget, according to the existing "*law*". In fact, the Court notes that the Draft Law proposed by the Government had a special article in the transitional provisions which aimed precisely at protecting the rights of persons who have already acquired a right to receive a certain salary or compensation from the state budget. Article 27 of the Transitional Provisions of the challenged Draft Law proposed by the Government provided that: *"1. If an individual, official or public functionary, received before the entry into force of this law, a full salary (basic salary with all kinds of regular allowances), which is higher than the full salary provided by this law, he will receive the new salary according to the provisions of this law and a special transitional allowance equal to the difference between the old salary and the new salary".*

270. However, the Assembly considered that such a draft-article was not necessary and removed it from the final draft of the Law on Salaries during the legislative process in the Assembly. From the preparatory documents, the Court has not noticed any discussion or reasoning as to why this was done. Non-compliance with the existing rights of individuals receiving a salary or compensation set by the state budget has raised a significant number of complaints which have also been addressed to the Ombudsperson. What should be emphasized in this regard is that the Assembly has considered that the principle of "predictability" is a very important principle - but only for the future, not for the present and for persons already negatively affected by the Law on Salaries. According to the new legal regulation of the Assembly, it turns out that for the future, the legislator considers that salaries can be reduced only in exceptional situations and financial difficulties; while none of the cuts of salaries in public sector through the challenged Law were justified on the basis of any "extraordinary situation" or "financial difficulty". They have simply been reduced in the name of the tendency for comprehensive "homogenization" and "harmonization" which turns out not to have been achieved. In fact, it results that the reduction of salaries for a significant number of salary recipients from the state budget, as evidenced by the data received from the Ministry of Finance and Transfers, was done arbitrarily and without any justification. For some, it is not even known how much and how their salary will be reduced, as confirmed by the response of the Ministry of Finance and Transfers. Such a selective approach to the principle of predictability which is an integral part of the principle of the rule of law and legal certainty - is unacceptable and should be avoided in any future legislation of the Assembly.

271. The reason why the focus of the analysis in terms of predictability is more on the "reduction" of salaries than on the "increase" of salaries made by the challenged Law is precisely the fact that the legislator during the exercise of constitutional competence for legislation had to take care for the rights of persons whose salary is reduced. The legislator has the right after this Judgment to take any kind of step immediately to increase salaries in the public sector in order to meet any public policy goal of increasing salaries in certain sectors. There are many modalities on how such a thing can be done, but this remains entirely at the discretion of the Assembly and the Government, after the respective analyzes they make. Immediately after this Judgment, the legislator has also the right to take any kind of step to reduce salaries in the public sector because there is no absolute prohibition on not reducing salaries in the public sector. However, although at the discretion of the Government and the Assembly, it should be borne in mind that any pay cut, for each existing position, must be strongly reasoned and not arbitrary. Also, any pay cut should be such as not to place the burden of salary cuts only on certain persons or certain sectors of the public sector. The reasons for salary cuts should be many times more stable than the reasons for salary increase. For the salaries of the Judiciary, it has already been elaborated above. They can never be reduced during the term of a judge unless the salary reduction is justified by an exceptional situation of proven financial difficulty (see the cases of various European and world Courts as well as the relevant Opinions of the Venice Commission which speak about the salaries of Judiciary, cited above).

272. Further, regarding the principle of "transparency" as one of the principles on which the regulation of the challenged Law is said to have been guided, it should be *"the procedure for determined the salary, its level, and administration of salary system should be transparent and open to public"*. It is not clear to the Court how this principle has been applied when about 42% of the positions currently receiving salaries from the state budget still cannot decipher how much they will receive with the new Law on Salaries. Moreover, for most of them the last word on where they will be classified and what salary they will have - will have the Government, namely the MPA and that only after the sub-legal acts that should be approved were approved by 1 December 2019. Both for the Judiciary as a third power and for the Independent Institutions - it is the Government, namely the MPA that would decide on the final salary of one of their employees. This leads to the conclusion that the principle of transparency - although appropriate and right as a principle, has not been applied through the challenged Law.

273. Consequently, the Court finds that the challenged Law has not followed and respected at least two of the basic principles on which the challenged Law is said to have been guided, that of predictability and transparency. The Court will not enter the consideration of other principles.

274. Article 4 of the Law on Salaries speaks about the salary of "civil servant" where it is stated that the same consists of *"basic salary and allowances, as the case may be"*. In the same article, paragraph 4 provides for an exception for employees of the Assembly Administration in terms of allowances and compensations. While paragraph 3 states that: *"Salary of the employee of the Administration of the Assembly of the Republic of Kosovo shall be regulated by this Law, according to Annex 1 of this Law"*, immediately in the next paragraph follows the exception according to which: *"Allowance and compensation of the employee of the Administration of the Assembly of the Republic of Kosovo shall be regulated by this Law and by special act adopted by the Presidency of the Assembly of the Republic of Kosovo"*. Further, paragraph 5 of Article 4 of the Law on Salaries states that: *"Regulation by special act, according to paragraph 4 of this Article, shall be done based on the nature and specific conditions of the work of the Assembly of the Republic of Kosovo"*.

275. In addition, Article 12 [Special allowances for public functionaries] speaks about the special allowances of the deputies on the basic salary; special allowances for the parliamentary function of the President of the Assembly, Vice President of the Assembly, Chairperson of the parliamentary committee, deputy chairperson of the parliamentary committee and head of the parliamentary group; the right to compensation for participation in the parliamentary session, in the meetings of the parliamentary committee and for the monthly expenses. According to paragraph 4 of this article, all competencies to determine the criteria and procedures for allowances and compensation for deputies are left to the Presidency of the Assembly to self-determine them by internal regulations. Further, Article 12 of the Law on Salaries stipulates that allowances and compensation for the political staff of the Assembly *"shall be regulated by a special act adopted by the Presidency of the Assembly"*.

276. Exceptions provided in Article 4 of the challenged Law, only for the Administration of the Assembly; and the exceptions provided for in Article 12 of the challenged Law, only for the deputies and the political staff of the Assembly - represent one of the most serious constitutional problems of the Law in question. Through this article, the legislator, respectively the Assembly as one of the three classic powers of

government of the Republic of Kosovo has provided that all issues related to allowances and compensations of its employees, civil and political staff, and its deputies to be regulated by "special acts" approved by the Presidency of the Assembly and that such an exception, according to the legislator "*shall be done based on the nature and specific conditions of the work of the Assembly of the Republic of Kosovo*."

277. Such exceptions as well as the reasoning given in the challenged Law might have been all right if the legislator had paid equal attention to other powers as well as to Independent Constitutional Institutions. If it treated all powers equally and in accordance with their constitutional specifics - it could result in regulation in accordance with the Constitution. However, the exclusion of only one power and non-compliance with the constitutional guarantees of other powers, completely ignoring the Judiciary and Independent Institutions is a legislative solution that does not comply with the values and principles of the Constitution, especially the principle of separation of powers. Add to this the fact that, apart from the Assembly, namely the legislative, the only other power authorized to regulate certain issues by sub-legal acts is the Government, namely the executive. The only power that is completely ignored by any specific and adapted regulation that would consider "*the nature and specific conditions*" of its work and independence - is the power of the Judiciary. The same can be said for the Independent Institutions referred to in Chapters VIII and XII of the Constitution.

278. Furthermore, the Court also notes that Articles 5, 6, 7, 8 and 9 of the challenged Law regulate issues related to the basic salary, allowances for market conditions, annual allowances based on the results of the evaluation of work, special allowances on basic salary and overtime allowances. For all these issues, the legislator has given the Government the authority to issue sub-legal acts for all institutions (except in specific cases where exceptions are provided - both for the Assembly and for the KSF, KIA and others that are implicitly completely excluded from the Law).

279. In this regard, the Court notes that the challenged Law gives sixteen (16) special competences to the Government to regulate certain issues through sub-legal acts and after consultation with the relevant ministry (see Articles 5.4; 5.5; 6.3; 6.4; 7.5; 8.3; 9.5; 14.4; 15.4; 17.4; 18.2; 19.4; 20.5; 21.6; 21.8; 22.5; 25.3; 26.2; 27.2 of the challenged Law - where in all these articles the Government is authorized to issue a sub-legal act; see also the two (2) specific competencies of the Assembly for sub-legal acts, elaborated above).

280. This means that all regulatory competencies through sub-legal acts are left in the hands of the Executive and the Legislative - as two of the powers that actually drafted, namely approved this legal initiative through a vote in the Assembly. The judiciary as a third power has neither the constitutional competencies to propose laws nor to adopt them. But, this does not mean that the other two sister powers should ignore it completely just due to the fact that it has not been an active participant in lawmaking. On the contrary, precisely because the third power has not been an active participant in lawmaking, special attention should have been paid to any legal regulation that could potentially create unconstitutional "interference" in institutional, functional, organizational independence. This would be achieved taking into account the "*specific nature and conditions*" of the work and independence of the Judiciary.

281. It is clear that the challenged Law, apart from the competencies given to the Government and the Assembly, does not give any competence to the Judiciary and Independent Constitutional Institutions to regulate certain issues. For all matters, the legislator has left the Government and its respective Ministries as crucial decision-making bodies. Such legal regulation, with the complete exception of the self-regulatory competencies of the Judiciary, has undoubtedly created an imbalance in the separation of powers which the spirit and letter of the Constitution by no means aspires to. Such a legal regulation, if confirmed as constitutional, would have the potential to create "interference" of the Executive with the Judiciary and "dependence" and "subordination" of the Judiciary towards the Executive because the former would have to depend by the will of the latter in terms of internal arrangements for staff and functional, organizational, budgetary and structural aspects of work. Such a legal regulation is in open violation of the Constitution.

282. Consequently, the Court finds that the challenged Law through exceptions made only to the Assembly and the Government has violated the constitutional guarantees of the independence of the Judiciary and Independent Institutions - creating an imbalance in the separation of powers.

283. Article 31 [Sub-legal acts] provides that all sub-legal acts provided by this law should *"be adopted* ***within nine (9) months*** *after the publication in the Official Gazette"*, whereas Article 34 [Entry in to Force] establishes that the challenged Law *"shall enter into force nine (9) months after its publication in the Official Gazette"*.

284. In this regard, the Court notes that the challenged Law was adopted by the Assembly on 2 February 2019; was published in the Official Gazette on 1 March 2019 and entered into force nine (9) months after publication, namely on 1 December 2019. In a clear manner, Article 31 of the challenged Law has provided the preparatory measure for the implementation of the Law in question, requesting that all sub-legal acts provided by the Law be approved "***within***" 9 months after publication in the Official Gazette, namely until 1 December 2019. The Court notes that the response of the Ministry of Finance and Transfers very clearly clarified that only one (1) out of a total of eighteen (18) sub-legal acts to be adopted – has been adopted. Among other things, for this reason, the Ministry of Finance and Transfers stressed that the Law on Salaries, even if it enters into force today, it could not be fully implemented in practice until all the sub-legal acts are adopted (seventeen (17) remaining). The fact that the challenged Law has been suspended by a decision on an interim measure by the Court and that this is one of the reasons why the sub-legal acts have not been adopted is not grounded. This is due to the fact that the sub-legal acts had to be adopted exactly within the 9-month *vacatio legis* period left by the challenged Law. The non-adoption of sub-legal acts has made it impossible for the Court to understand exactly for which positions the salary increases and for which positions exactly the salary decreases. In the answers submitted to the Court, the Ministry of Finance and Transfers admitted and clarified that it cannot give that answer for about 42% of the positions paid from the state budget because without the approval of sub-legal acts it is not known how much will be paid a series of positions that are currently paid from the state budget. All this careless legislative process, without a doubt, leads to an unacceptable situation of legal uncertainty that can in no way be compatible with the Constitution and its values and principles.

285. Consequently, the Court finds that the fact that the challenged Law, even if it enters into force, could not be immediately implemented in its entirety, is against the principle of predictability and legal certainty.

286. Article 32 [Prohibition and determining of equivalence] provides that upon the entry into force of the challenged Law, any change in the salary structure, components or levels coefficients is prohibited. Paragraph 2 of this Article provides that in the case of the creation of new functions, positions or job titles, the institution in which the position is created "***shall request***" the ministry responsible for public administration and the ministry responsible for finance to determine the salary class applicable to that function, position, or job title, on the basis of equivalence. Paragraph 3 of this Article provides that the ministry responsible for public administration and the

ministry responsible for finance, at the moment they receive a request from the designated Institution, "***assess the equivalent function, position or title***" with the basic equivalence to the principles of the challenged Law and will make the proposal "***for approval to the Government***" for the salary class that will be applied for that function, position or title.

287. This article also presents a serious conceptual and practical problem, especially for the Judiciary and Independent Institutions. If this provision were to be declared constitutional, it would mean that whenever the Judiciary, the Constitutional Court, the Ombudsperson and other Independent Institutions need to create a new position within their organization chart or change the internal organizational structure, depending on the need that may arise in the future - they should turn to the Government to seek permission and approval for the creation of a new position and to seek permission and approval to change the internal organizational structure. The challenged Law in this regard states that it is the MPA which "*will evaluate the function, position or title*" and will make the "*proposal for approval in the Government for the salary class that will be applied for that function, position or title*". Meanwhile, in the decisive and final decision-making chain is the Government which must "***approve***" every proposal of the Judiciary. In other practical terms this means that every new position, every new naming, every new function deemed necessary by the Judiciary - must be approved by the executive, namely the Government.

288. The Court finds that this legal regulation is in a flagrant way contrary to the notion of "institutional, functional and organizational" independence of the Judiciary and Independent Institutions. As such it is unacceptable and contrary to the Constitution and the key principle of separation of powers as a constitutional model of governance in the Republic of Kosovo.

289. Article 33 [Abrogation] expressly states that the challenged Law repeals the following laws or provisions:

> *"1.1. Law No.03/L-147 on Salaries of Civil Servant;*
> *1.2. Law No.03/L-03/L001 on the Benefits to Former High Officials, amended and supplemented by the Law No. 04/L-038;*
> *1.3. Article 11, paragraph 2 of the Law No.03/L-094 on the President of the Republic of Kosovo;*
> *1.4. Article 15 of the Law No.03/L-121 on Constitutional Court of the Republic of Kosovo;*
> *1.5. Article 9 of the Law No.03/L-159 on Anti-Corruption Agency;*

1.6. Article 35, paragraphs 1 and 2 of the Law No.06/L-054 on Courts;
1.7. Article 21, paragraph 1, sub-paragraph 1.1 to 1.10 of the Law No.03/|L-225 on State Prosecutor;
1.8. Article 18, paragraph 1 of the Law No.06/L-055 on Kosovo Judicial Council, as well as every legal provision and sub-legal act that regulates the issue of salary, compensations, allowances and remunerations."

290. Through Article 33 of the challenged Law, *inter alia*, some of the specific articles of the organic laws of the Judiciary that previously regulated the issue of salaries of the Judiciary in general, of the Constitutional Court and of the chairmen of both Councils, the Judiciary and the Prosecutor, have been explicitly repealed. However, by Article 28 [Transitional provisions] of the challenged Law it is foreseen that the system of salaries, allowances and remunerations provided in Annex no. 1 of the challenged Law do not apply to public officials with special status, namely, the judge of the Constitutional Court, the judge, the prosecutor, the chairman of the Judicial Council and the chairman of the Prosecutorial Council until 31 December 2022. Meanwhile, for the Privatization Agency of Kosovo, the legislator has provided the same exception until 31 December 2022 in Article 29 of the Law - but has not repealed existing laws regulating the salary of the Privatization Agency of Kosovo. This difference matters.

291. The Court notes two obvious and basic problems in this regard. The first concerns the legal vacuum and contradiction created by the challenged Law. This is due to the fact that at the legal moment when the challenged Law would enter into force, Article 33 of the challenged Law would repeal all the respective norms which currently regulate the salaries of the Judiciary, the Constitutional Court, the Chairs of the Judicial and Prosecutorial Councils (see points 1.4; 1.6; 1.7; 1.8 of Article 33 cited above). This means that with the entry into force of the challenged Law and if the latter were in force and not suspended, these legal provisions would no longer be in force because they would have been repealed by the challenged Law.

292. On the other hand, the Court notes that on the voting day in the Assembly a new article was added, according to which it is stated that: *"Provisions of this Law for the system of salaries, allowances and remunerations and Annex No.1 of this Law shall not be applied for the public functionaries with special status: judge of the Constitutional Court, judge, prosecutor, chair of the Judicial Council and chair of the Prosecutorial Council until 31 December 2022"* (see

Article 28 of the challenged Law). The question arises whether with the entry into force of the challenged Law certain articles of the organic laws mentioned in the points 1.4; 1.6; 1.7; 1.8 of Article 33 cited above have been repealed – according to which Law that these special functionaries would receive a salary. What salary would be preserved to them when the provisions governing their salary were repealed. With this negligent legal regulation, in fact, if the challenged Law came into force, it turns out that the legislator would have left without any legal regulation the above-mentioned special functionaries by repealing exactly the norms on which their salary is regulated. It is unclear how their old salary could have been implemented when the specific articles on which their old salary was based would have been repealed. The Assembly, if it wanted to do this, had to emphasize that Article 33 of the Law, namely points 1.4; 1.6; 1.7; 1.8 of it will not enter into force until 31 December 2022. Not that this would be a constitutionally acceptable solution - but at least technically it would not leave a legal vacuum as the regulation made by the Law on Salaries would leave, if it entered into force.

293. Another major problem with the way of regulating the salaries of the Judiciary is the approach of postponing the salary reduction for the power of the Judiciary for about 2 years and several months, respectively until the end of 2022. After 2022, namely on 1 January 2023, all incumbent judges would suffer drastic reductions of their salaries. As explicitly stated in all the Opinions of the Venice Commission and in many European and world level court practices, the salary of the individual judge can be reduced only as a result of an evidenced economic crisis that would constitute extraordinary circumstances for the state that such a measure should definitely be taken. Also, the burden of reducing salaries, if it is already considered necessary due to the economic crisis, should be proportionate and include everyone equally so that no particular sector bears the main burden. The challenged Law did not take into account any of these principles.

294. Consequently, the concept of maintaining the salaries of the Judiciary only until 2022, and then halving the salaries after that date cannot contribute to guaranteeing an independent Judiciary. Such a thing would in fact put an undesirable pressure on the Judiciary against the Legislative and Executive powers. Meanwhile, through the non-harmonized legal regulation regarding the legal effects of Article 28 of the challenged Law in conjunction with Article 33 of the challenged Law - the challenged Law, if its implementation was allowed, would cause a legal vacuum according to which the Judiciary and all public officials with special status referred to in Article 28 will be left without

an applicable "law" that determines their salaries (old or new) until 31 December 2022.

CONCLUSION - *regarding the compliance of the challenged Law with the principle of separation of powers, namely Articles 4 and 7 in conjunction with Articles 102, 103.1, 108, 109, 110, 115 of the Constitution and Article 132, 136, 139, 141 of Chapter XII of the Constitution*

295. In light of the above, the Court finds that the challenged Law is not in accordance with Articles 4 and 7 in conjunction with Articles 102, 103.1, 108, 109, 110, 115 of the Constitution and Articles 132, 136, 139, 141 of Chapter XII of the Constitution.

296. In case of new legislation in this field, the Government in the capacity of proposer of laws and the Assembly in the capacity of approving laws, are obliged to take into account the principles set out in this Judgment and the case law of the Constitutional Court in interpreting the respective articles of the Constitution. The "institutional, functional, organizational and budgetary" independence of the Judiciary and Independent Institutions must be recognized and any legal initiative must respect this independence.

297. Finding the above-mentioned violations makes the challenged Law in its entirety unconstitutional.

298. The Court has very carefully analyzed the possibility of partial repeal of the challenged Law. However, in the circumstances of the present case such a solution, unlike the circumstances of the Law on Public Officials which was partially repealed, was not possible for three reasons. First, because the constitutional violations identified in the challenged Law are of such serious weight that they affect the basis of the functioning of the government in the Republic of Kosovo - causing an imbalance in the separation of powers to the detriment of the Judiciary and Independent Institutions. Second, because the challenged Law does not offer an opportunity to repeal only some provisions and only some points of Annexes no. 1 and 2, because any kind of repeal would make the Law unenforceable in practice. And, in cases when the analysis leads to the conclusion that the Law with partial repeal becomes inapplicable with the remaining articles in force as constitutional, the Court is obliged to repeal the Law in its entirety.

III. Other allegations of violation of the Constitution raised by the Ombudsperson

299. The Court recalls that in addition to the alleged violation of the principle of "separation of powers" and "rule of law/legal certainty", the Applicant requested the Court to find that the challenged Law is also contrary to "equality before the law"; "protection of property" and some other articles of the Constitution, the ECHR and the UDHR.

300. Given that the Court has already found violations of articles 4, 7, 102, 103.1; 108; 109; 110, 115; chapter VIII and chapter XII of the Constitution, in terms of "separation of power" and finding these violations is sufficient for declaring the challenged Law in its entirety unconstitutional, does not deem it necessary to proceed further dealing with other allegations alleged by the Applicant, respectively Articles 3.2, 10, 21, 22.1, 23, 24, 46, 55, 58.3, 58.7, 119.1, 119.2, 130 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR and Article 23.2 of the UDHR (see, *mutatis mutandis*, cases of the Court in which on the occasion of finding a certain violation it was found that it is not necessary to address other allegations: KO01/17, Applicant Aida Dërguti and 23 other deputies of the Assembly of the Republic of Kosovo, *"Constitutional review of the Law on Amending and Supplementing the Law No. 04/L-261 on the War Veterans of the Kosovo Liberation Army"*, Judgment of 27 March 2017, paragraphs 101-103; KI65/15, Applicants *Tatjana Davila, Ljubiša Marić, Zorica Kršenković Zlatoj Jevtić*, Judgment of 14 September 2016, paragraph 137; KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraph 145).

301. Having said that, the Court nevertheless deems it necessary to emphasize two important aspects with regard to the Applicant's additional allegations.

302. The first concerns the obligation of the Government, as the proposer of laws, and the Assembly, as the legislator that finally approves the laws proposed by the Government, during the drafting of legislation related to salaries in the public sector, either through a general law. or through some special laws or even the amendment of existing laws, to take into account the principles of equality before the law and equal treatment of all persons whose rights are affected by any kind of legal amendment or change. The Government and the Assembly must ensure that the constitutional values of equality before the law and non-discrimination are respected in all circumstances and that any legal regulation is in accordance with Articles 3 and 24 of the Constitution in conjunction with Article 14 of the ECHR and in accordance with the case law of the Constitutional Court and that of the European Court of Human Rights.

303. The second concerns the obligation of the Government, as the proposer of laws, and the Assembly, as the legislator that finally approves the laws proposed by the Government, during the drafting of legislation related to salaries in the public sector, either through a general law or through some specific laws or even the amendment of existing laws, to take into account the relevant aspects of the property rights and expectations of all persons whose rights are affected by any kind of legal amendment, supplement or modification. Any possible reduction of existing salaries, although possible and at the final discretion of the executive and the legislative, must be justified and respect human rights and freedoms and be in accordance with the principles of predictability, legal certainty and rule of law. The Government and the Assembly must ensure that the right to property is respected in all circumstances and that any legal regulation is in accordance with Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR, as well as in accordance with the case law of the Constitutional Court and that of the European Court of Human Rights.

IV. Request for interim measure

304. The Applicant submitted the Referral to the Court where, *inter alia*, requested the imposition of an interim measure for suspension of the challenged Law in its entirety.

305. On 12 December 2019, the Court approved the request for interim measure as grounded and suspended the application of the challenged Law, *"without prejudice to the admissibility or merits of the referral."* The interim measure was decided until 30 mars 2020. (See the Decision on interim measure in case KO219/19, of 12 December 2019, in item I of the enacting clause).

306. On 30 March 2020, the Court decided to extend the interim measure, namely to suspend the implementation of the challenged Law until 30 June 2020. (See Decision on extension of the interim measure in case KO219/19, of 30 March 2020, in item I of the enacting clause).

307. On 30 June 2020, the Court declared the Referral admissible and decided on its merits. On the same date, the Court also decided to repeal the interim measure.

V. CONCLUSIONS

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

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

310. The Court concluded that the challenged Law contained a number of serious problems at the constitutional level that could be summarized as follows: (i) the challenged Law itself contradicts its purpose to "harmonize" salaries at the level of the entire public sector – by making arbitrary and unreasonable exceptions for some institutions, among others the Kosovo Security Force, the Kosovo Intelligence Agency, the Privatization Agency of Kosovo, the Central Bank of Kosovo, and the Assembly itself; (ii) the challenged Law completely excludes the independence of the Judicial power, by not leaving any self-regulatory competence for issues related to the implementation of "functional, organizational and budgetary" independence; (iii) the challenged Law, although emphasizing that the salaries are regulated by this Law, has reduced the legal regulation for many issues at the level of sub-legal acts, giving the possibility of sub-legal regulation only to the Executive and the Legislative; (iv) out of a total of eighteen (18) competencies to issue sub-legal acts, sixteen (16) are for the Government and two (2) for the Assembly, while no self-regulatory competence for the Judiciary or Independent Institutions; (v) the Judiciary and Independent Institutions have not been given any self-regulatory competence through which they could enjoy their "*institutional, organizational, structural and budgetary*" independence in relation to internal organization and their staff; (vi) only one (1) of the eighteen (18) sub-legal acts that had to be approved within the ninth (9) monthly period of vacatio legis has been approved, namely by 1 December 2019; (vii) as confirmed by the data of the Ministry of Finance and Transfers, for about 42% of the positions it is

not possible to decipher the salary because the latter will finally be determined through the relevant classifications with sub-legal acts of the Government; (viii) as confirmed by the data of the Ministry of Finance and Transfers the "additional budget cost" of the challenged Law "*is not part of the budget projections 2019-2021*"; (ix) as confirmed by the data of the Ministry of Finance and Transfers, even if the challenged Law entered into force today, it could not be fully implemented in the absence of the sub-legal acts.

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

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

guarantee with the amendment. Further, the Court does not consider that the principle of "transparency" was applied when about 42% of positions currently receiving salaries from the state budget, still cannot decipher where they are positioned and how much their salary would be with a new Law on Salaries.

313. Regarding Articles 4, 5 and 12 of the challenged Law, the Court noted that the Assembly, as one of the three classical powers of the government of the Republic of Kosovo, has provided that all matters relating to the allowances and remunerations of its employees, regular and political staff, and the deputies themselves are to be regulated by "special acts" approved by the Presidency of the Assembly and that such an exception, according to the legislator, "*is made based on the nature and specific working conditions of the Assembly of the Republic of Kosovo*". The Court considered that such exceptions provided for only one power – represent one of the most serious constitutional problems of the Law in question. The very selective exclusion of only one power and non-respect of the constitutional guarantees of other powers, completely ignoring the Judiciary and Independent Institutions is a legislative solution that does not coincide with the values and principles of the Constitution, especially the principle of separation and balance of powers.

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

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

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

317. Regarding Article 32 of the challenged Law, which provides that in case of entry into force of the challenged Law any change in the structure, components or levels of salary coefficients is prohibited, the Court noted some serious conceptual and practical problems to the detriment of the Judiciary and Independent Institutions. This is due to the fact that, if this provision were declared constitutional, it would mean that whenever the Judiciary and other Independent Institutions need to create a new position within their organizational chart, or change the internal organizational structure depending on the need that may arise in the future – they should address the Government to ask for permission and approval to create a new position and to seek

permission and approval to change the internal organizational structure. The challenged Law in the final decision-making chain, left the Government as a power that must "*approve*" any proposal of the Judiciary. The Court found that this legal regulation, without any doubt, in a flagrant way goes contrary to the notion of "institutional, functional and organizational" independence of the Judiciary and Independent Institutions. As such, it is unacceptable and contrary to the Constitution and the key principle of separation of powers as a selected constitutional model for the governance of the Republic of the country.

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

319. The first concerned the vacuum and legal contradiction created by the challenged Law. That is for fact that at the legal moment that the challenged Law would enter into force, Article 33 of this Law would repeal all relevant norms which currently regulate the salaries of the Judiciary, of the Constitutional Court, the chairpersons of the Judicial and Prosecutorial Councils (*see points 1.4; 1.6; 1.7; 1.8 of Article 33 of the challenged Law*) and for whose salaries at the same time the Law states that they will be saved for the respective period. The question arises as to whether the articles of the organic laws governing the current salaries would be repealed upon the entry into force of the challenged Law – on the basis of which Law these special functionaries would receive a salary. What salary would be preserved for them when the provisions governing their old salary – which was supposed to be maintained – would be repealed. By this careless legal regulation, it turns out that the legislator would have left the functionaries in question without any legal regulation. The second had to do with the concept of saving the salaries of the Judiciary only until the end of 2022, and then the drastic reduction of salaries after that date. Such a scenario is not considered to contribute to a guarantee of an independent Judiciary. On the contrary, such a legislative solution would place undesirable pressure on the Judiciary versus Legislative and Executive power.

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

321. Regarding the Assembly, the Court emphasized that the legislative power has the main constitutional competence for legislation at the national level. In terms of the circumstances of the present case, it was therefore indisputable the authorization of the Assembly, that in exercising its competence for "adoption of laws", it regulates salaries in the public sector according to a certain public policy voted by the Assembly itself. The latter has full authority to choose the best and most appropriate modality, which it considers that in terms of public policy fits the salary system for the Republic of Kosovo. The only limitation that the Assembly has in the legislation is to respect the procedures of lawmaking and to vote laws that are in accordance with the Constitution and the values and principles proclaimed there.

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

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

324. At the level of principles set by the Constitution, the Court emphasized that among the fundamental values embodied in the Constitution on

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

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

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

327. Unlike other institutions referred to in Chapter XII of the Constitution, "Independent Agencies" provided for in Article 142 of the Constitution

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

328. The key conclusions reached by the Court after analyzing the answers of the Forum of the Venice Commission and the Opinions of the Venice Commission and the case law of the various constitutional and supreme courts, were as follows: (i) there is no single possible system for regulating salaries in the public sector and that there is no internationally recognized principle governing the regulation of "equal pay for equal work"; (ii) most countries regulate salaries through different laws and at the same time apply different methods by regulating this issue either through special laws for specific sectors or through some more concentrated legal regulation; (iii) the Assembly, as a legislative body, has the competence and organic right to issue any kind of legislation on the regulation of salaries in the public sector provided that it complies with the Constitution; (iv) the principle of separation of power and the balance between Legislative, Executive and Judicial power does not imply the isolation of powers and the absence of mutual dependence; however, the latter also means avoiding situations in which unconstitutional "interference", "dependence" or "subordination" can be created between independent powers; (v) the independence of the judiciary, as one of the branches of power, implies that the judiciary is free from external pressure, and is not subject to influence by the executive branch; (vi) sufficient resources are essential to guarantee judicial independence from other state institutions and private parties – so that the judiciary can perform its duties with integrity and effectiveness; (vii) the reduction of the budget by the executive is an example of how the resources of the judiciary can be put under excessive and undesirable pressure;

(viii) there is no rule that creates absolute guarantee that the salaries in the public sector cannot be reduced per se – but that reduction of salaries must be justified; (ix) the reduction of the salary of the judiciary may occur only under conditions of a pronounced economic and financial crisis and which, moreover, must be officially recognized as such; (x) sacrifices in times of crisis [since the emphasis on reduction is always when there are crises] resulting in reduction of salaries that are not universal and are not evenly distributed among all citizens, in proportion to their individual financial ability – are not considered to be compatible with the concepts of distribution of burden among beneficiaries of salaries in a state.

329. Finally, the Court also noted several important issues.

330. In case of new legislation in this field, the Government as the proposer of laws and the Assembly as the voter of the laws are obliged to take into account the principles emphasized in this Judgment and other Judgments from the case law of the Constitutional Court in interpreting the respective articles of the Constitution. The "institutional, functional, organizational and budgetary independence" of the Judiciary and Independent Institutions must be recognized, and any legal initiative must respect this independence (See Judgments KO73/16 and KO171/18).

331. Finding the aforementioned violations made the challenged Law in its entirety unconstitutional. The Court analyzed very carefully the possibility of partial repeal of the challenged Law. However, in the circumstances of the present case such a solution, in contrast to the circumstances of the Law No. 06/L-114 on Public Officials which was partially repealed, was not possible for two reasons. First, because the constitutional violations evidenced in the challenged Law are of such serious gravity that the latter affect the core of the functioning of government in the Republic of Kosovo – causing an imbalance in the separation of power to the detriment of the Judiciary and Independent Institutions. Second, because the challenged Law does not provide an opportunity to repeal only a few provisions and only a few items of Annexes 1 and 2 because any kind of repeal would make the Law inapplicable in practice. And, in cases where the analysis leads to the conclusion that the Law with partial repeal becomes inapplicable with the remaining articles in force as constitutional, the Court is obliged to repeal the Law in its entirety.

332. The Court also emphasized that all powers without exception, have a constitutional obligation to cooperate with each other and perform public duties for the common public good and in the best interest of

all citizens of the Republic of Kosovo. These public duties also include the obligation of each power to take care during the performance of its constitutional duties for respect of the independence of the power to which it is creating an "interference". For example, the Government and the Assembly, despite having the competence to propose and vote on laws, which could also affect the sphere of the Judiciary, as a third power; they [the Government and the Assembly] must ensure that during the drafting of their proposals and until their finalization by the vote of the Assembly, the constitutional independence of the sister power, namely the Judiciary, is preserved. The Government and the Assembly must show the same care and sensitivity to other state actors, which the Constitution has provided with constitutional guarantees of functional, organizational, structural and budgetary independence. Guaranteeing and prior ensuring of the constitutionality of the initiatives of the Government and the Assembly should be the permanent and inseparable aspect of the legal creativity of these two powers.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 2 and 116.2 of the Constitution, Articles 22, 27, 29 and 30 of the Law and in accordance with Rule 59 (1) of the Rules of Procedure, on 30 June 2020,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO DECLARE by majority that Law No. 06/L-111 on Salaries in Public Sector, in its entirety, is **not in compliance** with: Articles 4 [Form of Government and Separation of Power]; 7 [Values]; 102 [General Principles of the Judicial System]; 103 [Organization and Jurisdiction of Courts] paragraph 1; 108 [Kosovo Judicial Council]; 109 [State Prosecutor]; 110 [Kosovo Prosecutorial Council], 115 [Organization of the Constitutional Court] and Articles 132 [Role and Competencies of the Ombudsperson]; 136 [Auditor-General of Kosovo]; 139 [Central Election Commission]; and 141 [Independent Media Commission] of the Chapter XII [Independent Institutions] of the Constitution;

III. TO DECLARE invalid, in its entirety, Law No. 06/L-111 on Salaries in Public Sector;

IV. TO REPEAL the decision on the imposition of interim measure of 12 December 2019 as well as the decision on the extension of the interim measure of 30 March 2020;

V. TO NOTIFY this Judgment to the Parties;

VI. TO PUBLISH this Judgment in the Official Gazette in accordance with Article 20.4 of the Law;

VII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KO139/18 , Applicant: Municipality of Skënderaj, Constitutional Review of the Collective Sectoral Contract No. 05-3815, of 12 June 2018

KO139/18, Resolution adopted on 30 September 2020, published on 12 November 2020

Keywords: *institutional referral, municipal budget, jubilee salaries, collective contract, inadmissible referral.*

In the circumstances of the present case, the Municipality of Skënderaj challenges the Collective Sectoral Contract (CSC) signed between the Ministry of Health and the Trade Union Health Federation of Kosovo on 12 June 2018. This Contract, in Article 17, had determined the payment of jubilee rewards for health workers, also stipulating that the respective amounts shall be paid by the last employer. The Applicant challenges this provision before the Court, alleging that it is contrary to paragraph 3 of Article 124 [Local Self-Government Organization and Operation] of the Constitution and paragraph 3 of Article 18 (Delegated Competencies) of Law no.03/L-040 on Local Self Government. The Applicant alleges that the obligation of the municipality to pay the jubilee rewards constitutes an additional financial burden for the municipality, contrary to the constitutional and legal guarantees, based on which, *inter alia*, the authority delegating the competence also transfers the obligation to cover the financial cost.

With regard to the allegations of the Applicant, the Court also considered the views of (i) the Ministry of Health; (ii) the Trade Union Health Federation; and (iii) the Ministry of Finance. The first, namely the Ministry of Health, mainly argued that (i) the CSC derives from the General Collective Agreement of Kosovo of 18 March 2014; (ii) the obligations for the payment of jubilee rewards derive from the General Collective Agreement and not from the challenged CSC; and (iii) based on the Law on Local Self Government, the circumstances of the present case are not related to the competencies delegated to the municipal level but rather to the implementation of Law No. 03/L-212 on Labor and General Collective Agreement of Kosovo.

In assessing the Applicant's allegations, the Court initially stated that referrals submitted to the Court pursuant to paragraph 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, must meet the following constitutional requirements: (i) The Municipality must challenge the constitutionality of a law of the Assembly or an act of the Government; and (ii) The Municipality must argue that the challenged law or act violates

municipal responsibilities or reduces its revenues. Therefore, the Court emphasized that in assessing the admissibility of the respective Referral, the most essential issue is the assessment of whether in the circumstances of the present case, a "Government act" is challenged before the Court.

In this context, the Court stated that (i) in the circumstances of the present case, an agreement signed between two parties is challenged, on the one side the Ministry of Health and on the other side the Trade Union Health Federation, respectively the Collective Contract signed at branch level , as defined by the Law on Labour; (ii) The Ministry of Health is only one party to the Agreement, respectively the challenged act, and consequently, the latter does not derive from the decision-making of the Government, but it is the result of a bilateral agreement based on the Law on Labour and the General Collective Agreement of Kosovo; and (iii) based on the comparative analysis of the Constitutions of the region and the case law of the respective Constitutional Courts, such agreements may not be reviewed by the Constitutional Courts before the legal remedies have been exhausted in regular proceedings, unless the respective Constitutions specifically define the jurisdiction of the Constitutional Courts to review the constitutionality of Collective Agreements or if they enable the respective Constitutional Courts to review "other acts" which do not necessarily qualify as acts of the Government. Based on the above mentioned observations, the Court found that the Applicant does not contest a "*Government act"* as required by paragraph 4 of Article 113 of the Constitution, and consequently it is not necessary to also assess whether the Collective Agreement may have violated municipal responsibilities or reduce its revenues because the first criterion of a cumulative test defined by the above mentioned article is not satisfied.

Finally, based on its case law related to cases filed pursuant to paragraph 4 of Article 113 of the Constitution, the Court also noted that even if the Municipality of Skënderaj had submitted a referral for constitutional review of the assessment of the constitutionality of the CSC, in its capacity of as a legal person and based on paragraph 7 of Article 113 of the Constitution, such referral would have been inadmissible due to non-exhaustion of legal remedies, because (i) based on paragraph 9 of Article 90 of the Law on Labour, for the resolution of various disputes by the representatives of employers, employees and the Government in the capacity of social partners, the Social-Economic Council is competent; and (ii) based on paragraphs 1 and 2 of Article 32 of the CSC, disputes between parties are initially resolved through "*mutual consultations and dialogue*" and in the contrary, through the "*Competent Court in Prishtina*".

Consequently and in conclusion, based on paragraphs 1 and 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Article 40 (Accuracy of the Referral) of the Law and paragraph 1 of Rule 73 (Referral

pursuant to Article 113.4 of the Constitution and Articles 40 and 41 of the Law) of the Rules of Procedure, the Referral of the Applicant was declared inadmissible for review of its merits.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO139/18

Applicant

Municipality of Skenderaj

Constitutional review of the Collective Sectoral Contract, No. 05-3815, of 12 June 2018

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 Municipality of Skënderaj, represented by the legal representative Mr. Enver Çerkini (hereinafter: the Applicant).

Challenged act

2. The Applicant challenges the Collective Sectoral Contract [No. 05-3815] (hereinafter: the CSC) of 12 June 2018, concluded between the Ministry of Health of the Republic of Kosovo (hereinafter: the Ministry of Health) and the Trade Union Health Federation of Kosovo (hereinafter: the Federation of Trade Unions).

Subject matter

3. The subject matter of this Referral is the constitutional review of Article 17 (Salaries) of the CSC, which which is alleged to be contrary

to paragraphs 3 and 5 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 18 (Delegated Competencies) of Law No. 03/L-040 on Local Self-Government (hereinafter: LSG).

4. The Applicant also requests (i) imposition of the interim measure due to "*the fact that we are dealing with public interests*"; and (ii) holding a hearing reasoning that "*to reach out to the objective truth, we consider it necessary to hold a public hearing*".

Legal basis

5. The Referral is based on paragraph 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution and Article 40 (Accuracy of the Referral) and 41 (Deadlines) of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 14 September 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 18 September 2018, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.

8. On 21 September 2018, the Court notified the Applicant about the registration of the Referral. On the same date, the Court notified the Ministry of Health and the Federation of Trade Unions about the registration of the Referral, and asked them to submit their comments, if any, related to the referral under consideration, by 11 October 2018.

9. On 11 October 2018, the Ministry of Health and the Federation of Trade Unions submitted their comments regarding the allegations raised in the Applicant's Referral.

10. On 15 October 2018, the Court notified (i) the Applicant about the receipt of comments from the Ministry of Health and the Federation of Trade Unions, giving them the opportunity to respond to their

comments; and (ii) the Ministry of Finance and the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister) about the registration of the Referral and requested them to submit their comments, if any. In both cases, the deadline for submission of comments was set on 1 November 2018.

11. On 1 and 5 November 2018, the Ministry of Health and the Ministry of Finance submitted their comments to the Court.

12. On 8 November 2018, the Applicant submitted another letter to the Court, whereby the Court was requested to hold a hearing.

13. On 12 November 2018, the Court notified the Ministry of Health about the receipt of comments from the Ministry of Finance and asked them to submit a response to the comments, if any, by 20 November 2018.

14. On 12 November 2018, the Court also notified the Applicant about the comments of the Ministry of Health and the Ministry of Finance and requested the latter to respond to the comments, if any, by 20 November 2018.

15. On 16 November 2018, the Court notified the Ministry of Labor and Social Welfare (hereinafter: the MLSW) about the registration of the Referral and also addressed questions to the Ministry in question regarding (i) finality of the General Collective Agreement of Kosovo (hereinafter: GCAK); (ii) legal status of CSC; and (iii) the budget set for the implementation of GCAK. The MLSW did not submit comments about the Referral under consideration nor did it respond to the abovementioned questions.

16. On 20 November 2018, the Applicant's comments and those of the Ministry of Health regarding the comments of the Ministry of Finance were submitted to the Court.

17. On 25 March 2019, 30 April 2019 and 10 January 2020, the Applicant submitted to the Court three additional documents. Through the first requested the imposition of an interim measure due to "*the fact that we are dealing with public interests*", also attaching in support of this request a Judgment of the Basic Court in Mitrovica by which the Municipality of Skenderaj was obliged to bear the costs related to the jubilee rewards arising from the CSC. Through the second, he filed a request for urgency, also emphasizing the importance of the interim measure. While through the third, asked for the correction of an error in their initial request, stating that "*we noticed that a technical error was made by us even though the content is in order, but instead of*

writing article 124 of the Constitution we referred to Article 123, so paragraph 3 of Article 124 is confused with Article 123 thereof".

18. On 18 December 2019, the Review Panel considered the report of the Judge Rapporteur, proposing that the Referral be declared admissible and the case be considered on merits. The minutes of this date reflect the individual statement of the members of the Review Panel, who by majority were against the admissibility of the Referral. In addition, the minutes also reflect the statements of other judges about this, as well as the same minutes reflect that the full Court finally decides that the decision-making regarding the case be postponed to one of the next sessions.

19. On 9 July 2020, the Judge Rapporteur presented before the Review Panel the same proposal with supplementations. The Review Panel, by majority, voted in favor of the proposal to declare the Referral admissible and to consider the case on merits. However, on the same date, the full Court, by a majority, decided against the proposal of the Judge Rapporteur and accordingly, decided to declare the Referral inadmissible. The Judge Rapporteur pursuant to paragraph (4) of Rule 58 (Deliberations and Voting) of the Rules of Procedure, requested the President of the Court to appoint another judge, from a majority, to prepare the Resolution on Inadmissibility. The President of the Court appointed Judge Gresa Caka-Nimani to this position.

20. On 30 September 2020, on behalf of the majority, Judge Gresa Caka-Nimani presented the Resolution on Inadmissibility before the Court. The judges during the discussion raised the issue of technical errors regarding the minutes of 18 December 2019.

21. On 30 October 2020, taking into account that the Court during the discussions on 30 September 2020, noted that the minutes of 18 December 2019 reflected contradictions as a result of technical errors, within the Administrative Session, the judges discussed the content of these minutes and found that the only finding from that session is the decision of judges of full Court on the postponement of the decision-making for one of the next sessions.

Summary of facts

22. On 18 March 2014, the Government of the Republic of Kosovo (hereinafter: the Government) and the Union of Independent Trade Unions of Kosovo and the representatives of employers, the Kosovo Chamber of Commerce and the Kosovo Business Alliance, concluded the GCAK. The latter, *inter alia*, determined (i) in its Article 2 (Scope)

that the provisions of the GCAK oblige the parties to the Agreement in the private, public and state sector, in general, at the level of branches and in enterprise level; (ii) in Article 4 [no title] that the Collective Agreement may be concluded at the level of the Branch and the Enterprise; (iii) in Article 6 [no title] that the provisions and qualifications of the GCAK are standard, unique and binding also at the branch and enterprise level; (iv) in Articles 52 (Jubilee Rewards) and 53 (Retirement reimbursement) it states that health workers receive a jubilee rewards in the amount of one (1), two (2) or three (3) salaries for ten (10) , twenty (20) thirty (30) years of work experience, respectively, and also in case of retirement, the jubilee reward in the amount of three (3) salaries, these amounts which are paid by the last employer; (v) in Article 81 [no title] that if the GCAK, after the expiration of the deadline, any of the parties does not withdraw, its implementation continues for another year; and finally (vi) in Article 82 [no title] that the GCAK enters into force on 1 January 2015.

23. On 12 June 2018, the Ministry of Health and the Federation of Trade Unions, concluded the CSC. The latter, *inter alia*, stipulated (i) in its Article 4 (Scope) that the relevant contract applies to the regulation of legal relations for all employees in health institutions; (ii) Article 32 (Resolution of Disputes) that resolving disputes between the signatory parties is done through consultation and mutual dialogue, and in case of failure, through the competent court in Prishtina; and (iii) in its Article 17 that health workers receive a jubilee rewards in the amount of one (1), two (2) or three (3) salaries for ten (10), twenty (20) and thirty (30) years of work experience, respectively, and also in case of retirement the jubilee rewards in the amount of three (3) salaries, these amounts which are paid by the last employer.

Applicant's allegations

24. The Applicant alleges that Article 17 of the CSC is contrary to paragraphs 3 and 5 of Article 124 of the Constitution and Article 18 of the LLSG.

25. The Applicant, more specifically, alleges that contrary to the constitutional and legal guarantees set forth in paragraph 3 of Article 124 of the Constitution and paragraph 3 of Article 18 of the LLSG, namely the obligation of the state authority to cover the costs of delegation of competencies at the municipal level, the Ministry of Health, pursuant to Article 17 of the CSC, has obliged the municipality itself to cover the costs related to the jubilee rewards of health employees.

26. The Applicant states before the Court that: "*The Municipality of Skenderaj requests the Constitutional Court of the Republic of Kosovo to assess the constitutionality of this collective contract in general, and in particular Article 17 paragraph 3, and sub-paragraphs 3.1, 3.2, and 3.3. and paragraph 4 and 5 of the same article of the Collective Sectoral Contract dated 12.06.2018, by which legal provisions have placed an additional burden on the municipality even though we have a small and poor budget in relation to the requests of citizens, and such a burden is unjust, unlawful and contrary to the Constitution and the law, due to the fact that the Ministry of Health before signing this contract had to foresee the budget and financial means, namely to create the budget line, because it has lists for every employee in the health sector who retire and those accompanying and jubilee salaries to be provided in the budget and not to unfairly burden the municipality for this".*

27. The Applicant requests the Court to (i) declare the Referral admissible; and (ii) repeal Article 17 of the CSC of 12 June 2018.

Comments of interested entities

28. The Court will further present the comments of (i) the Ministry of Health on the Applicant's Referral; (ii) the Federation of Health Trade Unions on the Applicant's Referral; (iii) Ministry of Finance; (iv) the Applicants regarding the responses of the Ministry of Health and the Ministry of Finance; and (v) the Ministry of Health regarding the letter from the Ministry of Finance.

(i) Comments of the Ministry of Health

29. Responding to the possibility given by the Court, on 21 September 2018 to the comments of the Ministry of Health regarding the allegations of the Applicant, the Ministry of Health submitted the comments with reference to Article 124 of the Constitution; Article 4 (Hierarchy among the Law, Collective Contract, Employer's Internal Act and the Labour Contract) and Article 90 (Collective Contract) of Law no. 03-L/212 on Labor (hereinafter: the Law on Labor); and Articles 2, 3 (Application and Inclusion), 4, 5, 6, 52 and 53 of the GCAK of 18 March 2014.

30. The Ministry of Health stated, *inter alia*, that (i) based on Article 90 of the Law on Labor, a Collective Agreement is directly applicable between the employer and the employee and that one may be concluded at the national level, such as the GCAK. of 18 March 2014 or at the branch level, such as the CSC of 12 June 2018; (ii) The GCAK in its Article 2 stipulates that its provisions are binding on the private,

public and state sector, at general level, of branches and enterprises, and that consequently, jubilee rewards for years of work experience and in case of retirement, are defined through the GCAK and were mandatory at the Kosovo level even before the signing of the CSC; (iii) consequently, the Ministry of Health, by signing the CSC, has not imposed any additional obligations but has only implemented the Law on Labor and Articles 52 and 53 of the GCAK, including the two latter in its Article 17; and (iv) the Ministry of Health has not "*delegated*" competencies at the municipal level, as it has not delegated any responsibility belonging the Ministry of Health at the municipal level, moreover, the LLSG in Article 3 (Definitions) and 18 thereof, determines exactly the manner of delegation of competencies from the central to the municipal level, and that such a delegation is done only through the law, which is not the case in the circumstances of the present case.

(ii) Comments of the Federation of Health Trade Unions

31. Responding to the opportunity provided by the Court, on 21 September 2018 to the comments of the Federation of Trade Unions regarding the allegations of the Applicant, the Federation of Trade Unions submitted their comments stating, *inter alia*, that (i) the Applicant has not exhausted legal remedies because based on Article 32 of the CSC, it was forced to initially try to address its allegations through social dialogue and the "*competent court in Prishtina*"; (ii) Article 17 of the CSC derives from Articles 52 and 53 of the GCAK on 18 March 2014, and consequently does not constitute any additional obligation; and (iii) the financial analysis of the CSC is "*calculated by the other signatory in this case the Ministry of Health*".

(iii) Comments of the Ministry of Finance

32. Responding to the opportunity provided by the Court on 15 October 2018 to the comments on the Applicant's Referral as well as the relevant submissions of the Ministry of Health and the Federation of Trade Unions, the Ministry of Finance submitted the relevant comments to the Court, emphasizing the CSC "*has not been subject to costing procedures and the Ministry of Finance has not provided any opinion on the eventual cost that this document may have. Therefore, the implementation of the provisions of this Agreement should be done within the existing budget allocations*".

(iv) Applicant's comments on the response of the Ministry of Finance and the Ministry of Health

33. Responding to the possibility provided by the Court on 12 November 2018 to the Applicant's comments regarding the comments of the Ministry of Health and Finance, the Applicant regarding the former stated that their comments are "*unfounded and unsubstantiated*", also adding that the CSC is also contrary to Law No. 03/L-048 on Public Financial Management and Accountability (hereinafter: the Law on Financial Management and Accountability), while regarding the latter, stated that the letter from the Ministry of Finance confirms their claims that the procedures provided by the Law on Financial Management and Accountability have not been respected.

(v) Comments of the Ministry of Health in the letter of the Ministry of Finance

34. Responding to the opportunity given by the Court, on 12 November 2018 to the comments of the Ministry of Health in the letter of the Ministry of Finance, the Ministry of Health stated that (i) GCAK of 18 March 2014 continues to be in force because based on Article 81 thereof, if after the expiration of the determined deadline no signatory party withdraws, its implementation continues for another year, namely until January 2019; and (ii) taking into account the fact that the GCAK is in force, "*as such does not represent additional costs to and regarding it, there was no need to consult the Ministry of Finance*" .

Relevant constitutional and legal provisions

THE CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 113
[Jurisdiction and Authorized Parties]

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[…]
4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.
[…]

Article 124
[Local Self-Government Organization and Operation]

1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.
[...]
3. Municipalities have their own, extended and delegated competencies in accordance with the law. The state authority which delegates competencies shall cover the expenditures incurred for the exercise of delegation.
[...]
5. Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law.

LAW NO. 03/L-212 ON LABOUR

Article 4
Hierarchy among the Law, Collective Contract, Employer's Internal Act and the Labour Contract

1. Provisions of the Collective Contract, Employer's Internal Act and Labour Contract shall be in compliance with the provisions of this Law.
[...]

Article 90
Collective Contract

1. Collective Contract may be concluded between:
1.1. Organization of employers and their representatives and
1.2. Organization of employees or, in cases where there are no such organisations, the agreement may be concluded by the representatives of employees;
2. . Collective Contract may be concluded at:
2.1. the state level,
2.2. . the branch level; and
2.3. the enterprise level.
[...]
3. . Collective Contract shall be concluded in a written form in official languages of Republic of Kosovo.
4. Collective Contract may be concluded for a certain period of time with a duration of maximum three (3) years.
[...]

9. . For the resolution of various disputes in a peaceful manner and the development of consultations on employment, social welfare and labour economic policies by the representatives of employers, employees and Government in the capacity of social partners, through a special legal-secondary legislation act, the Social-Economic Council shall be established.
[...]

LAW No. 03/L-040 ON LOCAL SELF GOVERNMENT

Article 3
Definitions

-"Delegated Competencies"- shall mean competencies of the central government and other central institutions the execution of which is temporarily assigned by law to municipalities;

Article 18

Delegated competencies

18.1 Central authorities in Republic of Kosova shall delegate responsibility over the following competencies to municipalities, in accordance with the law:
a) cadastral records;
b) civil registries;
c) voter registration;
d) business registration and licensing;
e) distribution of social assistance payments (excluding pensions); and
f) forestry protection on the municipal territory within the authority delegated by the central authority, including the granting of licenses for the felling of trees on the basis of rules adopted by the Government;
18.2 Central authorities in Republic of Kosova may delegate other competencies to municipalities, as appropriate, in accordance with the law.
18.3. Delegated competencies must in all cases be accompanied by the necessary funding in compliance with objectives, standards and requests determined by the Government of Kosova.

THE GENERAL COLLECTIVE AGREEMENT IN KOSOVO (signed on 18.03.2014 and entered into force on 01.01.2015)

Article 1

Purpose

1. Purpose of the present General Collective Agreement of Kosovo (hereinafter referred to as GCAK), is to set and regulate in a clear and detailed manner the rights, duties and obligations of the parties involved in the Agreement.
2.Parties of the present GCAK include: employers' representatives, workers' representatives and the Government of the Republic of Kosovo.
3.Government of Kosovo is guarantor for implementation of the present GCAK, concluded with parties' will as in paragraph 2 of the present Article.

Article 2
Scope

1. Provisions of the GCAK are binding to the parties of the Agreement, at private, public and state sector (at general level, branch level and company level).
[...]

Article 3
Application and inclusion

Provisions of the GCAK are applied throughout the territory of the Republic of Kosovo.

Article 4
[No title]

1. Provisions of the GCAL bind employers who, in any way, carry out economic, non-economic activities and civil services. Collective Agreement can copncluded at Branch or Enterprise levels.
[...]

Article 5
[No title]

GCAK applies to all employees who work for an employer, with their representation in the territory of Kosovo.

Article 6
[No title]

Provisions and quantification of GCAK are standard, unique and binding also at Branch and Company level.

Article 52
Jubilee rewards

1. Employee is entitled to jubilee rewards in following cases:
1.1. for 10 years of continuous experience at the last employer, equal to one monthly wage,
1.2. for 20 years of continuous experience, for the last employer, equal to two monthly wages,
1.3. for 30 years of continuous experience, for the last employer, equal to three monthly wages;
2. The last employer is the one who provides jubilee rewards.
3. Jubilee reward, is paid in a timeframe of one month, after meeting the conditions from the present paragraph.

Article 53
Retirement reimbursement

When retiring, employee is entitled to a reimbursement equal to three (3) monthly wages, he/she received during the last three (3) months.

SECTORAL COLLECTIVE CONTRACT
(signed on 12.06.2018)

Article 1
Purpose

1. The Sectoral Collective Contract (hereinafter: SCC) is bound by the parties in this contract for the advancement of the rights of labor relations and respecting the rights and obligations of the contracting parties.
2. Through the SCC, the rights of the labor relations are extended according to the legislation in force.
3. SCC regulates:
[...]
3.12. Resolving Disputes.

Article 17
Salary

1. *The salary of the employee increases for each full year of working time at a rate of 0.5% on the basic salary in accordance with the General Collective Agreement of Kosovo*
2. *The employee is entitled to compensation of the thirteenth (13) salary for each calendar year in the value of the basic salary, according to employer's budget possibilities.*
3. *Health workers, in jubilee years of employment benefit jubilee reward from the last employer in the amount of:*
   - *3.1 For 10 years of work experience in health institutions, worth a monthly salary;*
   - *3.2 For 20 years of work experience in health institutions, worth two monthly salaries;*
   - *3.3 For 30 years of work experience in health institutions, to the last employer, worth three monthly salaries.*
4. *The last employer is the one who pays jubilee rewards. The jubilee reward is paid within one month after the conditions of this paragraph have been met.*
5. *Compensation in case of retirement, the employee on retirement has the right to a subsequent payment of three (3) monthly salaries, which he has received for the last three (3) months.*

Article 32
Resolution of dispute

1. *The parties in this contract will resolve all disputes between them through mutual consultations and dialogue.*
2. *If the dispute between the parties cannot be resolved under paragraph 1 of this Article, the parties to the dispute shall be referred to the competent court in Pristina.*
3. *Health workers who are members of the trade union enjoy legal trade union protection.*

Admissibility of the Referral

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

36. The Court, in this respect, first refers to paragraphs 1 and 4 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which determine:

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act."

37. The Court also refers to Articles 40 (Accuracy of the Referral) and 41 (Deadlines) of the Law, which stipulate:

Article 40
(Accuracy of the Referral)

"In a referral made pursuant to Article 113, Paragraph 4 of the Constitution, a municipality shall submit, inter alia, relevant information in relation to the law or act of the government contested, which provision of the Constitution is allegedly infringed and which municipality responsibilities or revenues are affected by such law or act."

Article 41
(Deadlines)

"The referral should be submitted within one (1) year following the entry into force of the provision of the law or act of the government being contested by the municipality."

38. Finally, the Court also refers to the Rule 73 (Referral pursuant to Article 113.4 of the Constitution and Articles 40 and 41 of the Law), which specifies:

"(1) A referral filed under this Rule must fulfill the criteria established under Article 113.4 of the Constitution and Articles 40 and 41 of the Law.
(2) In a referral pursuant to this Rule, a municipality must submit, inter alia, the following information:
(a) relevant information in relation to the law or act of the government contested;
(b) the specific provision of the Constitution which is allegedly infringed; and (c) the municipality responsibilities or revenues that are affected by such law or act.

(3) The referral under this Rule must be filed within one (1) year following the entry into force of the provision of the law or act of the Government being contested."

39. Based on the abovementioned provisions of the Constitution, the Court notes that the referrals submitted to the Court pursuant to paragraph 4 of Article 113 of the Constitution must meet the following constitutional criteria: (i) The municipality must challenge the constitutionality of a law of the Assembly or of an act of the Government; and (ii) The municipality must substantiate that the challenged law or act violates municipal responsibilities or reduces its revenues. These two conditions are cumulative. Consequently, the respective Municipality must challenge the law of the Assembly or the act of the Government and argue that they have violated or reduced the municipal responsibilities or its revenues. Based on the Law and the Rules of Procedure, this law or act must be challenged in Court within one (1) year from its entry into force.
40. Consequently and in the following, in order to assess the admissibility of the Referral, the Court must first assess whether a law of the Assembly or an act of the Government is challenged before it, and if the answer is affirmative then, it must assess whether the relevant law/act reduces municipal responsibilities or affects its revenues.

41. In the circumstances of the present case, it is clear that the Agreement challenged by the Applicant, namely the CSC, is not the law of the Assembly. Therefore, it must be assessed whether the latter can qualify as a "*Government act*".

42. The Court notes in this context that the scope of the "acts" of the Government, namely the Prime Minister, Deputy Prime Ministers and Ministers, includes their decision-making, as set out in Article 92 [General Principles] of the Constitution. The Court, through its case law, has established that regardless of the formal name of these decisions issued, they are subject to constitutional review, if they raise "*important constitutional matters*" and taking into account the legal effects produced by them, always insofar as they have been brought before the Court in the manner prescribed by the Constitution and the Law (see case of the Court KO61/20, Applicant, *Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, on declaration of the Municipality of Prizren "*quarantine zone*"; and Decisions [No. 229/IV/2020], [No. 238/IV/2020], [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, *on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipalities of Prizren, Dragash*

and Istog, Judgment of 5 May 2029, paragraphs 92 to 98 and other references used therein.

43. In the circumstances of the present case, an agreement signed between the two parties is challenged before the Court, on the one hand the Ministry of Health and on the other the Federation of Trade Unions, namely the Collective Contract signed at branch level, as defined by paragraph 2.2 of Article 90 of the Law on Labour. The Court notes that based on the latter, namely paragraph 1.8 of Article 3 (Definitions) thereof, the Collective Agreement is defined as an agreement between employers' organizations and employees' organizations which regulates the rights, duties and responsibilities arising from the employment relationship according to the agreement reached. Furthermore, based on Article 90 of the Law on Labour, the Collective Agreement can be concluded between the employers' organization or its representative, and the employees' organization, or when there are no organizations, the agreement can also be concluded by the employees' representatives.

44. Consequently, the Ministry of Health is only one party to the Agreement, namely the challenged act. The latter does not derive from the decision-making of the Government, but is the result of a bilateral agreement based on the Law on Labor and GCAK of 18 March 2014. Consequently, it cannot be qualified as a "*government act*" for the purposes of paragraph 4 of Article 113 of the Constitution. This Agreement in fact reflects the mutual will between the Ministry of Health and the Federation of Health Trade Unions, as signatories and which, moreover, through it have agreed to address possible disputes through social dialogue or through "*the competent court in Prishtina*". Resolution of disputes in this regard belongs to the regular courts.

45. Therefore, and taking into account that no "*Government act*" is challenged before the Court, it does not assess further whether the Collective Agreement may have violated municipal responsibilities or reduced its revenues, as set out in paragraph 4 of Article 113 of the Constitution, because the first criterion of admissibility has not been met, namely the challenging of a law of the Assembly or the "*Government act*", as stipulated by the same paragraph of Article 113 of the Constitution.

46. The Court notes that the Constitutional Courts of the region have had a similar approach in this regard. More precisely, unlike the Constitution of Kosovo, a part of the constitutions of the states in the region, explicitly define the competence of the respective Constitutional Courts to assess the constitutionality of Collective

Contracts. This category includes the Republic of North Macedonia and that of Serbia. The first, in Article 110 of the Constitution, defines the jurisdiction of the Constitutional Court, and on the basis of which, the latter, among other things, decides on the compatibility of laws with the Constitution and other rules and Collective Agreements with the Constitution and laws. Whereas the second, in Article 167 of the Constitution, defines the jurisdiction of the Constitutional Court, and based on which, the latter, among other things, decides on the compatibility of laws and general acts with the Constitution; of general acts with law and general acts of organizations entrusted to public authorities, political parties, trade unions, citizens' associations and General Collective Agreements with the Constitution and the law.

47. Other constitutions, such as that of the Republic of Kosovo, do not refer to the competence of the Constitutional Courts to assess the constitutionality of a Collective Agreement. The latter, among others, refer beyond the assessment of the constitutionality of laws, to the assessment of the constitutionality of "*acts*" of central and local authorities or those issued for the exercise of public authority. More specifically, (i) Albania, in Article 131 of its Constitution, defines the jurisdiction of the Constitutional Court, based on which, among other things, the latter assesses the compatibility of normative acts of central and local authorities with the Constitution and international agreements; (ii) Slovenia, in Article 160 of its Constitution, defines the jurisdiction of the Constitutional Court, based on which, among other things, it specifies that the latter assesses the compatibility of laws with the Constitution, of regulations with the Constitution and with laws; and general acts issued in the exercise of public authority in accordance with the Constitution, laws and regulations; (iii) Croatia, in Article 129 of its Constitution, defines the jurisdiction of the Constitutional Court, based on which, among other things, it specifies that the latter assesses the compatibility of laws with the Constitution and other regulations with the Constitution and laws; whereas (iv) Montenegro, in Article 149 of this Constitution, defines the jurisdiction of the Constitutional Court, based on which, among other things, it specifies that the latter assesses the compatibility of laws with the Constitution and of regulations and other general acts with the Constitution and the law. Within the jurisdiction to assess "*other general acts*", the Constitutional Court of Montenegro also assessed the General Collective Agreement (See Decision U-II no. 3/15 of the Constitutional Court of Montenegro, 21 April 2017).

48. In contrast, the Constitutional Courts of Slovenia and Croatia rejected constitutional review of the Collective Agreements. The Constitutional Court of Slovenia when reviewing cases r. UI-220/94 of 6 February

1997 and UI-75/97 of 14 May 1997, held that it has no jurisdiction to review the provisions of the General Collective Agreement, emphasizing that this is the competence of the regular courts. Similarly, the Constitutional Court of Croatia, during the review of cases, Decision no. U-II-75/2018 of 30 January 2018 and Decisions U-II-363/2015 of 4 February 2015, U-II-318/2003 of 9 April 2003 and U-II-4380/2004 of 14 June 2006, also stated that it has no jurisdiction to assess the provisions of the General Collective Agreements, because this is the competence of the regular courts.

49. The Constitutional Court of Croatia, *inter alia*, stated as follows: "*In these cases, it was found that the (non) compliance of the collective agreements with the Constitution, the mandatory regulations and the morality of the society are decided by the courts applying the rules of the obligatory law for the invalidity of the contract. The Constitutional Court only in a case of a possible constitutional lawsuit decides whether a court decision issued in such a dispute violates human rights and fundamental freedoms guaranteed by the Constitution. From what was said above, it follows that the Constitutional Court is not competent to decide on the legal validity of collective agreements in the process of assessing the compliance of laws with the Constitution and other regulations with the Constitution and law. (*See Constitutional Court of Croatia, Decision No. U-II-75/2018 of 30 January 2018 and*, mutatis mutandis,* Decisions number: U-II-363/2015 of 4 February 2015, U-II-318/2003 of 9 April 2003 and U-II-4380/2004 of 14 June 2006).

50. The Court notes that it has followed the same approach in the previous cases reviewed by it and submitted to the Court based on paragraph 4 of Article 113 of the Constitution. One case, namely case KO89/16 (see the case of the Court, KO89/16, Applicant, *Municipality of Prishtina*, Resolution on Inadmissibility, of 5 December 2016), was declared inadmissible by the Court as out of time. While the other three, namely the cases KO08/13, KI07/10 and KO123/10, were declared inadmissible because a "*Government act*" was not challenged, as required by paragraph 4 of Article 113 of the Constitution.

51. More precisely, in case KO08/13 (see the case of Court KO08/13, Applicant *Municipality of Klina*, Resolution on Inadmissibility of 14 November 2013), referring to paragraph 4 of Article 113 of the Constitution, the Municipality of Klina challenged Decision [A. No. 811/2006] of 14 March 2007 and fifteen (15) other decisions of the Administrative panel of the Supreme Court, claiming that the latter, *inter alia*, were contrary to Articles 123 [General Principles] and 124 of the Constitution. The Court declared the Referral inadmissible,

stating that the admissibility requirements set out in paragraph 4 of Article 113 of the Constitution were not met, because the acts challenged by the Applicant were not "*acts of the Government"* for the purposes of this Article. Furthermore, the Court stated that even if a Referral was submitted pursuant to paragraph 7 of Article 113 of the Constitution, in the capacity of the respective municipality as a legal entity, the Referral would be inadmissible as out of time.

52. In case KI07/10 (see the case of the Court KI 07/10, Applicant *Municipality of Klina*, Resolution on Inadmissibility of 16 December 2010), referring to paragraph 4 of Article 113 of the Constitution, the Municipality of Klina challenged Decision [No. 112/08] of 5 June 2009 of the Independent Oversight Board of Kosovo. The Court declared the Referral inadmissible, stating that the admissibility requirements set out in paragraph 4 of Article 113 of the Constitution were not met, because the acts challenged by the Applicant were not "*acts of the Government*" for the purposes of this Article, but of an independent body based on the legislation in force. Furthermore, the Court stated that even if a Referral was submitted pursuant to paragraph 7 of Article 113 of the Constitution, in the capacity of the respective municipality as a legal entity, the Referral would be inadmissible as a result of non-exhaustion of legal remedies.

53. In case KO123/10 (see the case of the Court, KO123/10, Applicant *Municipality of Gjakova*, Resolution on Inadmissibility, of 13 May 2011), referring to paragraph 4 of Article 113 of the Constitution, the Municipality of Gjakova challenged Judgment [No. c. no. 183/2009] of 17 June 2009 of the District Commercial Court in Prishtina. The Court declared the Referral inadmissible stating that the admissibility requirements set out in paragraph 4 of Article 113 of the Constitution were not met, because the acts challenged by the Applicant were not "*acts of the Government"* for the purposes of this Article. Furthermore, the Court stated that even if a Referral was submitted pursuant to paragraph 7 of Article 113 of the Constitution, in the capacity of the respective municipality as a legal entity, the Referral would be inadmissible as out of time.

54. Therefore, based on the abovementioned case law regarding the cases filed pursuant to paragraph 4 of Article 113 of the Constitution, the Court also notes that even if the Municipality of Skenderaj had submitted a request for the constitutional review of the CSC, in its capacity as legal person and based on paragraph 7 of Article 113 of the Constitution, similar as in the case of Court KI07/10, the Referral would be inadmissible due to non-exhaustion of legal remedies. This is because (i) based on paragraph 9 of Article 90 of the Law on Labour,

the Social-Economic Council is competent for resolving various disputes by representatives of employers, employees and the Government in the capacity of social partners; and (ii) based on paragraphs 1 and 2 of Article 32 of the CSC, the disputes between the parties are resolved initially through "*consultations and mutual dialogue*" and vice versa, through the "*Competent Court in Prishtina*".

55. The Court has consistently reiterated that the purpose and rationale behind the requirement to exhaust the legal remedies or the exhaustion rule, provided by paragraph 7 of Article 113 of the Constitution, is to afford the relevant authorities, primarily the regular courts, the opportunity to prevent or put right the alleged violations of the Constitution. It is based on the presumption, reflected in Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the European Convention on Human Rights that the Kosovo legal order provides an effective remedy for the protection of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery (See in this regard, the cases of the European Convention on Human Rights: *Selmouni v. France*, cited above, paragraph 74; *Kudła v. Poland,* Judgment of 26 October 2000, paragraph 152*;* and among others, see also the cases of the Court: KI07/15, Applicant *Shefki Zogiani*, Resolution on Inadmissibility of 8 December 2016, paragraph 61; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; KI41/09, Applicant *AAB-RIINVEST University L.L.C*, Resolution on Inadmissibility of 3 February 2010, paragraph 16; and, KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

56. Therefore and in conclusion, pursuant to paragraphs 1 and 4 of Article 113 of the Constitution, Article 40 of the Law and paragraph 1 of Rule 73 of the Rules of Procedure, the Applicant's Referral is to be declared inadmissible.

Request for interim measure

57. The Court recalls that the Applicant requested the imposition of the interim measure due to the "*fact that we are dealing with public interests*".

58. The Court has now concluded that the Applicant's Referral is to be declared inadmissible.

59. 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 interim measure is to be rejected, because the latter cannot be the subject of review, as the referral is declared inadmissible (See, in this regard, the cases of the Court: KI159/18, Applicant *Azem Duraku*, Resolution on Inadmissibility of 6 May 2019, paragraphs 89-91; KI19/19 and KI20/19, Applicants *Muhamed Thaqi and Egzon Keka,* Resolution on Inadmissibility of 29 July 2019, paragraphs 53-55).

Request for hearing

60. The Court recalls that the Applicant also requested the Court to schedule a hearing on the grounds: "*to reach out to the objective truth, we consider it necessary to hold a public hearing*".

61. In this regard, the Court recalls that pursuant to paragraph (2) of Rule 42 (Right to Hearing and Waiver) of the Rules of Procedure, *"The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law."*

62. The Court notes that the abovementioned rule of Rules of Procedure is of a discretionary nature. As such, that rule only provides for the possibility for the Court to order a hearing in cases where it believes it is necessary to clarify issues of fact or law. Thus, the Court is not obliged to order a hearing if it considers that the existing evidence in the case file suffices, beyond any doubt, to reach a decision on merits in the case under consideration. (See, among others, case of the Court, KI48/18, *Applicant Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019, paragraph 272 and references mentioned therein).

63. In the present case, the Court does not consider that there is any uncertainty about the "*evidence or the law*" and therefore does not consider it necessary to hold a hearing. The documents included in the Referral are sufficient to decide on the inadmissibility of this case.

64. Therefore, the Court finds that the Applicant's request for scheduling a hearing must be rejected as inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.1 and 4 of the Constitution, Articles 20 and 40 of the Law, Rules 57 (4), 59 (2) and 73 (1) of the Rules of Procedure, on 30 September 2020, by majority

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for imposition of interim measure;

III. TO REJECT the request for holding a hearing;

IV. TO NOTIFY this Decision to the Parties;

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

VI. This Decision is effective immediately.

Judge Gresa Caka-Nimani

President of the Constitutional Court Arta Rama-Hajrizi

Case No. KO 98/20, Applicant: Hajrulla Çeko and 29 other deputies, Constitutional review of Decision No. 52/2020, of the President of the Republic of Kosovo of 14 March 2020

Keywords: *institutional referral, announcement of elections, postponement of elections, referral without subject of review*

The subject matter of the Referral was the constitutional review of the Decision [No. 52/20] of the President of the Republic of Kosovo, of 14 March 2020, on the postponement of holding of extraordinary elections for President of the Municipality of Podujeva. The Applicants alleged that the challenged decision is not in accordance with: paragraph 4 of Article 84 [Competencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation] and paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo, Article 21 of the Universal Declaration of Human Rights and Article 3 of Protocol No. 1 to the European Convention on Human Rights.
The Referral was based on sub-paragraph 1 of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court, as well as Rules 32 [Filing of Referrals and Replies] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure of the Constitutional Court.

Conclusions

#

1. With regard to the circumstances of the present case, the Court takes into account paragraph (4) of Rule 35 of the Rules of Procedure, as well as Article 37 of the ECHR, on which occasion, on the issue of cases before it, answers two questions as follows: *(i) first*, whether the circumstances for which the Applicants directly complained still exist; and, *(ii) second*, whether the effect of an eventual breach of the Convention due to those circumstances has also been remedied. The Court also assessed whether it is still necessary to continue with the review of the present case, in the context of respect for human rights guaranteed by the Constitution and the Convention.

2. In terms of this analysis, the Court further concluded that in the present case, (i) as long as the reason for which the Decision of the President was challenged, that is *the postponement of elections to indefinite period of time* no longer exists; and (ii) while the effect of the eventual violation of Article 45 of the Constitution and Article 3 of Protocol 1 to

the ECHR due to those circumstances has been addressed by setting a new election date (29 November 2020), the Court considers that the present case does not involve any special circumstances regarding the observance of human rights established in the Constitution and the Convention.

3. Accordingly, the Court finds that by the Decision of the President [No. 157/2020], the subject of the Applicants' Referral has significantly changed. The current position, namely *the setting of the election date* is such a circumstance which consists in the fact that the referral in question, already has no reasoning and that the aim that was pursued to be achieved, has already been fully achieved. In light of this, the Court considers that there is no merit to further review this matter and such a reasoning was clearly expressed by the Court also in its case law (see: cases of the Court: KO63/12, Applicant: *Alma Lama and 10 other deputies of the Assembly of the Republic of Kosovo, constitutional review of Articles 37, 38 and 39 of the Criminal Code No. 04/L-82 of the Republic of Kosovo,* decision on striking out the Referral of 10 December 2012, paragraph 19; Case KO107/10, Applicant: *Gani Geci and other deputies,* constitutional review of the Decision of Assembly of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunication, Decision to strike out the Referral of 17 August 2011, paragraphs 24-26; Cases KI58, KI66 and KI94/12, Applicants: *Selatin Gashi, Halit Azemi and group of Municipal Assembly Members of Viti, Request for constitutional review of the Decision of the Municipality of Mitrovica, Gjilan and Viti for conditioning the access of citizens to public services with payment of obligations towards publicly owned enterprises*, Decision to strike out the Referral of 5 July 2013, paragraph 45).

4. Therefore, as a general procedural principle, the Court does not render decisions on cases where the matter does not exist and the case becomes without subject of review. This is a generally accepted principle of conduct of courts and it is analogous to the principle of judicial restraint (see: case KO63/12, cited above, paragraph 23; KI11/09, *Tomë Krasniqi, constitutional review of Section 2.1 of the United Nations Mission in Kosovo (UNMIK) Administrative Direction No. 2003/12 and Article 20.1 of the Law on Radio Television of Kosovo*, *Law No. 02/L-47*, Decision to strike out the Referral of 30 May 2011, paragraph 46).

5. In assessing the constitutionality of Decision No. 52/20 of the President of the Republic of Kosovo, of 14 March 2020, the Court

decided by a majority of votes that the case has remained without subject of review and consequently decided:

(i) TO STRIKE OUT the Referral, in accordance with Rule 35 (4) of the Rules of Procedure;
(ii) TO NOTIFY this decision to the parties;

DECISION TO STRIKE OUT THE REFERRAL

in

Case No. KO98/20

Applicant

Hajrulla Çeko and 29 other deputies

Constitutional review of Decision No. 52/2020, of the President of the Republic of Kosovo of 14 March 2020

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

Applicants

1. The Referral was submitted by 30 deputies of the Assembly of the Republic of Kosovo (hereinafter: the Asssembly), namely: Hajrulla Çeko, Rexhep Selimi, Yllza Hoti, Liburn Aliu, Fatmire Mulhaxha Kollçaku, Arbërie Nagavci, Hekuran Murati, Fitore Pacolli, Saranda Bogujevci, Jahja Koka, Mefail Bajçinovci, Valon Ramadani, Mimoza Kusari Lila, Fitim Uka, Shpejtim Bulliqi, Artan Abrashi, Arbër Rexhaj, Arbëresha Kryeziu Hyseni, Labinotë Demi Murtezi, Alban Hyseni, Gazmend Gjyshinca, Arta Bajraliu, Enver Haliti, Agon Batusha, Dimal Basha, Fjolla Ujkani, Fitim Haziri, Elbert Krasniqi, Eman Rrahmani and Salih Zyba (hereinafter: the Applicants or Applicant deputies).

2. The Applicants were represented in the proceedings before the Constitutional Court of the Republic of Kosovo (hereinafter: the Court), by deputy Hajrulla Çeko.

Challenged act

3. The Applicants challenge Decision No. 52/20 of the President of the Republic of Kosovo, of 14 March 2020 (hereinafter: the challenged Decision) for the postponement of the extraordinary elections for the President of the Municipality of Podujeva.

Subject matter

4. The subject matter of the Referral is the constitutional review of the challenged Decision, which according to Applicants' allegations is not in compliance with paragraph 4 of Article 84 [Comptencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Article 21 of the Universal Declaration of Human Rights (hereinafter: the UDHR), Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

5. The Referral is based on sub-paragraph (1) of paragraph 2 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 29 [Accuracy of the Referral] and 30 [Deadlines] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 67 [Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

6. On 22 June 2020, the Applicants submitted the Referral to the Court challenging the Decision of the President to postpone the holding of extraordinary elections for the President of the Municipality of Podujeva.

7. On 22 June 2020, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

8. On 23 June 2020, the Applicants were notified about the registration of the Referral. On the same date, the Court notified about the registration of the Referral: the President of the Republic of Kosovo (hereinafter: the President); The President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), who was requested to submit a copy of the Referral to all members of the Assembly; The Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); The Ombudsperson and the Chairwoman of the Central Election Commission (hereinafter: the CEC).

9. The Court notified all interested parties mentioned above to submit their comments, if any, to the Court, within 15 days, namely until 8 July 2020, at the e-mail address of the Court or by personal delivery.

10. On 8 July 2020, the President submitted comments on case KO98/20 of the Constitutional Court.

11. On 10 July 2020, the Court notified the Applicants about the comments received on 8 July 2020. The Court also requested the Applicants to clarify by 17 July 2020 *that in addition to the "the fact that you challenge the Decision to postpone the holding of extraordinary elections for the President in the Municipality of Podujeva (Decision No. 52/20, of 14 March 2020), we ask you to clarify whether you also challenge the decision to postpone the holding of extraordinary elections for the President in the Municipality of North Mitrovica (No. 63/20, of 11 June 2020)".*

12. On the same date, the Court notified the President of the Assembly who was requested to submit a copy of the Referral to all deputies of the Assembly; the Prime Minister; The Ombudsperson; and the Chairwoman of the CEC; regarding the President's comments received on 8 May 2020.

13. On 28 July 2020, the Court notified the Applicants that within the set deadline, namely 17 July 2020, no response was received from them. Consequently, the Court notified the Applicants that *"the proceedings for the review of case KO98/20 will continue basedon the existing documentation".*

14. On 29 July 2020, the Applicants' authorized representative, via email addressed the Secretary of the Court, stating that he had received the letter of 28 July 2020, but that he had not received the letter of 10 July 2020, for which emphasizes that *"If there has been a request before, I want to inform you that I have not received anything from the Court.*

For this reason, please inform me concretely what is the request about, providing me with a reasonable deadline for response".

15. On 5 August 2020, the Court addresses the representative of the Applicants - deputy Çeko, where it confirms that the letter of the Court [Ref. no.: 1230/20/rl] of 10 July 2020, was sent by the Court to the Assembly of Kosovo and the latter was accepted by the Administration of the Assembly (In this regard, the Court attached the confirmation of receipt of the letter). The Court also addresses as follows: *"The Court confirms equal treatment of all parties to the proceedings before it. Consequently, in case you consider that you have not received the letter of the Court [No. ref.:1230/20/rl] of 10 July 2020, we request you to bring a confirmation from the Administration of the Assembly which clarifies that the document in question has not been accepted by you".*

16. On the same date, the Court addressed the Secretary of the Assembly regarding the request for the following information: (i) confirmation of receipt of the Court letter [Ref.no.:1230/20/rl] by the Administration of the Assembly; and at the same time (ii) the confirmation whether the letter of the Court was served on the addressee, namely deputy Hajrulla Çeko.

17. On 6 August 2020, the Applicants' representative, deputy Çeko, sent an email to the Secretary of the Court stating that: (i) he had not received the letter of the Court and that he had no idea what the letter was about, although the letter could be submitted to the Assembly and for which there is evidence; and (ii) he requests to be notified about the request in question and to be given a deadline to respond.

18. On 7 August 2020, the Secretary of the Assembly notified the Court that (i) the letter of the Court (Ref. no. 1230/20/rl) of 10 July 2020 was received by the Administration of the Assembly of Kosovo and (ii) the latter on 10 July 2020, from the Service for the Support of Deputies, was sent to the deputy, Mr. Hajrulla Çeko, in his mailbox dedicated to the deputies.

19. On 13 August 2020, the Court addressed the representative of the Applicants - deputy Çeko, informing him that the request for extension of the deadline was rejected regarding the letter of the Court (Ref. no. 1230/20/rl) of 10 July 2020.

20. On 3 September 2020, the Court addressed the CEC with a request for additional information, as follows:

(1) a. Have there been previous cases of postponement of elections in Kosovo - whether general or local elections?
b. If yes, which elections have been postponed (regular or early/extraordinary)?
(2) a. What are the decision-making authorities in cases of postponement of elections?
b. What was the legal basis used for postponing the elections?
(3) Based on the mandate of the CEC for the preparation, monitoring, direction and verification of all actions related to the election process, as well as based on paragraph 4 of Article 4 of Law No. 03/L-072 on Local Elections, what actions can be taken by the CEC regarding early elections, in the context of changing the deadlines in case this is necessary due to the circumstances?
(4) What was the basis of your request of 14 March 2020, addressed to the President to postpone the elections?
(5) *What are the actions taken by the CEC, from monitoring the electoral activities of other states?*

21. On 10 September 2020, the CEC responded to the Court regarding the abovementioned questions.

22. On 15 September 2020, the Court, on the issue of receiving additional information from the CEC, notified the President of the Assembly, who was requested to submit a copy of the Referral to all deputies of the Assembly; the President; the Prime Minister; and the Ombudsperson.

23. On 5 November 2020, the President of Kosovo resigned from the position of President of the Republic of Kosovo.

24. On 5 November 2020, the President of the Assembly, Mrs. Vjosa Osmani-Sadriu started to exercise the post of Acting President of the Republic of Kosovo.

25. On 18 November 2020, the Review Panel considered the report of the Judge Rapporteur, and by majority recommended to the Court the inadmisssibility of the Referral.

Summary of facts

26. On 6 February 2020, the Ministry of Local Government Administration (hereinafter: MLGA) by letter [Prot. No. 158] presented to the President the announcement stating that Agim Veliu has resigned from the post of the President of the Municipality of Podujeva.

27. On 7 February 2020, the President, by Decision 15/2020 on setting and announcing the date of the Extraordinary Elections for the President in the Municipality of Podujeva, determined that (i) the extraordinary elections for the President in the Municipality of Podujeva will be held on 15 March 2020; (ii) The Central Election Commission of the Republic of Kosovo is instructed to take all necessary actions for the organization and holding of elections for the Presiednet of Podujeva, in accordance with this decision and applicable law [...].

28. In the time interval between 11 March and 18 March 2020, the Government of Kosovo issued several decisions related to the prevention of the COVID-19 pandemics (see decisions of the Government: No. 01/07 of 11 March 2020; No. 01/08 of 12 March 2020; No. 01/09 of 13 March 2020; No. 02/09 of 13 March 2020; No. 01/10 of 14 March 2020; No. 01/11 of 15 March 2020; No. 01/12 of 17 March 2020; No. 01/13 of 18 March 2020).

29. On 11 March 2020, the CEC addressed the Ministry of Health for advice on whether to take any urgent specific health protection measures on the election day.

30. On 12 March 2020, the Ministry of Health responded to the CEC by sending Recommendations for polling stations during the elections, regarding the hygienic preventive measures given by the National Institute of Public Health of Kosovo (hereinafter: NIPHK).

31. On 14 March 2020, the NIPHK addressed the Chairwoman of the Central Election Commission (hereinafter: the CEC) with a recommendation *for temporary suspension of the elections of 15 March 2020 in Podujeva to prevent the spread of COVID-19 in the Republic of Kosovo.*

32. The aforementioned letter from the NIPHK states that taking into account the epidemiological situation with COVID-19 in recent days, the WHO assessment (1 March 2020) which considers the epidemiological situation with very high risk worldwide and the ECDC (2 March 2020) which considers it a high risk, as well as the declaration of a pandemic by the WHO on 11 March 2020, the measures of the Government of the Republic of Kosovo, of 11 March 2020, NIPHK and the Committee for Monitoring of Infectious Diseases of the Ministry of Health, have sent you in advance the Election Guide on 12 March 2020. As the epidemiological situation worsened yesterday on 13 March 2020, with the detection of two

positive cases of SARS CoV-2 and today on 14 March 2020 the third case resulted pozitive, NIPHK and the Committee for Monitoring of Infectious Diseases recommends to temporarily suspend the elections of 15 March 2020 in Podujeva, to prevent the spread of COVID-19 in the Republic of Kosovo.

33. On 14 March 2020, the Chairwoman of the CEC addressed a letter to the President of the Republic of Kosovo requesting the postponement of the date of the Extraordinary Elections for the President of the Municipality of Podujeva, until another appropriate time in accordance with the recommendation of the NIPHK. and the Infectious Diseases Monitoring Committee.

34. On 14 March 2020, the President issued Decision No. 52/2020, on the posponement of the extraordinary elections for the President of the Municipality of Podujeva, for an indefinite period due to prevention of the spread of Coronavirus-COVID-19 and preventing growth of the number of infected persons in the Republic of Kosovo and the preservation of public health.

35. On 14 August 2020, the Assembly of Kosovo adopted Law No. 07/L-006 on Prevention and Combating COVID-19 Pandemics in the Territory of the Republic of Kosovo. This law defines the responsibilities of state institutions, public, private and publik-private health institutions in taking measures to prevent, control, treat, monitor, provision of funding and share of responsibilities during the COVID-19 pandemics.. The same entered into force on 25 August 2020.

36. On 20 October 2020, the President, by Decision 157/2020, on setting and announcing the date of the Extraordinary Elections for the President of the Municipality of Podujeva, determined that (i) the extraordinary elections for the President of the Municipality of Podujeva will be held on 29 November 2020; (ii) The Central Election Commission of the Republic of Kosovo is instructed to take all necessary actions for the organization and holding of elections for the President of the Municipality of Podujeva, in accordance with this decision and applicable law; (iii) Organization and holding of elections for the President of the Municipality of Podujeva to be done in coordination with relevant institutions in accordance with Law No. 07/L-006 on prevention and combating the Covid-19 pandemics in the territory of the Republic of Kosovo (OG, No. 3, 25 August 2020), [...].

Applicant's allegations

37. The Court recalls that the Applicants challenge the constitutionality of the challenged Decision, namely Decision No. 52/2020 of the President, of 14 March 2020. According to the Applicants, the challenged Decision was taken in violation of paragraph 4 of Article 84 [Comptencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) with Article 21 of the Universal Declaration of Human Rights (in hereinafter: UDHR), Article 3 of Protocol No. 1 to the ECHR, paragraph 2 of Article 3 of the European Charter of Local Self-Government, and paragraph 3 of Article 56 of the Law on Local Self-Government, Article 4 of Law on Local Elections.

38. Regarding the *admissibility* of the Referral and its *accuracy*, the Applicants state that as a Parliamentary Group composed of 30 deputies of the VETËVENDOSJE! Movement, they are an authorized party to submit a request for constitutional review of President's Decision No. 52/2020, in accordance with Article 113.2 (1) of the Constitution. Moreover, the issue raised by the deputies in question is a constitutional issue, because it challenges the constitutionality of a Decision of a public authority within a certain legal deadline, which allegedly violates the above-mentioned constitutional articles.

39. The Applicants also allege that despite the naming of the act of the President as a decision, the latter is identical in form and content with the naming *decree* defined by the abovementioned article in the Constitution. Furthermore, the Applicants emphasize the case law of the Court in cases KO54/20, KO12/18 and KO73/16, where the Court considered that *"[...] in its case law, in essence, it has already been decided that one should not focus only on the naming of the act but on its content and effects. The challenged decision consequently falls within the scope of the word decree [...]"* of the President. Therefore, the Applicants conclude that they have met all the legal criteria to be an authorized party before the Court.

40. Regarding the content/substance of the challenged Decision, the Applicants state that the challenged Decision is not in accordance with Articles 123, 124 in conjunction with Article 45 of the Constitution, as well as paragraph 2 of Article 3 of the European Charter of Local Self-Government .

41. According to the Applicants, paragraph 1 of Article 123 clearly states that local self-government is guaranteed by law. Whereas, in the second paragraph of this article it is emphasized that *"Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections"*. Also in paragraph 3 it is emphasized that *"The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state"*. Paragraph 2 of Article 3 of the European Charter of Local Self-Government stipulates that *"composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them [...]"*.

42. The Applicants state that the case law of the Court in Judgment KO80/10, clearly states that the concept of local self-government is related to paragraph 1 of Article 45 of the Constitution which stipulates that "*Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision"*. While paragraph 2 of this Article provides that *"The vote is personal, equal, free and secret",* therefore, the President's Decision to postpone the holding of extraordinary elections indefinitely, deprives the citizens of the Municipality of Podujeva, contrary to the abovementioned articles, to vote for the new president after the resignation of the President of Podujeva in accordance with applicable legislation.

43. The Applicants further state that the President does not have the constitutional authority to render such decisions to postpone municipal elections indefinitely in order to prevent an increase in the number of persons infected with COVID-19. Also, the President has no constitutional competence to create policies and at the same time take adequate measures to protect public health. In this regard, the Applicants state that the Court in case KO54/20, has determined that *"With this Judgment, the Court will not assess whether the measures taken by the Government to prevent and fight pandemics COVID-19 are adequate and necessary or not. This is not the role of the Constitutional Court. Public health policies and decision-making do not enter, and are not part of the competencies and authorizations of this Court [...]"*. Therefore, a decision based on these measures without any constitutional and legal basis constitutes a violation of the Constitution and international conventions. Thus, decision-making

regarding public health and preventing the spread of the coronavirus is not the responsibility of the President.

44. According to the Applicants, the President postpones the holding of elections for the President of Podujeva on an idefinitite term, based only on the current situation not covered by a special law and the Constitution, such as the prevention of the spread of coronavirus and the preservation of public health. This decision deprives the citizens of the Municipality of Podujeva of their right to exercise their political right to elect one of the candidates for the president of the Assembly already certified by the CEC.

45. The Applicants further allege that the challenged decision has produced legal effects which are contrary to the principle of democracy, respect for human rights and the rule of law under Article 7 of the Constitution. Consequently, such a decision prohibits democracy from materializing its function through the participation of the citizens of a given municipality in terms of being elected through the voting of their representative as president of the respective municipality.

46. Therefore, according to the Applicants, the concept of democracy set out in Article 7 should be seen in conjunction with paragraph 1 of Article 45 of the Constitution of Kosovo, which represents the general constitutional norm that applies to local and central elections. Consequently, in this case the democracy defined in Article 7 is implemented through Article 45 of the Constitution which enables certain citizens of the respective municipality to elect the president of their municipality after the resignation of Mr. Agim Veliu as President of Municipality of Podujeva.

47. Also, the principle of the rule of law implies in the present case that the actions of the President materialized through the decision must be in accordance with the law and the Constitution of the country. On this basis, an essential component of the principle of the rule of law is legal certainty, according to which the decisions of public authorities must be based on the Constitution and law. Every act must have its own predictability which is enabled by constitutional and legal norms. While in this case, the decision of the president has violated legal certainty due to the fact that constitutional and legal norms are accurate, concise, clear and predictable in the event that a president of the municipality resigns. Thus, in this case, the President of the country must implement the constitutional and legal norm as defined in the Constitution and electoral legislation.

48. The Applicants state that the right to election and participation as defined in Article 45 paragraph 1 is a political right of a person who, by his will through constitutional and legal norms, has the constitutional right to vote (active right of vote) the president of Municipality of Podujeva as a citizen residing within that territory.

49. The Applicants further state that the decision to postpone the holding of extraordinary elections for the President of Municipality of Podujeva for an indefinite period is discriminatory in terms of the denial of a political right to citizens belonging to that municipality, in relacion to other municipalities.

50. The Applicants state in the following that according to them the Prime Minister of Kosovo, Mr. Avdullah Hoti has allowed the holding of Serbian elections in Kosovo. Therefore, on the one hand, the citizens of the respective Municipality are prohibited from exercising the political right to elect their president of municipality without any constitutional or legal basis, while on the other hand, the Serb citizens are allowed to vote in Kosovo for the parliamentary elections in Serbia. While there is no scientific evidence so far that some citizens may be more immune to COVID-19 in the exercise of the political right to vote and some other citizens due to this pandemics are unconstitutionally deprived of the exercise of this fundamental political right. In this regard, according to the Applicants, the President on 11 June 2020, issued Decision No. 63/2020, to postpone the holding of extraordinary elections for President of the Municipality of North Mitrovica. This decision is of the same nature as decision no. *52/2020,* and the latter is contrary to all constitutional, legal provisions and international conventions mentioned in this referral.

51. The Applicants further state that non-holding and postponing the elections for indefinite period without constitutional and legal support violates the rights guaranteed under Article 3 of Protocol No. 1 of the ECHR. According to the Applicants, the focus of this article is the obligation that the contracting state has and not on the rights and freedoms of natural or legal persons, although they are not excluded, as it is shown by case law of the ECHR. The Applicants further state that they are aware that in the case of Court KI48/18 it has been stated that Article 3 of Protocol No. 1 of the ECHR does not cover all categories of elections and in principle, its guarantees do not apply to local elections. However, they refer to this article in the light of the definitions and guarantees that the state possesses and that are related to the electoral rights protected beyond the ECHR and Article 45 of the Constitution.

52. In addition to the above, the Applicants allege that the Universal Declaration of Human Rights (hereinafter: the UDHR) which is an integral part of the Constitution of Kosovo by Article 22 thereof, which in Article 21 of this Declaration determines that the expression of the will of the people is done through periodic and free elections. According to the Applicants, this provision of the UDHR in the form of principle or legal value covers all elections at the level of state power depending on the levels of state power regulated and determined by the relevant legislation of the respective states.

53. The Applicants further state that the Decision to postpone the holding of extraordinary elections for the President of the Municipality of Podujeva and North Mitrovica deprives the citizens of the political right to vote and to be elected as defined in Article 45 of the Constitution. Consequently, according to the Applicants, the Principles of European Electoral Heritage, drafted by the Venice Commission, define the following five basic principles of the European electoral heritage: universal, equal, free, secret and direct suffrage.

54. Therefore, the Applicants consider that the postponement of the extraordinary elections for the President of the Municipality of Podujeva, in indefinite period is a violation of international conventions and the Code of Good Practice in Electoral Matters. Therefore, the Applicants consider that although the legal basis in the preamble of this decision is incorrect and moreover it is a misuse of the legislation in force, this Decision has produced legal effects in full violation of all the abovementioned provisions of the Constitution, international conventions and the Code of Good Practice in Electoral Matters.

55. Finally, the Applicants request the Court to *"issue a Judgment by which it decides: I. To declare this Referral admissible; II. To declare Decision No. 52/2020 of the President, of 14 March 2020, in violation of the Constitution of Kosovo and International Conventions; III. To order the President to announce the date of the extraordinary elections for the President of the Municipality of Podujeva as soon as possible; IV. To order that this judgment be notified to the parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette; V. This judgment is effective immediately".*

Comments of the President

56. With regard to the admissibility of the Referral, the President states that Referral K098/20 should be declared inadmissible by the Court, as it is unclear in both its accuracy and reasoning. Initially, the

President emphasizes that his powers are extended in a wide range of constitutional and legal articles, which represent the entirety of the role that the President has in the constitutional and legal system of Kosovo, based primarily on the Constitution, but also on the practice of the Constitutional Court.

57. The President further argues that his mandate has also political nature, as the President participates in the conduct of public affairs. In support of this, the President also uses references of the Constitutional Court (case of the Court K029/12 and KO48/12) where it is emphasized *"to take part in the conduct of public affairs", in Article 25 (a) of the ICCPR, is central to the exercise of a duly and legitimately elected President under the Constitution as part of his/her role as contemplated by Article 4 [...]"* of the Constitution. Whereas, Article 4 [Form of Government and Separation of Power] of the Constitution stipulates that *"The President of the Republic of Kosovo represents the unity of the people ... [and] ... is the legitimate representative of the country, internally and externally, and is the guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as provided in this Constitution." This statement as to the role of the President is central to one of the principles underpinning the Constitution of Kosovo which is the doctrine of the Separation of Powers*".

58. Thus, according to the President, some of his comptencies very clearly affect the political life of the country, such as when announcing elections for the Assembly of Kosovo or announcing elections for local self-government bodies. In the course of this, the President is the main factor that has the duty to maintain the unity of the people and stability, as well as to guarantee the democratic functioning of the institutions of the Republic of Kosovo. Further, the President emphasizes that in this case the request of the CEC was taken into account, which is responsible for organizing the elections and as a result the recommendation of the NIPHK was taken into account. Thus, the duty of the President to guarantee the democratic functioning of institutions is a permanent and continuous task, which he always performs taking into account the representation of the people and the protection of the interests of the citizens. Consequently, in case of not postponing the extraordinary elections in the Municipality of Podujeva, the health of the citizens and employees of the institutions that would participate in the electoral process would be endangered.

59. Following the President's response, it is stated that the President's Decision No. 52/2020 is fully in accordance with the Constitution and

the legislation in force. So, the decision is based on Law No. 03/L-094 on the President of the Republic of Kosovo and Law No. 03 L-072 on Local Elections in the Republic of Kosovo.

60. The President also emphasizes that the preliminary actions and events, before the issuance of Decision No. 52/2020 of 14 March 2020 are also important. Here should be taken into account the course of actions and events as a whole and not just the challenged decision, as all actions are taken in accordance with constitutional and legal powers and in light of the circumstances presented in the Republic of Kosovo, which preceded the issuance of Decision No. 52/2020.

61. Among these actions, the President mentions: (i) The resignation of the President of the Municipality of Podujeva on 6 February 2020; (ii) by Decision No. 15/2020 of 7 February 2020, the extraordinary elections for President of the Municipality of Podujeva were announced for 15 March 2020; (iii) In order to fight the COVID-19 pandemics, the Government on 12 March 2020, by Decision No. 01/08 of the Government, decides the establishment of the Special Commission for the prevention of Coronavirus infection COVID-19; and on 13 March 2020, the Government by Decision No. 01/09 of the Government imposes additional measures, which included, among others: closure of cafeteria, bars, pubs and restaurants, shopping malls except pharmacies and food markets; all cultural and sports activities are suspended; all public institutions are reduced to essential actions and essential staff except the staff of the health and security sector; private companies are ordered to organize the work in such a way that most of the activities are performed by the workers from home; it is recommended: calls on all citizens to avoid crowded places and to adhere to all measures taken by the Government and recommendations given by the NIPHK.

62. Therefore, according to the President, the issuance of the challenged Decision was made in order to preserve public health and prevent the spread of the COVID-19 pandemics. This Decision is a reflection of the request of the CEC, of 14 March 2020, regarding the temporary suspension of the Extraordinary Elections for President of Municipality of Podujeva, to prevent the spread of COVID-19 in the Republic of Kosovo. Also, the President emphasizes that the request of the CEC to postpone the elections was preceded by the preventive recommendation from the NIPHK and the Committee for Monitoring of Infectious Diseases, for the suspension of the Extraordinary Elections in Podujeva, of 14 March 2020, which followed the assessment of the epidemiological situation. of COVID-19, which has resulted in deterioration.

63. Therefore, when issuing the challenged decision, the President claims that he has always taken into account the circumstances that have pushed the change of the timing of the Extraordinary Elections for the President of the Municipality of Podujeva, the interests of citizens and the preservation of public health, acting in accordance with the preventive recommendation by the NIPHK and the Committee for Monitoring of Infectious Diseases, at the request of the CEC of 14 March 2020 and the relevant legislation in force.

64. Also according to the President, when taking the challenged Decision, the Decision No. 01/09, of the Government of 13 March 2020 was taken into account, where every public institution is required to reduce to essential actions and essential staff, except the staff of the health sector and the security sector.

65. The President also states that the Applicants' allegations are ungrounded, as Article 4.4 of Law No. 03/L-072 on Local Elections in the Republic of Kosovo, among others provides: *"... early elections shall be announced no later than ten (10) days after the dissolution. Early elections may not be held earlier than thirty (30) days and no later than forty-five (45) days after the dissolution. Early elections shall be governed by the same laws and CEC rules as other elections, except that CEC may change time frames as needed in accordance with the circumstances"*. Therefore, based on the preventive recommendation of the NIPHK, the CEC assessed that due to the circumstances caused by the high risk of the spread of COVID-19, the deadlines for holding Extraordinary Elections for President of the Municipality of Podujeva should be changed, namely should be suspended and such a request was addressed to the President, who took it into account and issued Decision No. 52/2020.

66. Finally, the President states that Referral KO98/20 should be declared inadmissible because it is incompatible *ratione materiae* with the Constitution.

CEC comments

67. Regarding the questions of the Court of 3 September 2020, the CEC answers as follows:

> *Referring to your request with five (5) questions submitted to the CEC on 03.09.2020, No. 767/2020, for information regarding the postponement of the extraordinary elections for the President of*

the Municipality of Podujeva, we are sending you the answers listed according to your questions as follows:
I. Since the independence of Kosovo until the extraordinary elections for the President of the Municiaplity of Podujeva, there has been no other cases of postponement of the elections.
II. The decision-making authority for announcing the elections in Kosovo, whether general or local elections in Kosovo, is the President of the Republic of Kosovo. The President, after consulting with political parties: a) based on Article 4 of the Law on General Elections, sets and announces the date of the elections for the Assembly of Kosovo; and b) based on Article 4 of the Law on Local Elections, sets and announces the date of local elections.
III. Actions taken by the CEC based on the mandate of the CEC, for the preparation, supervision, direction and verification of all actions related to the election process, according to Article 4 paragraph 4, the CEC may change the deadlines in case this is needed due to the circumstances. To regulate these actions, the CEC has issued CEC Regulation No. 15/2013 on Extraordinary Elections and Early Elections. Rule No. 15/20 according to Article 3 defines the possibility of shortening the 12 deadlines as follows: 1) deadlines for creating Voters List and the challenge and confirmation period; 2) deadlines for the certification procedure of political parties and candidates; 3) ballot lottery deadline, and the deadline for withdrawal from the ballot lottery; 4) deadline for substitution of candidates; 5) deadlines for the publication of lists of certified candidates and any amendments; 6) deadline set for the campaign spending limit; 7) the duration of the election campaign as well as the deadlines for the election campaign rallies; 8) deadlines for submission of the application for accreditation of election monitoring organizations and observers 9) deadlines for appointing the Municipal Election Commissions (MECs) and Polling Station Committees (PSC); 10) deadline for publication of Polling Centers; 11) application deadlines for registration as voters abroad of Kosovo, as well as the confirmation process terms; 12) deadlines for application for registration as voters with special needs.
IV. The concrete basis of the CEC request to the President of the Republic of Kosovo to postpone the elections was the response and recommendation of the NIPHK, of 14 March 2020, who recommended to the CEC the temporary suspension of the elections of 15 March 2020, in order to prevent the spread of COVID 19 in the Republic of Kosovo, in order to protect the public health of citizens.
V. The CEC, although initially planning and carrying out all preparations for the observation of the parliamentary elections

in the Republic of North Macedonia held this year, due to the emergence of cases of COVID-19 among the delegation that is scheduled to observe those elections, that activity has failed.

Important constitutional and legal provisions

Constitution of the Republic of Kosovo

Article 7 [Values]

1. The constitutional order of the Republic of Kosovo is based on the principles of freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, and a market economy.

Article 45 [Freedom of Election and Participation]

1. Every citizen of the Republic of Kosovo who has reached the age of eighteen, even if on the day of elections, has the right to elect and be elected, unless this right is limited by a court decision.

Article 84 [Competencies of the President]

The President of the Republic of Kosovo:
[…]
(4) issues decrees in accordance with this Constitution;

Chapter X Local Government and Territorial Organization
Article 123 [General Principles]

1. The right to local self-government is guaranteed and is regulated by law.
2. Local self-government is exercised by representative bodies elected through general, equal, free, direct, and secret ballot elections.
3. The activity of local self-government bodies is based on this Constitution and the laws of the Republic of Kosovo and respects the European Charter of Local Self-Government. The Republic of Kosovo shall observe and implement the European Charter on Local Self Government to the same extent as that required of a signatory state.
4. Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in

providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.

Article 124 [Local Self-Government Organization and Operation]

1. The basic unit of local government in the Republic of Kosovo is the municipality. Municipalities enjoy a high degree of local self-governance and encourage and ensure the active participation of all citizens in the decision-making process of the municipal bodies.

Universal Declaration of Human Rights

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Protocol No. 1 of the European Convention on Human Rights

Article 3
Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

LAW No. 03/L-040 ON LOCAL SELF GOVERNMENT

Article 56 Election of the Mayor of the Municipality

[...]

56.3 The term of office of the Mayor of the Municipality shall end upon;

a) the completion of his mandate;
b) his death;
c) his resignation;
d) his change of residence to another municipality;
e) his failure to report on duty for more than 1 months without a valid reason;
f) his removal from office in accordance with this law;
g) a final court decision depriving the Mayor of legal capacity to act; or

h) his conviction of a criminal offence with an order for imprisonment for six (6) months or more.

LAW No. 03/L-072 ON LOCAL ELECTIONS IN REPUBLIC OF KOSOVO

Article 4
Date and announcement of election

4.1 After consultation with political parties, the President of Kosovo sets and announces the date of local elections.
4.2 Elections for the institutions of local self-government shall take place on a Sunday every four (4) years. Elections cannot be held earlier than sixty (60) days before the expiry of the mandate or later than thirty (30) days after the expiry of the mandate.
4.3 According to the competencies of the President of Kosovo defined by the Constitution, the decision of the President to set the date of elections is made not later than four (4) months nor earlier than six (6) months before the date of the elections. 4.4 Following the dissolution of the Municipal Assembly or dismissal of the Mayor, if there is no complaint filed within five (5) days in the Constitutional Court, early local elections shall be announced by the President of Kosovo. Upon dissolution of the Municipal Assembly early elections shall be announced no later than ten (10) days after the dissolution. Early elections may not be held earlier than thirty (30) days and no later than forty-five (45) days after the dissolution. Early elections shall be governed by the same laws and CEC rules as other elections, except that CEC may change time frames as needed in accordance with the circumstances
4.5 The Decision to announce elections shall be made public in the 'Official Gazette of Kosovo.

LIGJI No. 03/L-094 ON THE PRESIDENT OF THE REPUBLIC OF KOSOVO

Article 6 Competencies of the President

President of Republic of Kosovo shall exercise competencies provided for by the Constitution of Republic of Kosovo and other laws in force.

Admissibility of the Referral

68. In order to decide on the Applicants' Referral, the Court must first examine whether the admissibility requirements established in the

Constitution and further specified in the Law and the Rules of Procedure have been met.

69. In this regard, the Court first refers to the relevant constitutional and legal provisions according to which the Assembly may appear as an Applicant before this Court:

Constitution of the Republic of Kosovo
Article 113 [Jurisdiction and Authorized Parties]

[...] 2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:

(1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government. [...]

Law on the Constitutional Court
CHAPTER III
Special Procedures

Procedure for cases defined under Article 113, Paragraph 2, items 1 and 2 of the Constitution

Article 29 [Accuracy of the Referral]

1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.
2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;
3. A referral shall specify the objections put forward against the constitutionality of the contested act.

Article 30 [Deadlines]

A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

Rules of Procedure of the Constitutional Court

VII. Special Provisions on the Procedures under Article 113 of the Constitution

Rule 67
[Referral pursuant to Article 113.2 (1) and (2) of the Constitution and Article 29 and 30 of the Law]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.2 (1) and (2) of the Constitution and Articles 29 and 30 of the Law.
(2) When filling a referral pursuant to Article 113. 2 of the Constitution, an authorized party shall indicate, inter alia, whether the full content of the challenged act or which parts of the said act are deemed to be incompatible with the Constitution.
(3) The referral shall specify the objections put forward against the constitutionality of the contested act.
(4) The referral under this Rule must be filed within a period of six (6) months from the day of entry into force of the contested act.

70. With regard to the circumstances of the present case, the Court also takes into account paragraph (4) of Rule 35 of the Rules of Procedure, which establishes as follows:

Rule 35
(Withdrawal, Dismissal and Rejection of Referrals)

[...]

(4) The Court may dismiss a referral when the Court determines that a claim is no longer an active controversy, does not present a justiciable case, and there are no special human rights issues present in the case.

71. The Court first notes that an obligation similar to Rule 35 paragraph 4 of the Rules of Procedure also exists in Article 37 of the European Convention on Human Rights, which in accordance with item 2 of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, provides for direct implementation of the Convention in the Republic of Kosovo, the lattter in the relevant part stipulates as follows:

Article 37
Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

a. the applicant does not intend to pursue his application; or
b. the matter has been resolved; or
c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

72. Therefore, in the context of the assessment of the admissibility of the Referral, the Court will first recall the substance of the case contained in this Referral and the respective allegations of the Applicants, in the assessment of which it will apply the standards of the ECtHR case law, in accordance with which, under Article 53 [Interpretation of Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

73. In this regard, the Court first recalls that the Applicants request the constitutional review of *Decision No. 52/2020 of 14 March 2020, of the President of the Republic of Kosovo*, which had to do with the postponement of the holding of extraordinary elections for the President of the Municipality of Podujeva for indefinite period, claiming that the latter is contrary to paragraph 4 of Article 84 [Comptencies of the President], Article 7 [Values], Article 123 [General Principles], Article 45 [Freedom of Election and Participation], paragraph 1 of Article 124 [Local Self-Government Organization and Operation] of the Constitution, Article 21 of the UDHR, Article 3 of Protocol No. 1 to the ECHR,

74. In this regard, the Court notes that the case law of the ECtHR, when assessing whether subparagraph b of paragraph 1 of Article 37 of the Convention applies to the cases before it, must answer two questions in turn: (i) *first*, whether the circumstances complained of directly by the Applicants still obtain, and (ii) *second*, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *ECtHR El Majjaoui cases & Stichting Touba Moskee v. the Netherlands*, Application No.

25525/03, Decision on striking out the application, paragraph 30; *Pisano v. Italy*, Application No. 36732/97; Decision on striking out the application, paragraph 42; *Sisojeva and others v. Latvia*, Application No. 60654/00, Decision on striking out the application, paragraph 97).

75. In the present case, in the context of the application of the first point of the abovementioned test, namely the assessment (i) *whether the circumstances complained of directly by the Applicants still obtain*, the Court notes that this includes first of all the determination of the situation whether the postponement of the extraordinary elections for the President of the Municipality of Podujeva still exists.

76. In connection with this point, the Court recalls that on 20 October 2020, the President by Decision No. 157/2020, has scheduled the date 29 November 2020, as the date of the extraordinary elections for the President of the Municipality of Podujeva. Therefore, regarding the first point of assessment, the fact of holding extraordinary elections for the President of the Municipality of Podujeva is no longer disputed. Consequently, the Court finds that with the fact of setting the date of the elections, the issue of non-holding the elections, namely the postponement of elections for intedifinite period has ceased to exist.

77. On the other hand, in the context of the application of the second point of the above test, namely the assessment (ii) *whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed*, the Court notes that this point includes the constitutional assessment, if the eventual violation of the Constitution and the Convention by the challenged Decision, has been remedied by the decision of the President [No. 157/2020] of 20 October 2020, on setting and announcing the date of the extraordinary elections for the President of the Municipality of Podujeva.

78. The Court notes that the Decision of the President [No. 157/2020], in addition to setting the date of the elections for the President of the Municipality of Podujeva, specified that "in coordination with relevant institutions in accordance with Law No. 07/L-006 on prevention and combating the Covid-19 pandemics in the territory of the Republic of Kosovo (OG, No. 3, 25 August 2020). The same decision in its legal basis also refers to the challenged decision, namely the Decision of the President No. 52/2020 [on the postponement of the extraordinary elections for the President of the Municipality of Podujeva, for an indefinite period] for which he states that it was issued due to the COVID-19 pandemics.

79. The Court based on the analysis of the current situation, which is influenced by the decision of the President [No. 157/2020], including the aspect of organizing elections in accordance with Law No. 07/L-006 on prevention and combating the Covid-19 pandemics, considers that the latter has replaced the challenged Decision and that the legal effect of eventual violation of the Constitution and the Convention by the challenged Decision, has already been remedied with setting 29 November 2020 as the date of the elections.

80. However, the Court will also assess whether it is still necessary to continue the examination of the present case, in the context of respect for human rights guaranteed by the Constitution and the Convention.

81. The Court first notes that the ECtHR standard, in cases where it is necessary to continue the examination of the case [in the context of respect for human rights guaranteed by the Convention], consists in those circumstances in which the Applicant's position is unclear as to the epilogue of his case and when the latter would unavoidably remain in an uncertain situation as regards the matters raised in the submission relied on under certain articles of the Convention (see the case of the ECtHR. *F.G v. Sweden*, Application No. 43611/11, Judgment of 23 March 2016, paragraphs 79-84;

82. Therefore, in the following the Court concludes that in the present case, (i) as long as the reason for which the President's Decision was challenged, namely *Postponement of elections for indefinitite period* no longer stands; and (ii) while the effect of the eventual violation of Article 45 of the Constitution and Article 3 of Protocol 1 to the ECHR due to those circumstances has been addressed by setting a new election date (29 November 2020), the Court considers that the case does not include any specific circumstances regarding the observance of human rights set out in the Constitution and the Convention.

83. Accordingly, the Court finds that by the Decision of the President [No. 157/2020], the subject of the Applicants' Referral has changed significantly. The current position, namely *the setting of the election date* is such a circumstance which consists in the fact that the referral in question, already has no rationale and that the aim that was sought to be achieved, has already been fully achieved. In light of this, the Court considers that there is no longer any merit to further consider this case and such a reasoning, the Court has already clearly stated in its case law (see the cases of the Court: KO63/12, Applicant *Alma Lama and 10 other deputies of the Assembly of the Republic of Kosovo Request for constitutional review of of Articles 37, 38 and 39 of the*

Criminal Code of the Republic of Kosovo, No. 04/L-82, Decision to strike out the Referral of 10 December 2012, paragraph 19; Case KO107/10, Applicant *Gani Geci and other deputies*, Constitutional Review of the Assembly Decision of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunication, Decision to strike out the Referral of 17 August 2011, paragraphs 24-26; Cases KI58, KI66 and KI94/12, with Applicants *Selatin Gashi, Halit Azemi and group of Municipal Assembly Members of Viti*, *Referral for constitutional review of the Decision of the Municipality of Mitrovica, Gjilan and Viti for conditioning the access of citizens to public services with payment of obligations towards publicly owned enterprises,* Decision to strike out the Referral of 5 July 2013, paragraph 45).

84. Thus, as a general procedural principle, the Court does not render decisions in cases where the case no longer exists and the issue becomes without subject of review. This is a universally accepted principle for the conduct of courts and is analogous to the principle of judicial restraint (see case KO63/12, cited above, paragraph 23; KI11/09, *Tomë Krasniqi*, *Constitutional review of Article 2.1 of the Administrative Direction No. 2003/12 of the United Nations Mission (UNMIK), and Article 20.1 of the Law No. 02/L-47 on Radio Television of Kosovo,* Decision to strike out the Referral of 30 May 2011, paragraph 46).

85. Therefore, considering the abovementioned assessments, the Court has already found that the 2 requirements of application of Article 37 paragraph 1 subparagraph b of the Convention are met. Also the allegation is no longer actively disputed and that the Court considers that there are no specific reasons regarding the respect for human rights established in the Constitution and the Convention for which it is necessary to proceed with the further review of this Referral, as long as there is no unresolved case or dispute regarding the constitutionality of the challenged decision and that the issue has in fact remained without subject of review.

86. Finally, taking into account Decision No. 157/2020 of the President on setting and announcing the date of the extraordinary elections for the President of the Municipality of Podujeva, the Court concludes that the Applicants no longer have an unresolved case or dispute regarding the constitutionality of the challenged decision and the issue is in fact without subject of review, therefore

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.2 (1) of the Constitution, Article 20 of the Law and Rules 35 (4) and 59 (3) of the Rules of Procedure, on 18 November 2020,

DECIDES

I. TO STRIKE OUT, the Referral in accordance with Rule 35 (4) of the Rules of Procedure;

II. TO NOTIFY this Decision to the Parties;

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

IV. TO DECLARE that this Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Selvete Gërxhaliu-Krasniqi	Arta Rama-Hajrizi

Case No. KI50/19, Applicant: the Supreme Court of the Republic of Kosovo, Request for constitutional review of Article 5 paragraph 2, and Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets

Keywords: *institutional referral, the Supreme Court of the Republic of Kosovo, constitutional review of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense (Contested Law 1) and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets (Contested Law 2), manifestly ill-founded referral.*

The subject matter of the Referral was the constitutional review of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1 and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2, who are allegedly in violation of Article 30 [Rights of the Accused], of the Constitution.

The Applicant alleges that according to the provisions of Article 7.3, 7.4 and 7.5 of the challenged Law 1, an indictment may be filed against the deceased, a defense counsel may be appointed and the court hearing may be held, which is contrary to the provisions of the CPCK.

The Court initially assessed whether the submitted Referral meets the admissibility requirements, as established in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure of the Court. Consequently, the Court notes that in the context of the assessment of the criterion of *whether the challenged Laws should be applied directly by the referring Court in the case under consideration before it*, concluded that this criterion is not met.

The Court found that the facts of the case show that on 14 October 2020, the referring Court had resolved the case before it. This resolution or completion of the case was made by the Supreme Court, by rendering Decision Pml. No. 3/2019, where it rejected the request of the interested party for protection of legality - on the grounds that after the withdrawal of the SPRK from the indictment there was no more competence to continue the criminal procedure.

The Court recalls its position that the Court may decide on the referrals relating to Article 113.8 of the Constitution only if there is an active case pending before the referring court and where "*the referring court's decision on that case depends on the compatibility of the law at issue*". As explained above, there is no longer an active case before the referring court, because the request for protection of legality the adjudication of which was suspended until a decision of the Constitutional Court - has already been resolved as a matter by the Supreme Court.

The Supreme Court could not decide on the case that it had already referred to the Constitutional Court before requesting the withdrawal of the case from the review proceedings in the Constitutional Court. This is due to the fact that Article 52 of the Law clearly states that: "*After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered*". This means that Article 52 of the Law provides for an *ex lege* suspension of the procedure at the moment the referral with the Constitutional Court is filed based on Article 113.8 of the Constitution. It follows that the Supreme Court was not able to take any procedural action in relation to the case without first notifying the Constitutional Court to which the case was referred for review.

In sum, in accordance with Article 113.8 of the Constitution, Articles 20, 51, 52 and 53 of the Law and Rule 77 of the Rules of Procedure, the Court declares Referral KO50/19 inadmissible for further consideration.

RESOLUTION ON INADMISSIBILITY

in

Case No. KO50/19

Applicant

The Supreme Court of the Republic of Kosovo

Request for constitutional review of Article 5 paragraph 2, and Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets

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 is submitted by the Supreme Court of the Republic of Kosovo (hereinafter: the referring Court) signed by the President Enver Peci.

Challenged laws

2. The referring court raises doubts about the constitutionality of: (i) Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of Law No. 04/L-140 on Extended Powers for Confiscation of Assets Acquired by Criminal Offense (Official Gazette of the Republic of Kosovo / no. 5 / 8 March 2013, Prishtina, hereinafter: the challenged Law 1); and (ii) Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1,

as well as paragraphs 7 and 8 of Law No. 06/L-087 on Extended Powers for Confiscation of Assets (Official Gazette of the Republic of Kosovo / no. 23/26 December 2018, Prishtina, hereinafter: the challenged Law 2) [hereinafter when referred to jointly: the challenged Laws].

Subject matter

3. The subject matter of the Referral was the constitutional review of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1 and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2, which are allegedly in violation of Article 30 [Rights of the Accused], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 51 [Accuracy of the Referral], 52 [Procedure before a court] and 53 [Decision] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law), as well as Rule 77 [Referral pursuant to Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2018 (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 26 March 2019, the referring Court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 27 March 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding), Gresa Caka-Nimani and Safet Hoxha.

7. On 2 April 2019, the Court notified the referring Court, the President of the Republic of Kosovo (hereinafter: the President), the President of the Assembly of the Republic of Kosovo (hereinafter: the President of the Assembly), the Prime Minister of Republic of Kosovo (hereinafter: the Prime Minister), the Ombudsperson and the Special Prosecution of the Republic of Kosovo (hereinafter: the SPRK),

offering the opportunity to submit comments, if any, within 15 (fifteen) days from the date of receipt of the letter of the Court.

8. On the same date, the Court notified the lawyer Visar Haxhibeqiri about the registration of Referral KO50/19, as a lawyer of the interested parties in the court proceedings before the regular courts, namely persons L.H. V.H and V.H. [*Clarification of the Court*: all interested parties are the descendants of the deceased H.H. against which the SPRK proposed the continuation of the criminal procedure of confiscation of assets acquired by criminal offense (hereinafter the Court will be referred to jointly as the "interested party")]. The Court also offered the interested parties the opportunity to submit comments within a period of 15 (fifteen) days from the date of receipt of the Court's letter.

9. On 18 April 2019, the interested party submitted comments regarding the Referral of the referring Court to this Court.

10. On 10 May 2019, the Court notified the referring Court, the President, the President of the Assembly, the Prime Minister, the Ombudsperson and the SPRK about the comments of the interested party. The referring Court was notified that its comments regarding the comments of the interested party, if any, can be submitted by 22 May 2019.

11. On 15 May 2019, the referring Court requested that the original case be returned to it.

12. On 3 June 2019, the Constitutional Court returned the original of the case to the referring Court.

13. The referring Court did not comment on the comments made by the interested party.

14. On 27 December 2019, the interested party submitted a supplementation to the referral stating that after the expiration of 30 (thirty) days of validity of the Decision [GJPP 181/2009] of 4 May 2011, neither the prosecution nor the court issued any order or court decision for freezing, sequestration or any other measure that would impede the free administration of the property that was the subject of the dispute in this case.

15. On 24 February 2020, the Court notified the referring Court, the President, the President of the Assembly, the Prime Minister, the

Ombudsperson and the SPRK about the supplementation of the Referral by the interested party.

16. On 4 March 2020, the interested party submitted the second supplementation of the Referral, where it placed emphasis on the letter of the SPRK addressed to the Basic Court - Department for Serious Crimes stating that the SPRK has waived the proposal to continue the criminal proceedings of confiscation of assets acquired by criminal offense against the deceased defendant H.H. *ex relation* [H.H. was the husband, namely the father of the interested parties mentioned above].

17. On 14 September 2020, the interested party submitted a request for deciding case KO50/19 or the latter be dismissed in accordance with Rule 35.4 of the Rules of Procedure.

18. On 14 September 2020, the Court addressed the SPRK for additional information regarding the case in question, specifically requesting confirmation *"has the proposal [PPS. No. 22/09] of 16 January 2018 for the extension of the criminal procedure of confiscation of assets acquired by the criminal offense against the deceased defendant H. H. ex relation been withdrawn? Such information was received by the Court from the interested parties in case KO50/19"*.

19. On 5 October 2020, in the absence of a response within the prescribed period, the Court reiterated the same request for additional information by the SPRK.

20. On 7 October 2020, the SPRK responded to the Court stating that they had responded earlier, but that their letter had not reached the official email of the Court. Further, in their response it was emphasized as follows: "*we inform you that this prosecution [SPRK] on 27.02.2020, addressed the Basic Court in Prishtina, with a notification that it has waived the Proposal PPS. No. 22/2019, of 16.01.2018, for the extension of the criminal procedure of confiscation of assets acquired by a criminal offense, against the deceased H.H., for the reasons which are mentioned in the letter which we are attaching to them"*.

21. On 13 October 2020, the Court initially notified the Supreme Court that based on the information received from the interested party, which was confirmed in communication with the SPRK, it results that the SPRK on 27 February 2020, notified the Department of Serious Crimes in the Basic Court in Prishtina "*give up the proposal PPS. No. 22/09 of 16.01.2018 for the extension of the criminal procedure of confiscation of assets acquired by criminal offense, against the*

deceased H.H". Having stated these facts, the Court requested further clarification from the Supreme Court:

> *"a) Based on the legislation in force, what is the practice of the Supreme Court in cases when the SPRK withdraws from the proposal to continue the criminal procedure of confiscation of assets acquired by criminal offenses?*
> *b) Does the procedure cease in case of withdrawal of the Prosecutor from the Proposal for continuation of the criminal procedure for confiscation of assets acquired by a criminal offense?*
> *c) Has anything changed in the status of case KO50/19 from the moment you submitted the referral to the Court, taking into account the procedural actions taken after you submitted the referral to the Constitutional Court?"*

22. On 14 October 2020, the Supreme Court by Decision [Pml. No. 3/2019] decided to reject the request for protection of legality filed by the lawyer of the interested party against Decision PKR. No. 1/17 of the Basic Court in Prishtina - Department for Serious Crimes, of 26 November 2018 and Decision [PN. No. 1240/18] of the Court of Appeals of Kosovo of 17 December 2018 as inadmissible.

23. On 27 October 2020, the Supreme Court responded to the Court with the following information: *"The Supreme Court of Kosovo, analyzing this procedural situation by Decision Pml. No. 3/2019 of 14 October 2020, found that the request for protection of legality of the defense counsel Visar Haxhibeqiri, a representative of the interested parties of the legal heirs of the now deceased H.H., filed against the decision of the Basic Court in Prishtina-Department for Serious Crimes PKR. No. 1/17 of 26.11.2018, and Decision PN. no. 1240/18 of the Court of Appeals of Kosovo of 17.12.2018,* ***dismissed as lacking subject matter.***

According to what was described above, the Supreme Court of Kosovo with the waiver of the proposal of the competent prosecution from the case has no further competence to continue the criminal proceedings according to the request for protection of legality and therefore the decision of this court in this case does not depend on compliance with Law no. 06/L-087 on Extended Powers for Confiscation of Property Acquired by Criminal Offense.

Therefore, I propose that the Constitutional Court, according to Rule 35 of the Rules of Procedure, assess the need for further proceedings in this case".

24. On 18 November 2020, the Review Panel after having considered the case, decided to postpone the decision to another session.

25. On 9 December 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

26. On 30 June 2009, the SPRK rendered a Decision to initiate investigations against 25 persons, for several criminal offenses of a financial nature. From the first stage of the investigation, it was noticed that in this criminal case, according to the SPRK, the deceased H.H. passed away on 21 March 2008.

27. On 15 March 2010, the Pre-Trial Judge of the District Court in Prishtina, upon the request of the SPRK Prosecutor, issued an order for covert measures – "Disclosure of financial data" against the late H.H., as a suspect for involvement in certain criminal offenses. According to the reports received from the banking authorities, H.H. even after his death, continued to have active accounts in commercial banks in Kosovo with a cash balance of 235,990.12 euro (two hundred and thirty five thousand nine hundred ninety euro and twelve cents).

28. On 28 April 2010, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the blocking/freezing of the bank accounts of H.H. in financial institutions in Kosovo for a period of thirty (30) days. This Decision stated that: *"Given the fact that H.H. was a suspect in this case together with the other suspects, therefore there is a reasonable suspicion that the money in the bank accounts derives from the commission of the criminal offense [...]*".

29. On 28 May 2010, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the imposition of an interim measure for securing property, in accordance with paragraphs 1 and 2 of Article 247 and paragraph 1 of Article 489 [Procedure for Confiscation] of the Provisional Criminal Procedure Code of Kosovo (hereinafter: PCPCK) and paragraph 1 of Article 60 [Confiscation of objects] of the Provisional Criminal Code of Kosovo (hereinafter: PCCK).

30. On 4 May 2011, the Pre-Trial Judge of the District Court in Prishtina, by Decision [GJPP 181/2009] ordered the temporary confiscation of the immovable property of H.H.

31. On 28 June 2017, the Basic Court - Serious Crimes Department in Prishtina (hereinafter: the Basic Court) by Judgment [PKR. No. 642/15], *inter alia* and insofar as relevant to this case, found K.P. guilty for committing certain criminal offenses. In the framework of this judgment, the Special Prosecution on 31 March 2016, also proposed the confiscation of assets which are managed in the name of the deceased H.H. However, the Basic Court in deciding on the confiscation of these assets/property, considered that the property was not the subject of the indictment, the deceased H.H. is not part of this criminal process and that the prosecutor has not requested or developed procedural actions for the confiscation of these assets as required by the extended powers for confiscation defined by law.

32. On 2 October 2017, the SPRK submitted a proposal to allow the procedure of confiscation of assets acquired by criminal activity [PPS. No. 22/2009], against the deceased H.H., regarding the confiscation of immovable property on behalf of and the amount of money in his bank accounts.

33. On 16 January 2018, the SPRK, after receiving the Judgment [PSKR. No. 486/2017] of 20 November 2017 of the Court of Appeals, again submitted a proposal to allow the procedure of confiscation of assets acquired by criminal activity [PPS. No. 22/2009], against the deceased H.H., regarding the confiscation of immovable property in his name and the amount of money that was in his bank accounts. The proposal to allow the procedure of confiscation of assets acquired by criminal activity was submitted by the SPRK based on the challenged Law 1.

34. On 26 November 2018, the Basic Court by Decision [PKR. No. 1/17], approved the SPRK proposal to allow the continuation of the confiscation procedure against the deceased H.H. The criminal proceedings were also continued against the deceased H.H. *ex relatione* for assets that are subject to confiscation.

35. On 30 November 2018, the interested party filed an appeal against the aforementioned Decision of the Basic Court, alleging essential violation of the provisions of the criminal procedure and due to violation of the criminal law.

36. On 17 December 2018, the Court of Appeals by Decision [PN. No. 1240/2018], rejected as ungrounded the appeal of the interested party filed against the decision of the first instance with the reasoning that "[*The first instance court, acted correctly when it approved the request of PPSRK, PPS. No. 22/2009, of 16.01.2018, to allow the*

continuation of the confiscation procedure against the now deceased H.H., ex relation, for assets that are subject to confiscation, […]".

37. On 24 December 2018, the interested party filed a request for protection of legality on the grounds of violation of criminal law and violations of the provisions of criminal procedure when such violations have affected the legality of the court decision.

38. On 26 March 2019, the referring Court, namely the Supreme Court, suspended the case before it and, based on Article 113.8 of the Constitution, submitted to the Court the request for assessment of compliance with the Constitution of the provisions of Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1, and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2.

39. On 14 October 2020, the referring Court, notwithstanding the fact that the case was sent to the Constitutional Court for review pursuant to Article 113.8 of the Constitution, rendered Decision Pml. No. 3/2019 rejecting as non-subject matter the Referral of the interested party in protecting legality. Specifically, the Court found that: "*the request for protection of legality of the defense counsel Visar Haxhibeqiri, representative of the interested parties to the legal heirs of the now deceased H.H., filed against the decision of the Basic Court in Prishtina- Serious Crimes Department PKR. No. 1/17 of 26.11.2018, and decision PN. No. 1240/18 of the Court of Appeals of Kosovo of 17.12.2018, is* ***dismissed as lacking subject matter.****"*

40. On 27 October 2020, the same referring Court, shortly after rejecting as lacking the subject matter the request of the interested party for protection of legality, requested the Court that "*pursuant to Rule 35 of the Rules of Procedure, to assess the need for further proceedings in this case".*

Applicant's allegations

41. The referring court claims that Article 5 paragraph 2, Article 7 paragraphs 3, 4 and 5 of the challenged Law 1, and Article 19 paragraph 1 subparagraph 1, paragraph 2 subparagraph 1, as well as paragraphs 7 and 8 of the challenged Law 2, are not in accordance with Article 30 [Rights of the Accused] of the Constitution.

42. The Applicant initially expresses doubts regarding the submission of the request for protection of legality submitted by the interested party, as *"[… pursuant to Article 432 paragraph 1 of the PCCK, this request*

may be filed only against a final court decision or against a court procedure which preceded the taking of such a decision, after the completion of the final criminal proceedings]".

43. Consequently, according to the Applicant, the first issue on which the decision depends is whether a request for protection of legality has been filed against the decision which was taken in the final criminal proceedings.

44. The referring Court notes that the Criminal Procedure Code of Kosovo (hereinafter: CPCK) refers to a living person, namely in Articles 19.3 to 19.6 are given the definitions of a suspect, defendant, accused and convicted person, but also in all other provisions, always is spoken about the living person. On this basis, the Applicant states that in accordance with the provision of Article 160 of the CPCK when during the course of criminal proceedings it is established that the defendant has passed away, the state prosecutor renders a decision to terminate the criminal proceedings. Therefore, the Applicant expresses dilemmas in understanding the provisions of Article 5.2 of the challenged Law 1 according to which *"assets subject to extended powers of confiscation which were acquired by a defendant who has died may be subject to confiscation under Article 7 of this Law".*

45. Furthermore, the Applicant alleges that according to the provisions of Articles 7.3, 7.4 and 7.5 of the challenged Law 1, an indictment may be filed against the deceased, a defense counsel may be appointed and court hearing may be held, which is contrary to the provisions of the CPCK.

46. The second issue, which at the same time presents the second dilemma of the referring Court and on which its decision depends, is whether the request for protection of legality was submitted by the authorized person.

47. According to the referring Court, this Referral was not filed by the authorized persons specified in Article 433 paragraph 1 of the CPCK, which includes the Chief State Prosecutor, the defendant and his defense counsel. Also, the referring court puts special emphasis on this provision where it is determined that 'after the death of the defendant, a request on his behalf may be submitted by the persons provided by Article 424 paragraph 1 last sentence of this Code, which includes: state prosecutor, the spouse, the extramarital spouse, a blood relation person in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person'.

48. Consequently, according to the referring Court, the request for protection of legality was submitted by the defense counsel assigned to the deceased person, against whom there is no criminal procedure and there was no criminal procedure even while he was alive.

49. Finally, as a main allegation presented by the referring Court is its suspicion in relation to the following issue: that since the deceased person under the challenged provisions obtains the status of the accused, the referring Court expresses doubt as to the compatibility of these provisions with Article 30 of the Constitution, because it is clear that a deceased person can neither have a lawyer nor enjoy these rights, while on the other hand, the accusation and the trial will have consequences for his heirs, even though they are persons against whom no indictment has been filed nor criminal proceedings conducted.

50. The referring court also reasoned that at the time of filing the request for protection of legality, the challenged Law 1 was in force, while from 10 January 2019 the challenged Law 2 was in force. However, according to the referring Court the provisions of interest for the case in question have not been amended, so Articles 5.2, 7.3, 7.4 and 7.5 of the challenged Law 1 are identical to the provisions of Articles 19.1.1, 19.2.1, 19.7 and 19.8 of the new Law (the challenged Law 2).

51. Finally, the referring Court notes that since its decision on merits is directly related to the legal norms of the challenged Laws, therefore cannot decide on the request for protection of legality until the Court has rendered the decision on merits regarding this request.

Comments of the interested party

52. The interested party initially expresses its surprise at the purpose of the Referral submitted to the Court, as according to it, this Referral does not address the issues raised through the legal remedies in this procedure.

53. With regard to the first allegation of the referring Court regarding the question whether the request for protection of legality was filed against the decision which was taken in criminal proceedings, as a final decision, the interested party states that the court decisions challenged by it represent meritorious decision-making (although erroneous) and not procedural decisions. According to them, this expected decision of the referring Court for the approval or not of the proposal of the State Prosecutor, has direct consequences whether

there will be criminal proceedings with the object of confiscation of property or not.

54. Therefore, according to the interested party, the Decision of the Court of Appeals [PN. No. 1240/2018] of 17 December 2018, is final and that the latter according to Article 432, paragraph 1 of the PCPCK may be challenged with extraordinary legal remedy.

55. As to the allegation of the referring Court regarding that *'[according to the provisions of Article 7.3, 7.4 and 7.5 of the challenged Law 1, an indictment may be filed against the deceased, a defense counsel may be appointed and a court hearing may be held, which is contrary to the provisions of the PCCK.]'* the interested party states that Article 5 paragraph 2 of the challenged Law 1 clearly states that property may be subject to confiscation under Article 7 and that this submission is not automatic and unconditional, but comes as a result of meeting certain legal conditions . The interested party claims that in order to file an indictment under this legal provision, the indictment is not filed against the defendant who died, but against the defendant who died *ex relatione* for the property subject to confiscation. So, the subject of the accusation in this case, is not the defendant who died, but his property.

56. The interested party further expresses its concern regarding the procedural violations committed by the two instances of the regular courts which have decided to *'continue the proceedings'*, which according to the interested party '*has never started*', since already deceased H.H. has never had the status of suspect, defendant, accused or convict in the criminal proceedings.

57. With regard to the second issue raised by the referring Court, as to whether the request for protection of legality was filed by an authorized person, as it is *"[...submitted by the defence counsel assigned to the deceased person...]"*, the interested party states that *"[Initially, the request was not filed by counsel assigned to the deceased person. The deceased person cannot have a guardian due to the extinction of his subjectivity and these rights do not belong to the deceased persons]"*.

58. Furthermore, the interested party states that the challenge to their legitimacy as applicants for the protection of legality has fatal consequences with a direct effect on the violation of constitutional rights, as follows: *"[Article 21 [General Principles] - where the fundamental principles of human rights in criminal proceedings have been violated, contrary to the PCCK; 2. Article 23 [Human Dignity] - tarnishing the image, loss of dignity, humiliation through*

the development of court proceedings contrary to applicable laws, arbitrary decisions in continuous violation of criminal and procedural law; 3. Article 24 [Equality Before the Law] - where discrimination is expressed by domestic institutions such as the State Prosecutor's Office and the Courts, attempting to obtain legal property under the tendency of establishing fictitious court proceedings, contrary to legal provisions in force; 4. Article 31 [Right to Fair and Impartial Trial] - where in the case in question is not provided even the minimum protection of rights in proceedings before the courts and the State Prosecutor's Office, in denial of familiarity with the case file in this criminal case despite the request submitted in writing to the court, under arbitrary and unilateral actions with unknown intentions to the detriment of the integrity of persons, dignity and attempt to seize private property; 5. Article 36 [Right to Privacy] - with the continuous publication of personal financial data and the dissemination of private information to the public, in relation to immovable property which has never been legally the subject of a criminal case; 6. Article 46 [Protection of Property] - deprivation of the right to property, arbitrary violation of the free disposition of private property]".

59. Based on the abovementioned elaborations, the interested party ultimately requests the Court to declare the Referral manifestly ill-founded because the provisions of the challenged Law 1 and the challenged Law 2 do not in any way infringe any constitutional right set forth in Article 30 of the Constitution.

60. Finally, the interested party requests the Court to assess the very existence of the criminal case in question, in the circumstances of non-fulfillment of the legal conditions for its existence, as a "continued" procedure without ever commencing, due to the lack of a decision to start the investigation, the lack of status of the party in the procedure of the deceased H.H. as a defendant, or any other status, lack of restraining orders issued by the court, non-inclusion in the initial indictment [PPS. No. 22/2009] of property, which are due to the violation of some applicable laws and with direct consequences for the interested parties in this procedure.

61. The interested party also submitted 2 supplementations to the comments given to the Court. On 27 December 2019, the lawyer of the interested party stated that after the expiration of the 30-day validity of the Decision [GJPP 181/2009] of 4 May 2011, neither the prosecution nor the court has issued any order or court decision for freezing, sequestration or any other measure that would impede their free administration of this property. The interested party provided the

Court with communications from the Cadastre Directorate of the Municipality of Prishtina and the Special Prosecution, where the latter through its spokesperson stated that *"While the Special Prosecution has assessed that there is no legal basis to file an indictment against the deceased, H.H., ex relation, because he never had the quality of a defendant while he was alive. Therefore, in the absence of an indictment, the court will have to issue a decision on this issue"*.

62. The second completion of the comments of the interested party was submitted on 4 March 2020, where the emphasis was placed on the letter of the Prosecution [PPS. No. 22/09] of 27 February 2020, addressed to the Basic Court - Serious Crimes Department where it was emphasized that the Prosecution withdrew from the proposal for the continuation of the criminal procedure of confiscation of assets acquired by criminal offense against the deceased defendant H.H. *ex relation*. By this letter, the Special Prosecution stated that *"Assessing the fact, that from the case file it results that H.H, while he was alive did not have the capacity of the defendant, while based on Law No. 04/L-140 on Extended Powers for Confiscation of Property Acquired by Criminal Offense, the indictment can be filed against the deceased defendant ex relation, this prosecution has not filed an Indictment within 180, therefore we consider that there is no legal basis either for the continuation of the confiscation procedure further, for this reason we withdraw the proposal [PPS. No. 22/09] of 16.01.2018 for the continuation of the criminal procedure of confiscation of assets acquired by criminal offense, against the deceased H.H"*.

Admissibility of the Referral

63. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and the Rules of Procedure.

64. In this respect, the Court refers to paragraphs 1 and 8, of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

> *2. "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *(...)*
>
> *8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to*

the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue."

65. The Court further refers to Articles 51, 52 and 53 of the Law, which provide:

Article 51
Accuracy of referral

1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution.

Article 52
Procedure before a court

After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered.

Article 53
Decision

The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court.

66. The Court also takes into account Rule 77 of its Rules of Procedure, which specifies:

Rule 77 [The Court also takes into account Rule 77 of its Rules of Procedure, which specifies]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.8 of the Constitution and Articles 51, 52 and 53 of the Law.

(2) Any Court of the Republic of Kosovo may submit a referral under this Rule provided that:
(a) the contested law is to be directly applied by the court with regard to the pending case; and

(b) the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

(3) The referral under this Rule must specify which provisions of the contested law are considered incompatible with the Consitution. The casefile under consideration by the court shall be attached to the referral.

(4) The referring court may file the referral ex officio or upon the request of one of the parties to the case and regardless of whether a party in the case has disputed the constitutionality of the respective legal provision.

(5) After the filing of the referral, the Court shall order the referring court to suspend the procedure related to the case in question until a decision of the Constitutional Court is rendered.

67. In light of the abovementioned normative framework, it follows that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria:

(1) The referral has been submitted by a "court";
(2) The challenged law must be directly applied by the referring Court in the case before it;
(3) The referring Court should not be certain of the compatibility of the challenged law with the Constitution;
(4) The referring Court must specify what provisions of the challenged law are considered incompatible with the Constitution;
(5) The legality of the challenged law is a precondition for making a decision in the case under review.

68. The Court notes its case law which confirms the above-mentioned criteria regarding the admissibility of the Referrals submitted pursuant to Article 113.8 of the Constitution (see, *mutatis mutandis*, the case of the Constitutional Court, KO157/18, Applicant: the *Supreme Court of the Republic of Kosovo*, Judgment of 13 March 2019, paragraphs 41-46; KO126/16, Applicant: the *Specialized Panel*

of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters, of 27 March 2017, paragraph 62, as well as the case of the Constitutional Court KO142/16, Applicant: *the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters*, of 9 May 2017, paragraph 58).

69. The abovementioned criteria must be met, all cumulatively, in order for a submitted referral under Article 113.8 to be considered on its merits. If any of these criteria are not met, then the referral must be declared inadmissible for review of merits due to non-compliance with the admissibility criteria established in the Constitution, Law and Rules of Procedure. Consequently, the Court will further assess the fulfillment of the abovementioned criteria.

(1) If the referral is submitted by a "court"

70. In this regard, the Court recalls that the Referral was submitted by the Supreme Court and signed by its President, within the framework of the powers relating to his function. The referral, at the time of submission, clearly stated that it was submitted by the Supreme Court which has to decide on the request for protection of legality submitted by the interested party.

71. Therefore, the Court considers that the present Referral was submitted by the "Court" within the meaning of Article 113.8 of the Constitution and within the meaning of the abovementioned case law of this Court.

(2) Whether the challenged Laws are to be directly applied by the referring Court in the case before it

72. The Court recalls that this criterion requires that the challenged Law or Laws must be applied directly by the referring Court in the case before it; and that the referring court should have an active case pending. Thus, before the referring Court there must be an unresolved case which has been suspended until the decision of the Constitutional Court regarding the constitutionality of the Law which is suspected to be inconsistent with the Constitution is rendered.

73. In the circumstances of the present case, the Court notes that this criterion is not met, as will be clarified below.

74. The Court recalls that the Supreme Court, in its capacity as a referring Court, has submitted the present Referral to this Court, requesting the

constitutional review of the two challenged Laws on suspicion that certain provisions may be inconsistent with the Constitution.

75. However, while the Constitutional Court was examining the case, it was informed by the interested party that the SPRK has withdrawn the indictment concerning the substance of the case before the referring Court. In that case, the Court was requested to reject the request and not to consider it further as there is no longer an active case before the Supreme Court.

76. As the Court did not have such official information from the Supreme Court as the referring Court, it initially addressed the SPRK to confirm whether the indictment in question has been withdrawn. The SPRK confirmed this in a letter. The Court then requested the referring Court to notify the Court about the status of the case before it (see the part of the proceedings before the Court which reflects the Court's communication with the interested party, the SPRK and the Supreme Court).

77. In this regard, the Court recalls the clarification it has received from the referring Court regarding the changes in the status of the case before it. The Supreme Court notified the Court that it has already decided on the case and in this respect also stated that: *"The Supreme Court of Kosovo with the waiver of the proposal of the competent prosecution* [SPRK] *from the case has no further jurisdiction to continue the criminal proceedings according to the request for protection of legality and consequently the decision of this court in this case does not depend on compliance with Law no. 06/L-087 on Extended Powers for Confiscation of Property Acquired by Criminal Offense. Therefore, I propose that the Constitutional Court, according to Rule 35 of the Rules of Procedure, to assess the need for further proceedings in this case".*

78. It appears from the facts of the case that on 14 October 2020 the referring court resolved the case before it. This resolution or conclusion of the case was made by the Supreme Court by the issuance of Decision Pml. No. 3/2019, where it rejected the request of the interested party for protection of legality - on the grounds that after the withdrawal of the SPRK from the indictment there was no competence to continue criminal proceedings.

79. The Court recalls its position that the Court may decide on requests relating to Article 113.8 of the Constitution only if there is an active case pending before the referring Court and where "*the decision of the referring court in a particular case depends on the compatibility of*

challenged law". As explained above, there is no longer an active case before the referring Court because the request for protection of legality for the decision of which the court proceedings was suspended until a decision of the Constitutional Court - has already been resolved as a matter by the Supreme Court.

80. The Constitutional Court was informed about the existence of the Decision [Pml. No. 3/2019] of 14 October 2020 of the Supreme Court only after having requested the Supreme Court specifically about the status of the case, following the information on procedural conduct it had received from the interested party.

81. The Court emphasizes the fact that the Supreme Court as the referring Court was obliged to notify the Court in a timely manner about all procedural developments that have taken place in this case and to update the Referral submitted to the Court with this relevant information, without delay.

82. The Supreme Court could not decide on the case which it had already referred to the Constitutional Court before requesting the withdrawal of the case from the review proceedings before the Constitutional Court. This is due to the fact that Article 52 of the Law clearly states that: "*After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered*". This means that Article 52 of the Law provides for an *ex lege* suspension of the procedure at the moment the referral is filed with the Constitutional Court based on Article 113.8 of the Constitution.

83. In the light of the foregoing, the Court finds that the admissibility criterion according to which the challenged Laws must be directly applied by the referring Court in the case before it, is not met in the circumstances of the present case as the referring Court does not have an active and unresolved case.

84. As this criterion is not met, the Court does not consider it necessary to further examine the other admissibility criteria.

85. In conclusion, in accordance with Article 113.8 of the Constitution, Articles 20, 51, 52 and 53 of the Law and Rule 77 of the Rules of Procedure, the Court declares Referral KO50/19 inadmissible for further consideration.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.8 of the Constitution, Articles 20, 51, 52 and 53 of the Law and in accordance with Rule 77 of the Rules of Procedure, on 9 December 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI35/18 Applicant: "Bayerische Versicherungsverbrand", Constitutional review of Judgment E. Rev. No. 18/2017 of the Supreme Court of Kosovo of 4 December 2017

KI35/18, Judgment of 11 December 2019, published on 10 January 2020

Keywords*: individual referral, legal entity, violation of constitutional rights, Article 31 - Right to Fair and Impartial Trial*

As a result of an accident caused by the INSIG insurer in 2007, the Applicant's insurer, H.H., suffered material damage. On 12 May 2009, the Applicant filed a claim with the Basic Court. The compensation amount of 10,500 euro in the name of the principal debt was approved by all regular courts. Disputable during the proceedings before the regular courts was the amount of the default interest and the manner of its calculation.

The Basic Court had initially determined the default interest at 20% per year starting on 12 May 2009 until the final payment. The Court of Appeals modified this Judgment by setting the interest "*paid by commercial banks on funds deposited in the bank over one year without a specified destination*" (i) with an additional penalty (i) of 20% starting from 12 May 2009 (the dale of filing the claim), until 29 July 2011 (entry into force of Law No. 04/L-018 on Compulsory Motor Liability Insurance) whereas (ii) starting from 30 July 2011 until the final payment, only the default interest 12% of the annual interest rate, based on Article 26 of the Law on Compulsory Motor Liability Insurance. Finally, the Supreme Court by Judgment [E. Rev. No. 18/2017] of 4 December 2017, modified the Judgment of lower instance courts regarding the default interest and imposed the obligation to INSIG the default interest "*in the amount of savings deposits without term paid by commercial banks in Kosovo without a specific destination over one year* (the date on which the expertise was made), and until the final payment.

The Applicant alleged that Judgment [E. Rev. No. 18/2017] of 4 December 2017, of the Supreme Court was rendered in violation of the fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of reasoning of the court decision, and in breach of the principle of legal certainty, because in his view, the Supreme Court in rendering this Judgment also acted contrary to its case law in at least seven (7) cases which he had submitted to the Court in support of his arguments.

In reviewing the merits of the case, the Court elaborated (i) the case law regarding the right to a reasoned court decision; and (ii) the fundamental principles relating to the consistency of case law and the relevant criteria on

the basis of which the European Court of Human Rights assesses whether the lack of consistency, namely the divergence in case law, constitutes a violation of Article 6 of the ECHR, namely, the three basic criteria for determining whether an alleged divergence constitutes a violation of Article 6 of the ECHR, including whether: (a) the divergences in case law are "*profound and long-standing*"; (b) domestic law establishes mechanisms capable of resolving such divergences; and (c) those mechanisms have been implemented and with what effect.

The Court, applying the abovementioned principles and criteria, held that Judgment [E. Rev. No. 18/2017] of 4 December 2017 of the Supreme Court was rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

(i) as to the lack of a reasoned court decision:

The Court held that the Supreme Court in rendering Judgment [E. Rev. No. 18/2017] of 4 December 2017, failed to substantiate the Applicant's substantive allegations and failed to substantiate its decision as to the amount of the default interest and the time from which the default interest was calculated; and

(ii) as to the principle of legal certainty in the context of inconsistency of the case law of the Supreme Court:

The Court regarding the application of the legal provisions related to the amount of default interest applicable in cases of compulsory motor liability insurance, applying the three criteria laid down by the European Court of Human Rights found that in the case law of the Supreme Court there are "*profound and long-standing differences*", because in at least nine (9) cases, within a period of five (5) years, the Supreme Court applied the legal provisions regarding the amount of the default interest in a divergent manner. Furthermore, the Court emphasized that despite the fact that the mechanisms for ensuring consistency in case law are set out in the relevant laws, this mechanism was not used by the Supreme Court.

Whereas, as regards the application of the legal provisions relating to the moment from which the calculation of the default interest begins, the Court found that the departure of the Supreme Court from the case law in this respect is an isolated case and which cannot pass the test laid down by the European Court of Human Rights to find "*profound and long-standing differences*" in the relevant case law.

JUDGMENT

in

Case No. KI35/18

Applicant

"Bayerische Versicherungsverbrand"

Constitutional review of Judgment E. Rev. No.18/2017 of the Supreme Court of Kosovo of 4 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 the insurance company "*Bayerische Versicherungsverbrand*" with its seat in Munich, Germany, represented by ICS Assistance LLC, by Visar Morina and Besnik Mr. Nikqi, lawyers from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges constitutionality of Judgment [E. Rev. No. 18/2017] of 4 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ae. No. 12/2016] of 6 June 2017 of the Court of Appeals and Judgment [III. C. No. 626/2013] of 30 October 2015 of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the abovementioned Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure).

5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

6. On 22 February 2018, the Applicant submitted the Referral to the Court.

7. On 26 February 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 21 March 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

10. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

11. On 12 October 2018, the Court sent a letter to the Applicant requesting him to attach a copy of the claim, the reply to the appeal and the reply to revision by them in the proceedings before the regular courts. On the same date, the Court notified the Insurance Company "INSIG" (hereinafter: INSIG) about the registration of the Referral and requested it to attach the revision submitted to the proceedings before the regular courts.

12. On 16 October 2018, the Applicant submitted the requested documents to the Court.

13. On 2 November 2018, the Insurance Company "INSIG", attached the requested document and submitted the relevant comments to the Court.

14. On 30 November 2018, as the term of office to the four abovementioned judges as Judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision No. GJR. 35/18 on the appointment of the new Review Panel and the latter was composed of: Arta Rama-Hajrizi (Presiding), Bajram Ljatifi and Remzije Istrefi-Peci.

15. On 19 April 2019, the Applicant, by a letter, informed the Court about the receipt of the Judgment of the Court of 15 April 2019 in case KI87/18 which was submitted to the Court by the same representatives as of the Applicant, requesting the Court to consider the case KI35/18 as a priority on the grounds that: *"[...] we are dealing with the same issue, moreover an earlier Individual Referral and with an interest in avoiding the possibility that the judgments of the Supreme Court would serve as a precedent [...]* ".

16. On 6 November 2019, the Judge Rapporteur presented the preliminary report to the Review Panel, and it was unanimously decided to adjourn the decision on the case for a next session.

17. On 8 November 2019, the Court requested from the Basic Court the full case file.

18. On 11 November 2019, the Basic Court submitted the full case file to the Court.

19. On 11 December 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

20. On the same date, the Court unanimously held that (i) the Referral is admissible; and by majority held that (ii) Judgment [E. Rev. No. 18/2017] of 4 December 2017 of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. Judge Nexhmi Rexhepi voted against this finding.

Summary of facts

21. On 4 June 2007, the person H.H. who was insured by the Applicant had a traffic accident caused by an insurer of INSIG in Prishtina. Person H.H., namely the Applicant's insured, was compensated by the latter in the amount of € 10,500.

22. According to the case file, it follows that on 12 May 2009, the Applicant filed a claim with the Basic Court.

23. According to the case file, it also follows that on 10 March 2011, the District Commercial Court by Judgment [IV. C. No. 503/2010] approved the Applicant's statement of claim as grounded. The respondent, namely INSIG, filed an appeal against this Judgment with the Court of Appeals. The latter, by Judgment [Ae. No. 233/2012] of 24 October 2013, approved the appeal, and remanded the case for retrial.

24. On 30 October 2015, in the repeated procedure, the Basic Court by Judgment [III. C. No. 626/2013] (i) approved the Applicant's statement of claim; (ii) obliged INSIG to pay the Applicant an amount of € 10,500 as a compensation, together with a penalty interest of 20% per year, starting from the date of filing the claim, namely 12 May 2009 until the final payment; and (iii)) forced INSIG to pay the costs of the proceedings. The Basic Court, by its Judgment, justified the imposition of a 20% penalty interest based on Article 277 (Default Interest) of the Law on Obligational Relationship of 30 March 1978 (hereinafter: LOR) and Article 5 (Claim Settlement) of Rule 3

amending the Rule on Compulsory Motor Liability Insurance (hereinafter: Rule 3).

25. On an unspecified date, INSIG filed appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court, alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of factual situation and erroneous application of substantive law, with the proposal that the challenged Judgment be modified or annulled and the case be remanded for retrial. The Applicant filed a response to the appeal and proposed that INSIG appeal be declared ungrounded.

26. On 6 June 2017, the Court of Appeals, by Judgment [Ae. No. 12/2016], rejected as ungrounded the appeal of INSIG and upheld the Judgment of the Basic Court (i) in respect of the principal debt on the basis of subrogation in the amount of € 10,500, and modified the relevant Judgment (ii) in respect of the penalty interest, forcing INSIG to pay the interest "*paid by commercial banks on funds deposited in the bank over one year without a specified destination*" with an additional penalty of 20% of from 12 May 2009 until 29 July 2011, whilst starting from 30 July 2011 until the final payment, only th default interest 12% on the annual interest rate. The Court of Appeals clarified that the 20% interest rate reduction to 12% after 30 July 2011, is the result of the entry into force of Law No. 04/L-018 on Compulsory Motor Liability Insurance (hereinafter: Law on Compulsory Insurance).

27. On 14 July 2017, INSIG filed an appeal against the Judgment of the Court of Appeals with the Supreme Court alleging violation of the provisions of contested procedure and erroneous application of substantive law, with the proposal that the revision be approved as grounded and the Judgments of the lower instance courts be annulled and the case be remanded for retrial. INSIG specifically challenged the amount of the default interest, namely the time from which it was calculated, noting that the Court of Appeals incorrectly applied the legal provision, namely Article 26 of the Law on Compulsory Insurance, when deducting 20% interest and 12% from the date of filing the claim because, according to the allegation, "*this is only valid when the injured party does not receive a response within 60 days*". On the other hand, the Applicant filed response to revision, proposing that (i) the respective revision be declared inadmissible pursuant to paragraph 2 of Article 214 of Law 04/L-118 on Amending and Supplementing Law 04/L-006 on Contested Procedure (hereinafter: Law on Amending and Supplementing the LCP); and (ii) declare INSIG allegations of erroneous application of substantive law by the

Court of Appeals as ungrounded, because the latter acted correctly when reasoning its decision under Rule 3 of the Rule 3 and Article 26 of the Law on Compulsory Insurance.

28. On 4 December 2017, the Supreme Court by Judgment [E. Rev. No. 18/2017] (i) rejected INSIG revision regarding the principal debt on a subrogation basis; while (ii) approved as grounded the revision regarding the default interest, obliging INSIG to pay the default interest "*in the amount of savings deposits without term paid by commercial banks in Kosovo without a specific destination over one year*" from 3 August 2015, namely the date on which the expertise was made, until the final payment. In the context of the latter, the Supreme Court, *inter alia*, reasoned:

> "*... [The Applicant] shall be paid interest on the amount of saving deposits payable by commercial banks in Kosovo without a fixed destination of more than one year, from 3.8.2015, (the day of expertise). until the final payment because the provision of Article 26.6 of the Law on Compulsory Motor Liability Insurance (Law No. 04L-018) providing for a 12% interest rate, and the provision of Article 5.5 of Rule 3 of the Central Bank of Kosovo (CBK) The Rule Amending the Rule on Compulsory Motor Liability Insurance of 1.10.2008 does not apply in the present case because there is no evidence in the case file that [the Applicant] has addressed [INSIG] with an extrajudicial claim for compensation, which [INSIG] has not addressed and thus delayed. Moreover this law has no retroactive effect because the case occurred in 2007 while this law entered into force in 2011".*

Applicant's allegations

29. The Applicant alleges that Judgment [E. Rev. No. 18/2017] of 4 December 2017 of the Supreme Court in rendered in violation of the fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR. The Applicant specifically alleges a violation of the right to a reasoned court decision and the principle of legal certainty as a result of the divergence in the relevant case law of the Supreme Court.

30. As to the allegations related to the lack of a reasoned court decision, the Applicant alleges that the Supreme Court, when modifying the Judgment [Ae. No. 12/2016] of the Court of Appeals of 6 June 2017, did not specify the legal basis on which has based its decision

regarding the default interest. Moreover, according to the Applicant, the Supreme Court also acted contrary to its case law in respect of default interest, in respect of which, unlike the present case, it applied Rule 3 and the Law on Compulsory Insurance. In this context, the Applicant refers to seven (7) Judgments of the Supreme Court, as follows: (i) Judgment [E. Rev. No. 20/2014] of 14 April 2014; (ii) Judgment [E.Rev. No. 48/2014] of 27 October 2014; iii) Judgment [E. Rev. 55/2014] of 3 November 2014; (iv) Judgment [E. Rev. 62/2014] of 21 January 2015; (v) Judgment [E. Rev. No. 6/2015] of 19 March 2015; (vi) Judgment [E. Rev. No. 14/2016] of 24 March 2016; and (vii) Judgment [E. Rev. 27/2017] of 14 December 2017.

31. The Applicant specifically states that, by the challenged Judgment, the Supreme Court had determined the default interest "*in the amount of deposits without fix-term paid by commercial banks in Kosovo without a specific destination for more than one year*", without reasoning (i) the legal basis upon which this default interest is determined; nor (ii) the departure from its case law in respect of the default interests.

32. In addition, the Applicant alleges that the Supreme Court also failed to reason (i) the determination of the time from which INSIG had been delayed, namely the date of mechanical expertise without legal support, unlike the date on which the compensation claim was filed, in respect of which the Supreme Court held that there was no evidence that it was submitted, contrary to the evidence administered at the main hearing of 20 October 2015; and (ii) did not justify the retroactive effect of the law on Compulsory Insurance, despite Article 43 (Repeal) of this law.

33. In its allegations, the Applicant has elaborated on the fundamental principles of the right to a reasoned court decision as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR and in support of these arguments, the Applicant also referred to the cases of the Court KI55/09, Applicant *NTSH Meteorit*, Judgment of 3 December 2010; KI135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI138/15 Applicants *Sharr BeteiligungsGmbH LLC*, Judgment of 4 September 2017; and KI97/16 Applicant *IKK Classic*, Judgment of 4 December 2017; and the case law of the European Court of Human Rights (hereinafter: the ECtHR) *Boldea v. Romania* (Judgment of 15 February 2007); *Hiro Balani v. Spain* (Judgment of

9 December 1994); *Ruiz Torija v. Spain* (Judgment of 9 December 1994) and *Helle v. the Netherland* (Judgment of 19 December 1997).

34. Finally, the Applicant requests the Court to declare its Referral admissible, and to conclude that the challenged Judgment of the Supreme Court is rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and the same be declared invalid, remanding the case for retrial.

Comments submitted by the interested party "INSIG"

35. On 2 November 2018, INSIG sent to the Court its comments regarding the Applicant's Referral. According to INSIG, the Supreme Court has correctly decided regarding the default interest, due to the fact that the Applicant did not submit to INSIG a claim for compensation as provided by law. Furthermore, according to INSIG, the Court of Appeals and the Basic Court have erroneously applied the legal provisions when setting interest rates of 20% and 12% because "*this applies only when the claimant does not receive a response to the claim for pecuniary damage within 60 days*". Finally, INSIG proposes to the Court to reject the Applicant's Referral as ungrounded.

Relevant legal provisions

LAW ON OBLIGATIONAL RELATIONSHIPS

III. DEFAULT INTEREST

When Owed

Article 277

(1) A debtor being late in the performance of a pecuniary obligation shall owe, in addition to the principal, default interest, at the rate determined by federal law.

(2) The Federal Executive Council shall determine the default interest on the monetary obligation resulting from the contract in the economy.

(3) Should the rate of stipulated interest be higher than the rate of default interest, it shall continue to run even after the debtor's delay.

RULE 3 ON AMENDING THE RULE ON COMPULSORY THIRD PARTY LIABILITY MOTOR VEHICLE INSURANCE

"Article 5 Claim Settlement

5.1 Settlement
Indemnity claims of third parties based on a CTPL Insurance in accordance with provisions of this Rule, including recourse from the Guarantee Fund have to be settled within the period of 10 days of the submission of necessary proofs and relevant documentation required by the insurance company or the Guarantee Fund referring to the claimed indemnity for death, bodily injury or property damage.

The Guarantee Fund or an insurance company that fails to make a settlement of a valid claim within a period of ten (10) days as prescribed above shall pay a late payment penalty equal to 20 % yearly interest calculated from the date when the claim was reported until the date when indemnity was paid or settled".

LAW NO. 04/L-018 ON COMPULSORY MOTOR LIABILITY INSURANCE

Article 26
Compensation claims procedure

1. The insurer shall be obliged to process, for damages to persons latest within a period of 60 (sixty) days, while for damages to property within a period of 15 (fifteen) days from the day of submission of the compensation claim, the claim shall be processed and the injured party shall be notified in writing of:
1.1. compensation offer with relevant explanations;
1.2. decision and legal reasons for rejecting the compensation claim, when the liability and the damage degree are disputable.

2. If the submitted claim is not completed by evidence and documentation necessary to render a decision on compensation, the insurer shall be obliged, latest within a period of 3 (three) days from the date of the receipt of compensation claim, to notify the injured party in writing, indicating the evidence and documentation required to supplement the claim. Time limits from paragraph 1 of this Article on insurer's obligation to process the compensation claims shall apply as of the day of receipt or the completion of claim documentation, respectively.

3. CBK will issue sub-legal act to establish the compensation procedure, including such determination when a claim is considered completed by evidence and documentation necessary to render a decision on compensation.

4. Being unable to establish the damage, or to have the compensation claim fully processed respectively, the liable insurer shall be obliged to pay to the injured party the undisputable share of damage as an advance payment, within the time limit set out in paragraph 1 of this Article.

5. If the liable insurer fails to reply to the injured party within the time limits established under paragraph 1 of this Article, the injured party shall have the right to file a lawsuit to the competent Court.

6. In the event of noncompliance with time limits established under paragraph 1 of this Article, and non-fulfillment of obligation in advance payment from paragraph 4 of this Article, the liable insurer shall be held responsible for the delay in fulfilling the compensation obligations, hence charging the insurer with an interest rate for the delay. This interest rate shall be paid at twelve percent (12 %) of the annual interest rate and shall be counted for each delay day until the compensation is paid off by the liable insurer, starting from the date of submission of compensation claim.

7. Provisions from paragraph 1, 2, 4 and 5 of this Article shall respectively apply in cases of compensation claims processing which shall bind the Bureau to damages based on border insurance and the Compensation Fund liabilities.

8. Special procedures and time limits under the Crete Agreement shall apply to compensation claims from the International Motor Insurance Card system.

Assessment of the Admissibility of Referral

36. The Court first examines whether the Referral has met the admissibility criteria established in the Constitution and further specified in the Law and the Rules of Procedure.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

38. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which provides: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

39. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Article 47 [Individual Requests], Article 48 [Accuracy of the Referral] and Article 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…".*

40. In this regard, the Court notes that the Applicant has the right to file a constitutional complaint, invoking the alleged violations of his fundamental rights and freedoms, which apply to individuals and legal entities. (See Constitutional Court case No. KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

41. As to the fulfillment of the admissibility criteria laid down in the Constitution and the Law, as elaborated above, the Court finds that the Applicant is an authorized party challenging an act of a public authority, namely Judgment [E. Rev. No. 18/2017] of 4 December 2017 of the Supreme Court, having exhausted all legal remedies provided by law. The Applicant also clarified the rights and freedoms that allegedly were violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the time limits set forth in Article 49 of the Law.

42. The Court finds that the Applicant's Referral also meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph 3 of Rule 39 of the Rules of Procedure.

43. The Court also notes that the Referral cannot be declared inadmissible on any other grounds. It must therefore be declared admissible and its merits should be reviewed (See also, in this context, the case of the ECtHR, *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144).

Merits

44. The Court initially recalls that the accident occurred in 2007. It was caused by INSIG insured, while the insured of the Applicant H.H. suffered material damage. The Court also notes that according to the Applicant, on 12 May 2009, the relevant reimbursement was requested by INSIG, and given that no agreement was reached, the latter filed a claim with the Basic Court on 19 March 2010. However, according to all regular courts, the date 12 May 2009, figures as the date of filing the claim with the relevant court, and the date from which the regular courts, with the exception of the Supreme Court, have

calculated that INSIG has fallen into default, and consequently the calculation of the default interest has begun.

45. The Court further recalls that the Applicant's case was originally remanded for retrial by Judgment [Ae. No. 233/2012] of 24 October 2013 of the Court of Appeals. In the retrial, all three instances of the regular courts, by their respective Judgments, approved the amount of compensation of € 10,500 in the name of the principal debt. This amount, according to the case file, was also confirmed through the expertise of 3 August 2015, which was supplemented on 10 September 2015. The first, namely of 3 August 2015, is relevant because it is used by the Supreme Court as a date from which the default interest should be calculated. It is the latter, namely the calculation of the default interest, which is challenged throughout the regular courts and the Applicant's main allegation before the Court.

46. In this context, the Court recalls that the Basic Court by Judgment [III. C. No. 626/2013] of 30 October 2015, based on Article 277 of the LOR and Article 5 of Rule 3 set the penalty interest of 20 % per year starting from the day of filing the claim, namely 12 May 2009 until the final payment. The Court of Appeals by Judgment [Ae. No. 12/2016] of 6 June 2017, based on Article 277 of the LOR, Article 5 of Rule 3 and Article 26 of the Law on Compulsory Insurance, determined the interest "*that pay commercial banks for funds deposited in the banks for more than one year without specific destination*" with an additional penalty (i) of 20% starting from 12 May 2009, as the date of filing the claim, until 29 July 2011, the date in which the Law on Compulsory Insurance entered into force and pursuant to Article 43 thereof, Rule 3 was repealed; whereas (ii) from 30 July 2011 until the final payment, only the 12% of the annual interest rate, based on Article 26 of the Law on Compulsory Insurance. Whereas, the Supreme Court, by Judgment [E. Rev. No. 18/2017] of 4 December 2017, upheld INSIG revision in respect of default interest, and determined INSIG default interest only to be "*in the amount of interest savings deposits without term paid by commercial banks in Kosovo without a fixed destination for more than one year*" from 3 August 2015, namely the date on which the expertise was made, until the final payment. The Court emphasized that (i) Rule 3 and the Law on Compulsory Insurance are not applicable in the circumstances of the present case because they were not in force in 2007 when the accident occurred and had no "*retroactive effect*", and (ii) "*there is no evidence in the case file that [the Applicant] addressed [INSIG] with a claim for extrajudicial redress for which [INSIG] has not dealt with and thus has fallen into default*".

47. The Supreme Court, however, did not specify and reason the legal basis on which (i) it set the default interest "*in the amount of savings deposits without term paid by commercial banks in Kosovo without a specific destination for more than one year*"; and (ii) the date of expertise, namely 3 August 2015, as the date from which the default interest was calculated, despite that the Basic Court and the Court of Appeals, which set the date for filing the claim, namely 12 May 2009, as the date from which INSIG was in delay, and consequently the date from which the default interest is calculated.

48. The aforementioned are, in substance, the Applicant's main allegations, on the basis of which he alleges that Judgment [E. Rev. No. 18/2017] of the Supreme Court of 4 December 2017, was in breach of his fundamental rights and freedoms. guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to lack of reasoning of the court decision, and moreover, in breach of the principle of legal certainty, because according to the Applicant, the Supreme Court in rendering this Judgment had also acted contrary to its case law.

49. These two categories of allegations, the lack of a reasoned court decision and the inconsistency in the case-law of the Supreme Court with regard to the legal provisions on the default interest in the context of compulsory motor third party liability insurance, will be examined by the Court on the basis of the case law of the ECtHR, in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Therefore, and hereinafter, the Court will first examine the Applicant's allegations regarding (i) the lack of a reasoning of the court decision, to proceed with the examination of the allegations concerning (ii) the lack of consistency, namely the divergence in case law of the Supreme Court. To this end, the Court will first elaborate the general principles, and then apply them in the circumstances of the present case.

I. As to the allegations related to the lack of a reasoned court decision

50. With regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated practice. This practice was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994;

Higgins and Others v. France, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; and KI124/17, Applicant *Bedri Salihu,* Judgment of 27 May 2019).

51. In principle, the case law of the ECtHR and that of the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*indicate with sufficient clarity the reasons on which they base their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to each argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicants are to be addressed and the reasons given must be based on the applicable law.

52. The Court also recalls that it has consistently stated that the decisions of the courts will violate the constitutional principle of the prohibition of arbitrariness in decision-making if the reasoning given does not contain established facts, the relevant legal provisions and the logical relationship between them. (See, *inter alia*, the cases of the Court: KI72/12, Applicants *Veton Berisha and Ilfete Haziri*, cited above, paragraph 61; KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; KI 96/16 Applicants *IKK Classic*, cited above, paragraph 52; and KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 49).

53. The Court recalls that in the circumstances of the present case, the Applicant's allegations of the lack of reasoning with regard to the challenged Judgment of the Supreme Court consist in (i) amending the default interest imposed by the lower courts without justifying and without establishing the legal basis on which was set the default interest; and (ii) setting the date of expertise rather than of filing the claim as the date from which the default interest is calculated. The Court considers that these two issues constitute the substantive

allegations of the Applicant and must therefore have been reasoned by the Supreme Court.

54. In order to determine whether the reasoning given by the Supreme Court meets the standards of a reasoned court decision, the Court recalls the reasoning of the Supreme Court in Judgment [E. Rev. No. 18/2017], where is stated as below:

> *„[...] the claimants [the Applicants] is to be paid the debt at the interest of savings deposits without fix-term paid by commercial banks in Kosovo, with no specific destination for more than one year, from the filing of the claim on 03.08.2015 (from the date of the expertise), until the final payment because the provision of Article 26.6 of the Law on Compulsory Motor Liability Insurance (Law No. 04/L-018), providing for a 12% interest nor the provision of Article 5.5 of Rule 3 of the Central Bank of the Republic of Kosovo (CBK) Rule on Amending the Rule on Compulsory of Motor Liability Insurance of 1.10.2008 does not apply in the present case, as there is no evidence in the case file that the claimant has addressed the respondent with a claim for extra-judicial compensation - that the respondent has not dealt with and thus falls into delay. Furthermore, this law has no retroactive effect, as the case occurred in 2007 and this law entered into force in 2011".*

55. In this context, and as noted above, the Court notes that the Supreme Court excluded the applicability of Rule 3 and the Law on Compulsory Insurance in the circumstances of the present case, reasoning that (i) the latter were not in force at the time when the accident happened in 2007; and (ii) there is no evidence that the Applicant filed a claim for compensation with the respondent, namely INSIG. On the basis of this reasoning, the Supreme Court quashed the Judgments of the lower courts regarding the default interest of 20% and 12% respectively.

56. In this context, the Court notes that the Court held that the default interest rate of 12% as set out in Article 26 of the Law on Compulsory Insurance and 20% as set out in Article 5 of Rule 3 are not applicable in the circumstances of the case, because the relevant regulation was not in force at the time of the accident in 2007. However, noting that there was no evidence that the Applicant had filed a claim for compensation, the Court was based on the same legal regulative which stated that it was not applicable in terms of determining the amount of the default interest. The Court recalls that the claims for indemnity,

namely compensation and the relevant time limits, are set out in Article 5 of Rule 3 and Article 26 of the Law on Compulsory Insurance.

57. Furthermore, the Court notes that in setting the default interest "*in the amount of savings deposits without term paid by commercial banks in Kosovo without a specific destination for more than one year*", the Supreme Court (i) did not specify and justify the legal basis; and (ii) did not justify the determination of the date of expertise, namely 3 August 2015, as the date from which the default interest is calculated, despite the Basic Court and the Court of Appeals which had set the date of filing the claim, namely 12 May 2009, as the date from which INSIG was delayed, and consequently the date from which the default interest is calculated. In respect of the latter, the Court notes the difference of six (6) years of default interest depending on what date is calculated the date of falling overdue of the respondent.

58. With regard to the abovementioned positions of the Supreme Court, the Court reiterates that the ECHR, *inter alia*, in the Judgment *Hadjianastassiou v. Greece*, cited above, held that the domestic courts should "*indicate with sufficient clarity the reasons on which they base their decision"*. (See, in this context, also the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 61).

59. Furthermore, and based on its case law, the Court notes that the relevant reasoning of the Supreme Court failed to explain precisely the relationship between the facts presented and the application of the law which it used and which it did not cited at all, namely, how they correlate with each other and how they influenced the decision of the Supreme Court to modify the decisions of the lower court on how to set interest rates. (See also the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraphs 60 and 87). The Court stated several times in its case law that the court decisions will violate the constitutional principle of prohibiting arbitrariness in decision-making if the reasoning given do not contain established facts and legal provisions, as well as the logical relationship between them.

60. The Court recalls that it found a violation of that right in a reasoned court decision in a similar case, namely KI87/18, in which it assessed the constitutionality of Judgment [E. Rev. No. 27/2017] of 24 January 2018 of the Supreme Court (hereinafter: case KI87/18). In this case, the latter had also approved the respondent's revision and modified the judgments of the lower instance courts on regarding the manner in which the default interest was set. Even in this case, the Supreme Court had determined "*the interest in the amount of the savings*

deposits payable by commercial banks in Kosovo, with no fixed destination for more than one year, from filing the claim on 19.11.2010 until the final payment". The Court notes that even in this case, the Supreme Court stated that the Law on Compulsory Insurance entered into force after the accident happened, and was therefore not applicable in the circumstances of the respective case. (See the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 21). The Court held that the reasoning of the decision of the Supreme Court did not meet the standards embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, *inter alia*, because (i) the Supreme Court did not specify the applicable law in the relevant circumstances (see the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 58); and (ii) did not explain the relationship between the facts presented and the law enforcement to which it referred. (See the case of Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 60).

61. Therefore, having regard to the foregoing observations and the proceedings as a whole, the Court considers that the Judgment of the Supreme Court, namely Judgment [E. Rev. No. 18/2017] of 4 December 2017, did not give sufficient reasons to the Applicant to (i) determine the default interest "*in the amount of savings deposits without term paid by commercial banks in Kosovo without a specific destination over one year*"; and (ii) determining the date of expertise and not the date of filing the claim, as the lower courts found, from which the default interest is calculated, thereby infringing the Applicant's right to a reasoned court decision, as an integral part of the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR (See also in this context the case of ECtHR *Grădinar v. Moldova*, Judgment of 8 April 2008, paragraph 115).

62. Upon finding that the Judgment [E. Rev. No. 18/2017] of the Supreme Court of 4 December 2017 was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to lack of a reasoned court decision, the Court will next consider the Applicant's allegations concerning the violation of the principle of legal certainty by the Supreme Court in rendering this Judgment, namely the lack of consistency in the relevant case law.

63. Consequently and in the following, the Court will elaborate (i) the fundamental principles deriving from the ECtHR case law concerning the consistency of case law; and (ii) the relevant criteria on the basis

of which the ECtHR assesses whether the lack of consistency, namely the divergence in case-law, constitutes a violation of Article 6 of the ECHR. (For more on the consistency of case law, see the ECtHR Guide of 31 December 2018 on Article 6 of the ECHR (Civil limb); Right to a Fair Trial; Part IV. Procedural Requirements; A. Fairness; 2. Scope, c. Consistency of domestic case law).

II. As to allegations related to divergence of the case law

(i) General principles

64. With regard to the fundamental principles related to the consistency of case law, the Court notes that the case law of the ECtHR has resulted in four fundamental principles that characterize the analysis as to the consistency of case law, as follows: (i) legal certainty; (ii) does not have an acquired right to consistency in case law; (iii) the divergence is not necessarily contrary to the ECHR; and (iv) excluding evident arbitrariness.

65. Concerning the first principle, the ECtHR has focused on the principle of legal certainty, which in this context is embodied in all the articles of the ECHR and constitutes one of the fundamental aspects of the rule of law. (See ECHR case, *Neydet Sahin and Perihan Sahin v. Turkey*, Judgment of 20 October 2011, paragraph 56). This principle guarantees certain stability in legal situations and contributes to public confidence in the courts. The persistence of divergence in the case law can create situations of legal uncertainty resulting in a decrease in public confidence in the judicial system, while this trust is clearly one of the essential components of the rule of law. (See, in this context, the case of ECtHR *Hayati Çelebi and Others v. Turkey*, Judgment of 9 February 2016, paragraph 52; and *Ferreira Santos Pardal v. Portugal*, Judgment of 30 July 2015, paragraph 42; see also case of the Court, KI42/2017, Applicant *Kushtrim Ibraj*, Resolution on Inadmissibility of 25 January 2018, paragraph 33).

66. As to the second principle, the ECtHR found that the requirements of legal certainty and the protection of the legitimate confidence of the public, do not confer nor guarantee an acquired right to consistency of case law. The development of case law is not, in itself, inconsistent with the fair administration of justice as failure to maintain a dynamic and evolving approach would jeopardize continued reform or improvement. (See, *inter alia*, the cases of the ECHR, *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 58; and the *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of

29 November 2016, paragraph 116; and see also case of the Court, KI42/2017, Applicant *Kushtrim Ibraj*, cited above, paragraph 34).

67. Regarding the third principle, the ECtHR found that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the ECHR. (See, ECHR cases, *Nejdet Sahin and Perihan Sahin*, cited above, paragraph 51; *Albu and Others v. Romania and Sixty-Three (63) Other Claims*, Judgment of 10 May 2012, paragraph 34; *Santo Pinto v. Portugal*, Judgment of 20 May 2008, paragraph 41; and the *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 122; and see also the case of the Court, KI42/2017, with Applicant *Kushtrim Ibraj*, cited above, paragraph 35).

68. Finally, and with regard to the fourth principle, the ECtHR has consistently stated that, except in cases of apparent arbitrariness, it is not its task to call into question the interpretation of domestic law by the domestic courts. (See, for example, ECHR *Ādamsons v. Latvia*, Judgment of 24 June 2008, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50) and in principle, it is not its function to compare different decisions of the courts, even if issued in apparently similar proceedings. It must respect the independence of those courts. Furthermore, the ECtHR has emphasized that there can be no consideration of divergence in case law when the factual circumstances of the case are objectively different. (See, in this context, the case of ECtHR *Uçar v. Turkey*, Decision of 29 September 2009). Equally, treating the two disputes differently cannot be considered to create divergent case law when justified by a change in the factual situations in question. (See ECtHR cases, *Hayati Çelebi and others,* Judgment of 9 February 2016, paragraph 52; as well as the *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 116).

69. The Court also notes that the ECtHR approach to analyzing divergences in case law differs depending on the fact whether (i) the divergences exist within the same branch of courts; or (ii) between two different branches of the courts which are completely independent of each other. The second situation concerns judicial systems consisting of more than one branch of the judicial system, each with its own, independent, supreme court, which is not subject to any common judicial hierarchy. The main case of the ECtHR concerning the lack of consistency, namely the divergence of case law, *Nejdet Şahin and*

Perihan Şahin v. Turkey, falls into this category. However, the fundamental principles established through this case are also used in assessing divergences concerning case law even in cases belonging to the first category, namely those with a unique judicial system, which would be the case in the context of legal system of the Republic of Kosovo.

70. Referring to the principles set out above, the Court further notes that the ECtHR uses three basic criteria to determine whether an alleged divergence constitutes a violation of Article 6 of the ECHR, as follows:: (i) *whether "profound and long-standing differences" exist in the case-law*; (ii) whether the domestic law provides for a mechanism to overcome these divergences*, and* (iii) whether that mechanism has been applied and, if so, to what extent. (In this context, see ECtHR cases, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraphs 116 - 135; *Iordan Iordanov and Others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 53; and *Hayati Çelebi and Others*, cited above, paragraph 52; and see also the case of the Court, KI42/2017, Applicant *Kushtrim Ibraj*, cited above, paragraph 39).

71. The Court further notes that the concept of "*profound and long-standing differences*" has been elaborated by the ECtHR, *inter alia* in the case of the *Lupeni Greek Catholic Parish and Others v. Romania,* the case in which the ECtHR found a violation of Article 6 of the ECHR, because of a breach of the principle of legal certainty. (See ECHR case, *Lupeni Greek Catholic Parish and others v. Romania*, cited above, paragraph 135). Therefore, the Court, and to the extent relevant, will elaborate superficially on the circumstances of the present case. The latter had to do with "*profound and long-standing differences*" in a case law of a single court, namely of the Supreme Court, and the failure to use the mechanism to ensure the harmonization and consistency of case law. More specifically, the circumstances of this case reflect the existence of conflicting case law within the higher domestic court, resulting in divergent case law within the lower courts as a consequence. The case concerned the interpretation of a legislative decree, as formulated prior to the relevant amendments, and related to the jurisdiction of the courts to decide on the actions of the Greek Catholic Parish. This decree was consistently interpreted inconsistently, in some cases rejecting, and in other cases approving the jurisdiction to decided on disputes brought before them by the Greek Catholic Parish, thus affecting the rights of access to court as guaranteed by Article 6 of the ECHR, to the

Applicants concerned. As a result, the Romanian legislature amended the text of the relevant decree. However, this amendment resulted in another set of conflicting court decisions. As a consequence, the right of access to court became contested for a large number of Greek Catholic parishes. Moreover, this contradictory case law had affected a large number of persons and would consequently bring a large number of court cases, and the domestic courts expected to face a large number of claims.

72. In illustrating the case above, the Court notes that in finding a violation of Article 6 of the ECHR in terms of divergence in case law, and in determining whether "*profound and long-standing differences*" exist, the ECtHR also considered whether the discrepancy was isolated or affected a large number of people. (See, *inter alia*, the case of the ECtHR, *Albu and Others v. Romania*, cited above, paragraph 38).

73. The Court also notes in this respect that the ECtHR has not found a violation of Article 6 of the ECHR in cases of divergent case law even and if it has affected a large number of people regarding the same matter over a short period of time, before the respective disputes were settled by the higher courts, thereby enabling state mechanisms to ensure proper consistency. (See, *inter alia*, the case of the ECtHR, *Albu and Others v. Romania*, Judgment of 10 May 2012, paragraphs 42 - 43).

74. The latter relates to the second and third criteria, namely the existence of a mechanism capable of resolving inconsistencies in case law and whether this mechanism has been used and to what extent. In this regard, the ECtHR initially held that the absence of such a mechanism constituted a violation of the right to a fair trial guaranteed by Article 6 of the ECHR. (See, in this context, *Tudor Tudor v. Romania*, Judgment of 4 March 2009, paragraphs 30-32; and *Ştefănică and Others v. Romania*, Judgment of 2 February 2010, paragraphs 37-38; and Nejdet *Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 54). In this regard, the ECtHR has repeatedly emphasized the importance of establishing mechanisms to ensure consistency and uniformity of the case law of the courts. It has also stated that it is the responsibility of states to organize their legal systems in such a way as to avoid divergences in case law. (See ECHR cases, *Vrioni and Others v. Albania*, Judgment of 24 March 2009, paragraph 58; *Mullai and Others v. Albania*, Judgment of 23 March 2010, paragraph 86; *Brezovec v. Croatia*, Judgment of 29 March 2011 , paragraph 66; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 55). The ECtHR has also emphasized that the role of a supreme court

is precisely to resolve such controversies. (In this context, see ECHR case, *Beian v. Romania* (no. 1), cited above, paragraph 37; *Zielinski and Pradal & Gonslaez and Others v. France*, Judgment of 28 October 1999; and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 123). This is because, if the contradictory practice takes place within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thereby undermining the principle of legal certainty and weakening public confidence in the judicial system. (See, in this context, the case of the ECtHR *Beian (no. 1),* cited above, paragraph 39; and the *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 123).

(ii) Application of such principles in the circumstances of the present case

75. In the following, the Court will apply the principles set out above in the circumstances of the present case, applying the criteria on the basis of which the ECtHR addresses divergence issues with regard to case law, starting with the assessment of whether, in the circumstances of the present case, (i) the alleged divergences in case law are "*profound and long-standing*" and, if this is the case, (ii) the existence of mechanisms capable of resolving the relevant divergence; and (iii) an assessment of whether these mechanisms have been implemented and with what effect in the circumstances of the present case. The Court will apply these criteria, having regard to the fundamental principles concerning the consistency of the case law elaborated above, thereby (i) the importance of legal certainty; (ii) the fact that the principle of legal certainty and the importance of consistency in case law do not guarantee a right to such consistency in case law; (iii) that, in fact, divergences in case law do not necessarily result in a violation of the Constitution and the ECHR; and importantly (iv) that the ECtHR finds such violations in the event of evident arbitrariness.

76. In this regard, the Court should also reiterate that, based on the ECtHR case law, it is not its function to compare different decisions of regular courts, even if taken in apparently similar proceedings. It must respect the independence of the courts. Moreover, in such cases, namely allegations of constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the Applicants should submit to the Court relevant arguments concerning the factual and legal similarity of the cases alleging that they have been resolved differently than the regular courts, thus resulting in a divergence in case law and which may have resulted in a violation of their

constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

77. In the circumstances of the present case, the Court recalls that the Applicant alleges that in his case, the Supreme Court decided differently regarding the default interest, acting contrary to its case law. In support of his arguments, it refers to the other seven (7) Supreme Court cases as follows: (i) Judgment [E. Rev. No. 20/2014] of 14 April 2014; (ii) Judgment [E. Rev. No. 48/2014] of 27 October 2014; (iii) Judgment [E. Rev. 55/2014] of 3 November 2014; (iv) Judgment [E. Rev. 62/2014] of 21 January 2015; (v) Judgment [E. Rev. No. 6/2015] of 19 March 2015; (vi) Judgment [E. Rev. V. 14/2016] of 24 March 2016; and (vii) Judgment [E. Rev. 27/2017] of 24 January 2018. Moreover, in case KI87/18, the Court assessed the constitutionality of the Judgment [E. Rev. 23/2017] of the Supreme Court of 23 December 2017, and which the Court will also include in its analysis.

78. Before analyzing and finding whether the challenged Judgment of the Supreme Court, beyond the absence of a reasoned court decision, was also rendered in breach of the principle of legal certainty as a result of the divergence in the relevant case law, the Court will further and initially present the relevant parts of the abovementioned Judgments, namely those relating to the amount of the default interest and the moment of its calculation, insofar as the latter are elaborated.

a) Judgment [E. Rev. No. 20/2014] of 14 April 2014

79. The Supreme Court by Judgment [E. Rev. No. 20/2014] of 14 April 2014 rejected as ungrounded the respondent's revision against Judgment [Ae. No. 3/2013] of 16 January 2014, confirmed the annual interest of 12%, thereon based on Article 26 of the Law on Compulsory Insurance in relation to an Accident caused in 2009, and also confirmed that the calculation of default interest in the circumstances of this case starts from the date of filing a claim for compensation. In this regard and among others, this Judgment states as follows:

> *"The respondent's claims in the revision that the lower instance courts have erroneously applied the substantive law when the claimant was recognized the interest at the rate of 12% per year of the approved amount are ungrounded, as the lower instance courts right have correctly applied the substantive law and the provision of Article 277 of the LOR in conjunction with Article 26 item 6 of the law on compulsory motor third party liability*

insurance No. 04/L-018 which provides that in case of failure to comply with the deadlines set forth in paragraph 1 of this Article, and failure to pay the advance payment referred to in paragraph 4 of this Article, the responsible insurer shall be deemed to be in default in fulfilling its indemnity obligation, being charged with delayed interest payment. This interest is payable at the rate of 12% of the annual interest and is calculated for each day of delay starting from the date of filing the claim for compensation.

b) Judgment [E. Rev. No. 48/2014] of 27 October 2014

80. The Supreme Court by Judgment [E. Rev. No. 48/2014] of 27 October 2014, rejected as ungrounded the respondent's revision against the Judgment [Ac. No. 460/2012] of 13 May 2014, and confirmed the application of an annual interest rate of 20% until 29 July 2019, based on Article 5 of Rule 3 and thereafter 12%, based on Article 26 of the Law on Compulsory Insurance, in connection with an accident caused in 2009. The Supreme Court also confirmed the date 19 November 2010, namely the filing of a claim for indemnity, as the date from which the calculation of default interest in the circumstances of this case begins. In this regard and *inter alia,*, this Judgment states as follows:

"This Court considers that the lower instance courts also correctly applied the substantive law when they recognized to the claimant the right to interest in the amount of the principal debt at the rate of 20% per year from 19.11.2010 to 28.7. 2011 and interest of 12% starting from 29.7.2011 until the final payment because according to the provision of Article 277 of the LOR and Article 26.6 of the Law on Compulsory Motor Insurance No. 04/L – 018 which provides that in case of failure to comply with the deadlines set forth in paragraph 1 of this Article, and failure to fulfill the obligation to pay the advance referred to in paragraph 4 of this Article, the responsible insurer shall be deemed to be late in fulfilling the indemnity obligation by charging interest on late payment, this interest is paid at the rate of 12% of the annual interest and is calculated for each day of delay until the indemnity is paid by the responsible insurer, beginning on the date of filing of the claim for compensation".

c) Judgment [E. Rev. 55/2014] of 3 November 2014

81. The Supreme Court by Judgment [E. Rev. 55/2014] of 3 November 2014 rejected as ungrounded the respondent's revision against

Judgment [Ae. No. 46/2013] of 10 May 2014, and upheld the annual interest rate of 12% based on Article 26 of the Law on Compulsory Insurance in relation to an accident caused in 2009. In this respect and among others, this Judgment states as follows:

> *"The Judgment of the Court of Appeals of Kosovo, Ae. No. 43/2013 of 10.5.2014, rejected the appeal of the respondent as ungrounded and upheld the judgment of the District Commercial Court [...], which upheld the claimant's statement of claim and the respondent was obliged to pay in the name of regressive debt the amount of € 14,041.58, with an annual interest rate of 12%, calculated from 19.12.2010 until the definitive payment and on behalf of procedural expenses the amount of [...]".*

82. As to the moment of the calculation of the default interest, this Judgment of the Supreme Court shows that it was calculated from 19 December 2010, which is related to that of the filing of claim. In this respect, this Judgment stated as follows:

> *"The respondent's allegation that the respondent's offer was not taken into account is not grounded, since the parties failed to reach an extrajudicial settlement, the matter remain to be resolved in a civil dispute."*

d) Judgment [E. Rev. 62/2014] of 21 January 2015

83. The Supreme Court by Judgment [E. Rev. No. 62/2014] of 21 January 2015, rejected as ungrounded the respondent's revision against Judgment [Ae. No. 57/2013] of 10 June 2014, and confirmed the annual interest rate of 12% based on Article 26 of the Law on Compulsory Insurance in relation to an accident caused in 2009 and calculating the delay from the moment of filing the claim for compensation. In this regard and among other things, this Judgment states as follows:

> *"This Court considers that the second instance court correctly applied the substantive law when it recognized to the claimant the right to interest in the amount of the principal debt at the rate of 12% starting from 14.6.2010 until the final payment because according to the provision of Article 277 of the LOR and Article 26.6 of the Law on Compulsory Motor Insurance No. 04/L –018 is foreseen the rate of 12% of the annual interest and is calculated for each day of delay until the indemnity is paid by the responsible insurer, beginning on the date of filing of the claim for indemnity. It follows from the case file that the claimant filed*

the claim for compensation of damage with the respondent from 14.06.2010 […]".

e) Judgment [E. Rev. No. 6/2015] of 19 March 2015;

84. The Supreme Court by Judgment [E. Rev. No. 6/2015] of 19 March 2015 rejected as ungrounded the respondent's revision against Judgment [Ae. No. 162/2013] of 10 June 2014, and upheld the annual interest of 12 % based on Article 26 of the Law on Compulsory Insurance in relation to an accident caused in 2009. In this respect and among others, this Judgment states as follows:

"By the judgment of the Court of Appeals of Kosovo Ae. No. 162/2013 of 10.06.2014, the appeal of the respondent was rejected as ungrounded, and the Judgment of the Basic Court in Prishtina […] was upheld, which approved as grounded the statement of claim of the claimant, and the respondent was obliged to pay the claimant the amount of € 17,924.35, in the name of compensation for damage-Casco regression related to the repair of the damaged vehicle […] in the accident of 25.08 .2009, […] with a 12% penalty interest rate, starting on 22.07.2010 until the final payment and the costs of the proceedings in the amount of € 1.134,29.

f) Judgment [E. Rev. No. 14/2016] of 24 March 2016

85. The Supreme Court by Judgment [E. Rev. No. 14/2016] of 24 March 2016, rejected as ungrounded the respondent's revision against Judgment [Ae. No. 40/2015] of 12 November 2015, and upheld the annual interest of 12 % based on Article 26 of the Law on Compulsory Insurance in relation to an accident caused in 2009. In this respect and among others, this Judgment states as follows:

"By the judgment of the Court of Appeals of Kosovo Ae. No. 40/2015 of 12.11.2015, the appeal of the respondent was rejected as ungrounded, and the Judgment of the Basic Court in Prishtina […] was upheld, which in part I of the enacting clause approved as grounded the claimant's statement of claim to oblige the insurance company […]to pay the claimant the amount of €42,243.41, in the name of the regression from the motor insurance, with an interest rate of 12% pr year, counting from 14.1.2010, until the final payment […]

g) Judgment [E. Rev. 23/2017] of 14 December 2017

86. The Supreme Court by Judgment [E. Rev. 23/2017] of 14 December 2017, modified Judgment [Ae. No. 53/2016] of 21 September 2017, determining the application of the annual interest rate of 20% until 29 July 2019, based on Article 5 of Rule 3 and thereafter 12%, on the basis of Article 26 of the Law on Compulsory Insurance, in respect of an accident caused in 2009. The Supreme Court also confirmed 22 April 2010, namely the filing of the claim for damages, as the date from which the calculation of the default interest in the circumstances of this case begins. In this regard and among other things, this Judgment states as follows:

> *"[...] as to the interest rate, the appealed judgment Ae No. 53/2016 of the Court of Appeals of Kosovo of 21.09.2017 is modified, and the respondent is obliged to pay the claimant up to 20% interest in the amount of the approved claim, starting from 22.04.2010 as the date of filing the claim for compensation of damage up to 29.07.2011, and from 30.07.2011 until the final payment the interest at the rate of 12% in the adjudicated amount".*

h) Judgment [E. Rev.27/2017] of 24 January 2018

87. The Supreme Court by Judgment [E. Rev. No. 27/2017] of 24 January 2018, the Judgment which was declared in violation of the Constitution by Case KI87/18, modified Judgment [Ae. No. 191/2015] of 31 October 2017, in respect of the default interest. The Supreme Court modified the finding of the lower courts which had determined the application of an annual interest rate of 12% based on Article 26 of the Law on Compulsory Insurance in connection with an accident in 2009. The Supreme Court determined that in the circumstances in this case, "*the interest rate in the amount of savings deposits paid by commercial banks in Kosovo without a fixed destination of more than one year*" In this regard, and among other, this Judgment states as it follows:

> *„Regarding determination of the interest rate, the judgments of the lower instance courts dealt with the erroneous application of the substantive law, and as a consequence they were amended so that the claimant should be paid the amount of € 23,609.24, by the respondent with interest of savings deposits paid by commercial banks in Kosovo, without specific destiation of more than one year, from 19.11.2010 until the definitive payment, since the Law on Compulsory Insurance has entered into force in 2011 while the case occurred in 2009 and as such does not apply to the present case".*

88. In addition, prior to the analysis of whether (i) the challenged Judgment of the Supreme Court, namely Judgment [E. Rev. No. 18/2017] of 4 December 2017, is rendered by the Supreme Court in violation of its case law; and (ii) the divergences alleged in the case law are "*profound and long-standing*", the Court first recalls the reasoning of the challenged Judgment with regard to the default interest. The Court recalls at the same time that the Supreme Court, in the circumstances of the present case, determined (i) "*interest on saving deposits without term paid by commercial banks in Kosovo without a specific destination for more than one year*"; (ii) the date of expertise, namely 3 August 2015 as the date from which the calculation of the default interest begins; and (iii) that Rule 3 and the Law on Compulsory Insurance was not applicable in the circumstances of the present case.

89. In this context, and with regard to the applicable law in the circumstances of the present case, the Court first notes that based on Article 9 (Entry into Force) of Rule 3, the latter entered into force on 1 October 2008. Whereas, the Law on Compulsory Motor Liability Insurance was adopted by the Assembly of the Republic of Kosovo on 23 June 2011, by Decree of the President of the Republic of Kosovo on 5 July 2011, published in the Official Gazette of the Republic of Kosovo on 14 July 2011, and based on Article 44 thereof (Entry into Force), entered into force fifteen (15) days after its publication in the Official Gazette, consequently on 29 July 2011. Furthermore, this Law, through its Article 43, has established the repeal of UNMIK Regulation 2001/25 governing the compulsory motor insurance and the respective sub-legal acts of the Central Bank of Kosovo (hereinafter: the CBK), which are contrary to this law.

90. This regulative, including the LOR, which was applied in all cases referred to by the Applicant and clarified above, specifies both the amount of default interest and the time from which it is calculated. With regard to the amount of the default interest, the Court notes that it (i) is not expressly set forth in Article 277 of the LOR; (ii) is 20% based on Article 5 of Rule 3; and (iii) is 12% based on Article 26 of the Law on Compulsory Insurance. Whereas, as regards the time of the calculation, the Court notes that the default interest is applied from the moment of delay to the fulfillment of the obligation. The calculation of this moment (i) is not specifically defined in Article 277 of the LOR; (ii) commences on the date the damage is reported until the date on which the indemnity has been paid or settled pursuant to Article 5 of Rule 3; whereas (iii) in the event of damage to property, it commences within fifteen (15) days of the filing of a completed claim

for damages pursuant to Article 26 of the Law on Compulsory Insurance.

91. The Court recalls that in the circumstances of the present case, the Court of Appeals, by Judgment [Ae. No. 12/2016] of 6 June 2017, set the date of 29 July 2011, namely the date of entry into force of the Law on Compulsory Insurance, as the date from which the default interest rate would be reduced from 20% to 12%, thereby applying Article 26 of the Law on Compulsory Insurance in respect of the default interest. However, the Court recalls that the Supreme Court, in quashing the judgments of the lower courts in respect of the default interest, stated that neither (i) Rule 3 nor (ii) the Law on Compulsory Insurance were in force at the time the accident occurred in 2007, and consequently, were not applicable in the circumstances of the present case. However, and as already pointed out by the Court, the finding that there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR as a result of the lack of reasoning of the court decision, in quashing the lower courts' judgments in respect of delay, the Supreme Court did not justify two issues: (i) the legal basis on which the new default interest was determined; and (ii) the legal basis on which it had determined the date of expertise as the date on which INSIG has fallen into default, and was obliged to pay the default interest.

92. As to the allegations regarding the violation of the principle of legal certainty, namely, in the circumstances of the present case, the lack of consistency in case law, the Court notes that the Judgments referred to by the Applicant can be divided into two categories. Judgment [E. Rev. No. 27/2017] of 24 January 2018 falls in the first category and which, as in the circumstances of the present case, determined "*the interest on saving deposits without term paid by commercial banks in Kosovo, with no specific destination over one year*", whereas, in contrast, had applied this interest from the date of filing the claim, namely 19 November 2010. This case was also considered by the Court in case KI87/18, in which it found a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, both as a result of the lack of a reasoned court decision and as a result of the lack of consistency in the relevant case law, thus resulting in a violation of the principle of legal certainty. (See more specifically paragraphs 82-88 of case KI87/18, Applicant "*IF Skadeforsikring*", cited above).

93. Whereas, other Judgments fall in the second category, and in which the Supreme Court applied the 12% interest rate prescribed by Article 26 of the Law on Compulsory Insurance, with the exception of Judgments [E. Rev. No. 48 2014] of 27 October 2017 and [E. Rev. No.

23/2017] of 14 December 2017, to which the Supreme Court applied the 20% default interest until 29 July 2011, whilst from that date, namely, the date of entry into force of the Law on Compulsory Insurance, the default interest of 12%. The Court notes that the interpretation of the applicable law by the Supreme Court in these two cases coincides with the interpretation of the Court of Appeals in Judgment [Ae. No. 12/2016] of 6 June 2017, in the Applicant's circumstances.

94. In all other cases within this category, namely Judgments [E. Rev. 55/2014] of 3 November 2013; [E. Rev. No. 20/2014] of 14 April 2014; [E. Rev. 62/2014] of 21 January 2015; [E. Rev. No. 6/2015] of 19 March, 2015; and [E. Rev. No. 14/2016] of 24 March 2016 of the Supreme Court (i) 12% default interest was applied based on Article 26 of the Law on Compulsory Insurance; and (ii) this default interest was in all cases applied starting on the due dates of 2010, taking into account, as the starting date, the date of filing the request for compensation or the claim.

95. The Court notes that it assesses the consistency of the case law of the regular courts only in relation to the Applicant's alleged violations. Consequently, the lack of consistency in case law must have resulted in a violation of the Applicant's fundamental rights and freedoms. To hold such a violation, and to establish that the Applicant's fundamental rights and freedoms have been violated as a result of the "*profound and long-standing differences*" in the relevant case law, the factual and legal circumstances of the Applicant's case must coincide with those of the cases in which the contradiction is alleged.

96. In this respect, the Court notes that, unlike all the cases referred to by the Applicant, including the Judgment of the Court in case KI87/18, the accident occurred in 2007. It is not disputable that Rule 3 and the Law on Compulsory Insurance were not in force at the time of the accident. However, the Court notes that the Law on Compulsory Insurance in at least five (5) above cases was applied retroactively, and consequently, before its entry into force. This is unlike the circumstances of the present case, in which the Supreme Court modified the Judgments of the lower courts on the grounds that Rule 3 and the Law on Compulsory Insurance were not applicable because they were not in force at the time of the accident.

97. The Court in this respect reiterates its position that it has consistently held that the application and interpretation of the law is within the jurisdiction of the regular courts; and that its role is only to ensure that

the application and interpretation of the law by the regular courts are compatible with the Constitution and the ECHR (See ECtHR cases, *Brualla Gomes de la Torre v. France*, Judgment of 19 December 1997, paragraph 31; *Waite and Kennedy v. Germany*, Judgment of 18 February 1999, paragraph 54; *Kuchoglu v. Bulgaria*, Judgment of 10 May 2007, paragraph 50; *Işyark v. Bulgaria*, Judgment of 20 November 2008, paragraph 48; and *Nejdet Sahin and Perihan Sahin v. Turkey, cited* above, paragraph 49). Having said that, the Court has also stated that the exception to this general principle, are the cases of evident arbitrariness. (See, for example, ECtHR cases *Adamsons v. Latvia*, cited above, paragraph 118; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 50).

98. In the context of the circumstances of the case, the Court recalls that the ECtHR has stated that the contradictions in the case law are an integral part of any judicial system and that divergence in the case law may also arise within the same court. That, in itself, is not necessarily contrary to the Constitution and the ECHR. (See ECtHR cases, *Santo Pinto v. Portugal*, cited above, paragraph 41; and *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 51). Moreover, and as noted above, the ECtHR has consistently stated that the requirements for legal certainty and legitimate protection of public confidence in the courts do not provide/guarantee a right to consistent case law. Moreover, the development of case law is important to maintain the proper dynamic for the continuous improvement of the administration of justice. (See ECtHR case, *Atanasovski v. "the Former Yugoslav Republic of Macedonia*", Judgment of 14 January 2010, paragraph 38; and *Nejdet Sahin and Perihan Sahin*, cited above, paragraph 58). However, based on the ECtHR case law, an exception to these general principles, is an apparent arbitrariness, and in terms of assessing the lack of judicial consistency, assessing whether there are "*profound and long-standing differences*" in the relevant case law and if there is an effective mechanism to address the latter.

99. The Court notes that in the circumstances of the present case, in at least nine (9) cases, including the Applicant's case, and within a period of five (5) years, the Supreme Court has applied the legal provisions regarding the amount of the default interest in different manner in respect of accidents, which, with the exception of the Applicant's case, occurred in 2009, and consequently prior to the entry into force of the Law on Compulsory Insurance. Interpretations include (i) the determination of the default interest in the amount of savings deposits paid by commercial banks in Kosovo without specific destinations over one year, in two cases, including the Applicant's case; (ii) the

application of the 12% interest rate determined by Rule 3 until the date of entry into force of the Law on Compulsory Insurance, the date on which the 20% interest was applied in two cases; and (iii) the application of a 20% interest rate in respect of accidents caused in 2009 and beginning on the certain dates in 2010, the period in which Rule 3 was in force and not the Law on Compulsory Insurance, and which, as stated above, was applied retroactively in at least five (5) cases. Moreover, the Court notes that the same divergence is evident in all the decisions of the Court of Appeals and which were reviewed through revision by the Supreme Court.

100. The Court also notes that, unlike the case under consideration, the Supreme Court rejected as ungrounded the requests for revision in cases [E. Rev. No. 48/2014] of 27 October 2014; [E. Rev. No. 62/2014] of 21 January 2015; [E. Rev. 55/2014] of 3 November 2014; [E. Rev. No. 20/2014] of 14 April 2014; [E. Rev. No. 14/2016] of 24 March 2016; and [E. Rev. No. 6/2015] of 19 March 2015, the cases which sometimes include the application of 12% and 20% interest based on the date of entry into force of the Law on Compulsory Insurance, and sometimes apply retroactively Article 26 of the Law on Compulsory Insurance, thus applying a 12% interest rate starting in 2010.

101. The Court recalls that the case law of the ECtHR has emphasized the fact that the divergence in the case law is not necessarily inconsistent with the ECHR, because the dynamic and evolving approach of the courts to the interpretation of applicable law and, moreover, the development of the case law is important to maintain the proper dynamic of continually improving the administration of justice. However, in the circumstances of the present case, the contradictions highlighted in the relevant case law of the Supreme Court do not present a trend of improvement and consolidation of the case law in relation to default interest in cases of compulsory motor third party liability insurance. Moreover, the aforementioned contradictions do not constitute an isolated case.

102. On the contrary, given the nature of the cases related to compulsory motor liability insurance, this conflicting case law has consistently affected a number of persons over a five (5) year period, and has the potential to affect an even greater number of persons, resulting in an increase in the number of lawsuits and the challenging of the court decisions as a result of the continuing contradictions in the case law of the Supreme Court regarding compulsory motor liability insurance.

103. In this context and consequently, the Court must find, as it did in Case KI87/18, that in the circumstances of the present case, and with regard

to the determination of the amount of default interest relating to motor liability insurance, there are "*profound and long-standing differences*" in the case law of regular courts. (See also Case KI87/18, Applicant "*IF Skadeforsikring*", cited above, paragraph 79).

104. This finding, however, does not apply to the Applicant's allegations that relate to the moment from which this default interest applies. The Court recalls that, unlike all the cases referred to the Court, and as already established, without elaborating and reasoning the relevant legal basis, in the circumstances of the Applicant's case, the Supreme Court set the date of expertise as the date from which the calculation of the default interest started. However, the Court notes and considering that this is the only case of all the cases examined in which the Supreme Court departed from its case law in this respect, it cannot find "*profound and long-standing differences*" in the relevant case law, as to the interpretation of legal provisions related to the delay, namely the moment of calculating the default interest. The Court considers that in this context the Applicant's case is an isolated case and, based on the ECtHR case law, cannot pass the threshold to find "*profound and long-standing differences*" and violate the principle of legal certainty. The Court is satisfied with the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the lack of a reasoned court decision in this regard.

105. On the other hand, the finding that there are "*profound and long-standing differences*" in the case law regarding the amount of default interest does not necessarily result in a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. To find this, the Court must also consider the other two ECtHR criteria that are relevant to assessing the lack of consistency of case law, namely whether the applicable law establishes mechanisms capable of resolving such divergence; and whether such a mechanism has been applied in the circumstances of a case and with what effect.

106. The Court notes that the Supreme Court has a mechanism to enable resolution of such contradictions, a mechanism which has not been applied in the circumstances of the present case, thereby meeting both of the abovementioned criteria.

107. In this context, the Court recalls that in the case KI87/18, the Court stated that based on item 10 of paragraph 2 of Article 14 (Competences and Responsibilities of the President and Vice-President of the Court) of Law on Courts No. 06/L-054 (hereinafter: the Law on Courts), the Presidents of the courts shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that

court; to analyze the organization of the court; to review and propose changes to procedures and practices. (See case of the Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 80). Through this case, the Court also emphasized that the functioning of the mechanism of harmonization of the case law itself is neither impossible nor limited, and which would directly reduce its application and efficiency in the practice itself. (See case of the Court KI87/18 Applicant *"IF Skadeforsikring"*, cited above, paragraph 81)

108. However, and furthermore, the Court also notes in this case that item 4 of paragraph 1 of Article 26 (Competences of the Supreme Court) of the Law on Courts, defines the exclusive competence of the Supreme Court itself to determine principled positions, issue legal opinions and guidelines for unique application of laws by the courts in the territory of the Republic of Kosovo. In the case involving the circumstances of the present case, namely the application of the default interest on compulsory motor third party liability insurance, the Supreme Court not only failed to do so but in fact served as a source of divergence in the case law, thus violating the principle of legal certainty.

109. The Court notes that the ECtHR has consistently emphasized that the role of a supreme court is precisely to resolve such contradictions. In addition, it has also maintained that, if the contradictory practice takes place within one of the highest court authorities in a country, that court itself becomes a source of legal uncertainty, thereby undermining the principle of legal certainty and weakening public confidence in the judicial system.

110. Therefore, the Court, in the light of the foregoing, finds that in the circumstances of the present case all three criteria of the ECtHR are met regarding the assessment whether the lack of consistency, namely the divergences in the case law, have resulted in a violation of the rights and freedoms to fair and impartial trial. The Court reiterates that, in the circumstances of the present case, it found "*profound and long-standing differences*" in the case-law of the Supreme Court on the application of provisions governing the amount of default interest in the context of compulsory motor third party liability insurance, and moreover, it has also established that the existing mechanisms of the Supreme Court to harmonize this practice, were not used.

111. As a result, the Court must find that, in the context of the Applicant's allegations, the "*profound and long-standing differences*" in the case law of the Supreme Court related to the non-use of mechanisms established by the law designed to ensure proper consistency within

the case law of the highest Court in the country, have resulted in a breach of the principle of legal certainty and a breach of the right to fair and impartial trial of the Applicant, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Conclusions

112. The Court dealt with all of the Applicant's allegations, applying on this assessment the case law of the Court and of the ECtHR regarding the lack of a reasoned court decision and the principle of legal certainty in terms of the consistency of the case law, such safeguards, that, with certain exceptions, are guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

113. As to the lack of a reasoned court decision, the Court found that in rendering the Judgment [E. Rev. No. 18/2017] of 4 December 2017, the Supreme Court failed to substantiate the Applicant's substantive allegations and did not reason its decision as to the amount of the default interest and the time from which the calculation of the respective interest runs.

114. As to the principle of legal certainty in the context of the lack of consistency, namely the divergence of the case law of the Supreme Court, the Court, having elaborated the fundamental principles and criteria of the ECtHR in this context, applied the latter in the circumstances of the present case, and found that in the case law of the Supreme Court there are "*profound and long-standing differences*" with regard to the application of legal provisions relating to the amount of default interest applicable in cases of compulsory motor liability insurance, moreover, despite the fact that the insurance mechanisms of consistency in case law are set out in the respective laws, this mechanism was not used by the Supreme Court. Therefore, the Court found that the principle of legal certainty has been violated, and that the Judgment [E. Rev. No. 18/2017] of 4 December 2017 was rendered in violation of the Applicant's fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Court did not find the same violation with regard to the application of the legal provisions relating to the time of falling into default, namely the moment from which the calculation of the default interest begins, assessing the Supreme Court's departure from the case law in this regard as an isolated case and which cannot pass the test set by the ECtHR to hold "*profound and long-standing differences*" in the case law.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 11 December 2019,

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid Judgment E. Rev. No. 18/2017, of the Supreme Court of 4 December 2017;

IV. TO REMAND Judgment E. Rev. No. 18/2017 of the Supreme Court of 4 December 2017 for reconsideration in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to submit information to the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the judgment of the Court;

VI. TO REMAIN seized of the matter, pending compliance with that order;

VII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI07/18 Applicant: "Çeliku Rollers" l.l.c. Constitutional review of Judgment E. Rev. No. 14/2017, of 14 September 2017

KI/07/18, Judgment of 18 December 2019, published on 20 January 2020

Keywords: *individual referral, legal person, violation of constitutional rights, Article 31 - Right to Fair and Impartial Trial in conjunction with Article 6 (Right to a Fair Trial) of the European Convention on Human Rights;*

The main cause of the dispute between the Applicant and N.P. "Vali AL-PVC", and who had signed an initial contract and then agreed for additional work, was the quality of aluminum profiles for the glass holders in the residential building "Plisi" in Gjilan, and which was constructed by the Applicant. The latter had concluded that the profiles were of inadequate quality and consequently ordered their removal and replacement by another company. N.P. "Vali AL-PVC" initially filed the proposal for the imposition of a security measure with the Municipal Court in Gjilan requesting that the Applicant be prohibited from installing new profiles, and subsequently filed a claim with the Municipal Court in Gjilan, seeking the full performance of the Contract and compensation for the work completed. The Applicant filed counter-claim. The regular courts had ruled in favor of the N.P. "Vali AL-PVC". The contested matter throughout the proceedings before the regular courts turned out to be the expertise of the judicial expert, an expertise which the Applicant has contested throughout the regular courts, including the Constitutional Court. The Applicant in substance alleges that the Judgment [E. Rev. No. 14/2017] of the Supreme Court of 14 September 2017 was rendered in violation of his rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, because according to it, violated (i) the principle of equality of arms as a result of expert bias; (ii) the Applicant's right to be heard as a result of improper examination of evidence; and (iii) the right to a reasoned court decision.

In examining the merits of the case, the Court first elaborated the general principles of the case law of the European Court of Human Rights in relation to (i) expert reports, expert bias and relevant effects on the principle of equality of arms; (ii) the obligation of the regular courts to assess testimonies and evidence; and (iii) the right to a reasoned court decision.

As to the first case, the Court, in addition to elaborating on the general principles of the European Court of Human Rights in this respect, also examined in detail the relevant case law of this Court, including the cases *Letinčić v. Croatia; Sara Lind Eggertsdottir v. Iceland; Mantovanelli v.*

France; Devinar v. Slovenia; and Van Kück v. Germany, to clarify the circumstances in which the European Court of Human Rights has found a violation of Article 6 of the European Convention on Human Rights concerning the lack of expert neutrality or even the possibility of effective participation and challenging the findings of the respective reports. The Court in the context held that as regards (i) the impartiality of the expert, the Applicant does not substantiate legitimate doubts as to the expert's impartiality, nor why the latter may be objectively justified in the circumstances of the present case, moreover, based on the case law of the European Court of Human Rights, it cannot be concluded that the expert concerned was not neutral or impartial; (ii) the procedure followed for the compilation of the expertise report, the Applicant having had the opportunity to effectively participate and contest its findings; and (iii) determining new expertise, the Applicant has not sufficiently argued the deficiencies and uncertainties of the contested report during the review sessions and has not sufficiently substantiated his request to determine new expertise.

As to the second issue, the Court, in addition to elaborating on the general principles of the European Court of Human Rights in this respect, also examined in detail the relevant case law of the European Court of Human Rights, including cases *Kraska v. Switzerland* and *Perez v. France* to clarify the circumstances in which this Court has found a violation of Article 6 of the European Convention on Human Rights in respect of failure to comply with the obligation of the courts to properly examine the submissions, arguments and evidence adduced by the parties. In this context, the Court held that the Applicant's submissions, arguments and evidence, throughout the proceedings, had been properly examined by the regular courts. The Court held that a finding to the contrary finds no support in the applicable law nor in the case law of the European Court of Human Rights.

As to the third case, the Court referred to its already consolidated case-law regarding the reasoned court decision and held that the Applicant's substantive allegations were sufficiently reasoned throughout the regular courts.

Finally, applying the abovementioned principles and criteria, the Court held that the Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court was rendered in compliance with Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights.

JUDGMENT

in

Case No. KI07/18

Applicant

"Çeliku Rollers" l.l.c.

Constitutional review of Judgment E. Rev. No. 14/2017 of the Supreme Court of Kosovo, of 14 September 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 "Çeliku Rollers" l.l.c. with its seat in the Municipality of Gjilan, represented by Rudi Metaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges constitutionality of Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [Ae. No. 133/2016] of 14 April 2017 of the Court of Appeals and Judgment [IC. No. 660/2013] of 31 March 2016 of the Department of Commercial Affairs of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

4. The Applicant also requests the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure.

Legal basis

5. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals], 27 [Interim Measures] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 57 [Decision on Interim Measure] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

6. On 31 May 2018, the Court adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

7. On 12 January 2018, the Applicant submitted the Referral to the Court.

8. On 16 January 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Bekim Sejdiu.

9. On 29 January 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

10. On 7 February 2018, the Applicant submitted an additional document to the Court specifying the Referral, requesting the replacement of the

Referral originally filed and also submitting the request for interim measure.

11. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

12. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

13. On 1 April 2019, as the term of office to the four abovementioned judges as Judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI07/18, on the appointment of the new Review Panel and the latter was composed of judges: Bekim Sejdiu (Presiding), Radomir Laban and Remzije Istrefi-Peci.

14. On 18 December 2019, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

15. On the same date, the Court unanimously held that (i) the Referral is admissible; and that (ii) Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

16. In April 2012, the Applicant, which conducts the commercial activity mainly in the construction of residential and non-residential buildings, reached a verbal agreement with N.P. “Vali AL-PVC", an individual business, which main activity is the production and assembly of metal doors and windows, related to the furnishing of the residential building's doors and windows, "Plisi".

17. On 2 October 2012, the foregoing entered into a contract for the supply and construction of doors and windows of plastic and aluminum profiles in the total contracted value of € 37,000.00 (hereinafter: the Contract). The latter determined that half of this value, namely € 18,560.00, be compensated in cash, while the other half through a flat of 58 m² surface area in the amount of EUR 320 per m².

18. On 7 June 2013, the parties agreed to additional work in the amount of € 42,127.40. This work was agreed upon through a document entitled "Bid", which contains the additional work to be performed and the respective prices for each. Through this "Bid", the total liability between the parties amounted to € 79,247.40. The Applicant had originally paid to N.P. "Vali AL-PVC" the amount of € 38,000 in order for the works to commence, and also, according to the case file, transferred to the actual possession of a residential apartment, which ownership would be transferred after completion of the additional works and its registration with the relevant cadastral office.

19. On 10 June 2013, the Applicant proposed to N.P. "Vali AL-PVC", that the compensation by apartment be converted into cash compensation and that the total value of the debt of € 79,247 set forth in the "Bid" should be converted into a liability of the total value of € 42,247.00 after deducting the payment of 38,000 euro already made. According to the case file, no such agreement was signed.

20. According to the Applicant, in carrying out works by N.P. "Vali AL-PVC", delays arose as a result of the lack of quality aluminum profiles/glass holders, and which allegedly could not safely maintain the type of glass agreed upon by the parties. After a delay, allegedly, of 9 (nine) months and following several notifications by the Applicant, the latter engaged another company to carry out the works and which dismantled the profiles/glass holders and began placing new ones upon the request of the Applicant.

21. On 3 September 2013, N.P. "Vali AL-PVC" submitted a proposal for imposition of a security measure to the Basic Court in Gjilan requesting that the Applicant be prohibited from mounting new profiles, restoring the situation to its former state.

22. On 24 December 2013, N.P. "Vali AL-PVC" filed a lawsuit with the Municipal Court in Gjilan, seeking the full performance of the Contract and compensation for the works completed. On 16 October 2013, the Basic Court in Gjilan by Decision [C. No. 548/13] declared itself incompetent, referring the case to the Basic Court in Prishtina.

23. Based on the case file, the lawsuit was also filed by N.P. "Vali AL-PVC" and Çeliku Rolls" l.l.c. It follows from the latter that the Applicant's claim was withdrawn. However, the latter on 9 July 2015, filed a counterclaim in which, *inter alia*, stated that (i) the "Bid" had not replaced the Contract and, consequently, the compensation agreement of 50% of the cash value of liability and 50% of the compensation through the apartment remained in force; (ii) with the increase in the

value of the obligation, the Applicant has replaced the original residence with another 152 m2, namely € 95,000; (iii) as a result, the value of the claimant's compensation had amounted to EUR 133,000; and (iv) having in mind the delay in completing the works and the quality of the profiles/glass holders, was forced to replace them.

24. On 31 March 2016, the Basic Court by Judgment [IC. No. 660/2013] decided to: (i) uphold the claimant's statement of claim, namely N.P. "Vali AL-PVC", forcing the Applicant to compensate the claimant in the name of debt for construction works in the amount of € 81,279.50, with legal interest in the amount applied by commercial banks, including the costs of the proceedings; and (ii) reject as ungrounded the Applicant's counterclaim.

25. The decision of the Basic Court was based on the expert report of the forensic expert, who found that the value of the respondent's obligation towards the claimant was € 120,975.00, which would have been deducted from the amount of € 38,000 already paid to the claimant. The Applicant challenged this expertise and proposed the extraction of another construction expertise, but the Basic Court rejected the Applicant's request to appoint a second expertise.

26. On 27 April 2016, the Applicant filed an appeal with the Court of Appeals alleging violation of the provisions of the challenged procedure, erroneous or incomplete determination of factual situation and erroneous application of substantive law, with the proposal that the Judgment of the Basic Court is modified by either approving the Applicant's counterclaim or annulling it and remanding the case for retrial. The Applicant, *inter alia*, specifically challenged (i) the expertise's report alleging that it had failed to assess the quality of the glass profiles/holders; and (ii) the rejection of the Basic Court to approve the additional expertise in order to establish the quality of the glass profiles / holders. In challenging the expertise reports, the Applicant referred to the letter of the general representative of the Greek "*Alumil*" in Albania of 26 June 2016 and the opinion of the expert I.M. of 27 April 2016.

27. On 14 April 2017, the Court of Appeals by Judgment [Ae. No. 133/2016] rejected as ungrounded the appeal of the Applicant, thereby upholding the abovementioned Judgment of the Basic Court.

28. On 8 June 2017, the Applicant filed a request for revision with the Supreme Court, alleging an essential violation of the provisions of the contested procedure and erroneous application of substantive law, with the proposal that the revision be upheld as grounded and after

the two judgments of the lower courts were annulled, the case be remanded. The Applicant specifically challenged the expertise report, focusing on the quality of the glass profiles/holders and the value of the obligation. With regard to the former, the Applicant reiterated that the expertise report fails to make an accurate assessment of the quality of the glass profiles/holders and that this is substantiated by the documents of "*Alumil-Albania*", the opinion of the expert I.M. and the report of the company "*ENI Design*", evidence which the Applicant allegedly was obliged to provide after the Basic Court rejected his proposal for additional expertise by three experts in the relevant field, including the possibility to engage the Technical Faculty of the University of Prishtina. Moreover, the Applicant alleges that the Basic Court did not justify the rejection of this proposal. Whereas, regarding the latter, namely the value of the obligation, the Applicant, *inter alia*, challenged the fact that the value of the obligation determined through the expertise report exceeded the overall value of the obligations taken by the claimant through the Contract and the "Bid" between the parties.

29. On 14 September 2017, the Supreme Court by Judgment [E. Rev. No. 14/2017] rejected as ungrounded the Applicant's revision and upheld the Judgments of the lower courts.

Applicant's allegations

30. The Applicant alleges that the challenged Judgment, namely Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court, is rendered in violation of his rights guaranteed by Article 6 (Right to a fair trial) of the ECHR.

31. In this respect, the Applicant specifically alleges a violation of (i) the principle of equality of arms, because of the expert's bias; (ii) his right to be heard; and (iii) his right to a reasoned court decision.

32. With regard to the former, the Applicant focuses his argument on the bias of the judicial expert. According to the allegation, and among others, the latter (i) has exceeded the scope of expertise; (ii) did not assess the quality of the glass profiles/holders in relation to the criteria set out in the Contract, namely did not clarify whether the placed aluminum profiles/glass holders are capable of holding the contracted glass, but assessed whether they are in accordance with "*standards applicable in the Republic of Kosovo*" and "*generally in line with modern construction standards*"; (iii) erroneously held that "*with the agreement of both parties the apartament has not been taken in compensation*"; and (iv) did not base its findings on the facts. In

support of his allegations of violation of the principle of equality of arms as a result of the bias of the judicial expert, the Applicant refers to the decisions of the European Court of Human Rights (hereinafter: the ECtHR), *Dombo Beheer B.V. v. the Netherlands* (Judgment of 27 October 1993) and *Sara Lind Eggersdottir v. Iceland* (Judgment of 5 July 2007).

33. With respect to the second, the Applicant alleges that his right to be heard has been violated because the Court of Appeals failed to consider the evidence submitted by the Applicant, namely the statement of the general representative of "*Alumil*". According to the Applicant, this evidence proved the inaccuracies of the expertise report and proved that the glass profiles/holders were not of the proper quality. Moreover, through the request for revision, an additional privately conducted expertise was submitted to the Supreme Court, and the latter allegedly did not review or refer to it in its reasoning. In this context of the courts' obligation to consider evidence and submissions, the Applicant refers to the ECtHR judgments, *Kraska v. Switzerland* (Judgment of 19 April 1993) and *Perez v. France* (Judgment of 12 February 2004).

34. As to the third, namely the allegations of lack of a reasoned court decision, the Applicant alleges that the Basic Court did not justify the Applicant's rejection of the request to assign a second expert opinion, and that despite the Basic Court's reasoning, paragraph 2 of Article 366 of Law no. 03/L-006 on Contested Procedure (hereinafter: the LCP) does not prevent the relevant court from appointing a second expert opinion.

35. The Applicant also alleges that the courts have failed to substantiate (i) the Applicant's allegations in the counterclaim concerning the delay of the claimant, causing the loss of profit and the requirement to appoint an economic expert to calculate the damage in the question; (ii) the assessment of the evidence submitted to the Court of Appeals, namely the opinion of '*Alumil*' and that of expert I.M. submitted to the Court of Appeals and private expertise submitted to the Supreme Court; (iii) the amount of the obligation set out in the expert report, which in the amount of € 120,975.00 exceeds the obligation set out in the Contract and the "Bid" in the amount of € 79,247.40; and (iv) finding that the compensation with the apartment for half of the value of the contracted works has been converted into cash compensation, despite the fact that this finding is in breach of the Contract agreed between the parties. In support of his allegations of the lack of a reasoned court decision, the Applicant refers to the decisions of the

ECtHR, *Hirvisaari v. Finland* (Judgment of 25 September 2001) and *Donadze v. Georgia* (Judgment of 7 March 2006);

36. Finally, the Applicant requests the Court to declare his Referral admissible and to declare invalid the three Judgments of the regular courts and to remand to the Basic Court for retrial in a new panel; or to declare invalid the Judgment of the Supreme Court and the Court of Appeals, remanding the case to the appeal level; or declare invalid only the Judgment of the Supreme Court, remanding the case for retrial to the Supreme Court in a new composition of the panel. The Applicant specifically states that the restoration of the Applicant's constitutional rights can only be achieved through a first or second instance retrial.

37. The Applicant also requests the imposition of interim measure claiming, *inter alia*, that its imposition is in the public interest. The Applicant justifies the latter by producing the legal effects of Judgments which, according to him, are not in accordance with the Constitution.

Assessment of the admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

40. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution which establishes that: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable".*

41. In addition, the Court also refers to the admissibility requirements as prescribed by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which 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…".

42. Regarding the fulfillment of the admissibility requirements, as stated above, the Court initially notes that the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (See case of the Constitutional Court No. KI41/09, Applicant: *AAB-RIINVEST University LLC*, Resolution on Inadmissibility of 3 February 2010, paragraph 14). Accordingly, the Court finds that the Applicant is an authorized party challenging an act of public authority, namely Judgment [E. Rev. No. 14/2017] of the Supreme Court of 14 September 2017, after the exhaustion of all legal remedies provided by law.

43. The Applicant also clarified the rights and freedoms it claims to have been violated in accordance with the requirements of Article 48 of the

Law, and submitted the Referral in accordance with the deadlines established in Article 49 of the Law.

44. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the criteria set out in paragraph 3 of Rule 39 of the Rules of Procedure.

45. Moreover and finally, the Court considers that this Referral is not manifestly ill-founded pursuant to paragraph 2 of Rule 39 of the Rules of Procedure and, accordingly, is to be declared admissible. (See also, in this context, the case of the ECtHR, *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144).

Relevant Constitutional and Legal Provisions:

The 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.

[...]

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.

[...]

Relevant provisions of Law No. 03/L-006 on Contested Procedure

Article 356

The court can do an expertise if interested parties propose so. This will be done any time if there is a need to specify facts or circumstances that the judge does not have sufficient knowledge for.

Article 357

357.1 The party that proposes an expertise has to state why that expertise is needed for as well as its goal. The person for an expertise should also be proposed.

357.2 The opponent party should be given a chance to say its opinion regarding proposed expert.

357.3 If the involved parties can not bring a decision regarding the person who will conduct the expertise, or regarding the object or volume, then the court will decide about it.

Article 361

The evidence taken by expertise is specified by an order issued by court and it consists of:

a) name, family name, and the expert's profession;
b) the subject that is contested;
c) volume and the subject of the expertise;
d) deadline for the written opinion and conclusion.

Article 366

366.1 The court can ask for further explanations if the expertise is not clear or when it has a deficiency, as well as when there are different opinions within experts, either itself or if a party requests it. In this case, a deadline is set for the submission of the supplemental opinion in written.

366.2 If experts opinion is not clear or if the opinion is not submitted after the court order, the court will assign another expert after the declaration of both parties involved.

Article 367

The court sends written conclusion and the opinion at least eight (8) days before the main hearing session.

Merits

46. The Court recalls that in 2012, the parties to the dispute signed a Contract and to which, a year later, they attached an additional document called “Bid”, specifying the list and corresponding prices of doors and windows which N.P. "Vali AL-PVC" was obliged to supply and install them for the Applicant in the respective residential building “Plisi”. The initial contract stipulated that half of the compensation would be made through cash, and the other half through an apartment at the relevant construction site. During the implementation of this Contract, the quality of the profiles/glass holders contracted and settled by N.P. "Vali AL-PVC" became disputable. The Applicant allegedly, after delays in the execution of works, engaged another company and removed the profiles/glass holders placed by N.P. "Vali AL-PVC". This action by the Applicant resulted in the initiation of court proceedings, which, by three Judgments of the regular courts, ended in the favor of the claimant, namely N.P. "Vali AL-PVC".

47. The most disputable issue in the regular court proceedings and the Applicant’s main allegation before the Court is the expertise report made at the Basic Court level. The expertise made at the level of this court was charged with (i) assessing whether claimant’s aluminum mounted profiles were in compliance with construction standards; and (ii) calculation of the value of the works performed by the claimant. With regard to the former, the professional expertise found that “*plastic windows and doors placed in the apartments of this building are in accordance with the norms and standards of construction applicable in the Republic of Kosovo,*” and that “*the mounted aluminum profiles and those demolished from the facility complied with the construction standards*”; whereas with respect to the latter, it initially held that, with the agreement of the parties, the apartment was not compensated, while the value of the work performed on the premises was 120,975.00 euro, and accordingly the remained debt was 81,279.50 euro, because an amount € 38,000 had already been paid.

48. The Applicant challenged the findings of this expertise at the Basic Court level, proposing to issue additional expertise. This request was rejected by the Basic Court. At the Court of Appeal, the Applicant again challenged the findings of expertise, submitting two additional pieces

of evidence, the letter of the general representative of "*Alumili*" of Greece in Albania and the opinion of the expert I.M., and which, according to the Applicant, corroborate the inaccuracy of the expert report on which the Basic Court decision was based, in its entirety. The Court of Appeal upheld the position of the Basic Court that no additional expertise was needed. In the Supreme Court, the Applicant again challenged the findings of the expert report, submitting in favor of his arguments a private expertise. The Supreme Court upheld the position of the lower courts.

49. The Applicant continues to challenge the findings of the expert report also to the Court, alleging that the respective expert was biased and, moreover, that the regular courts have not examined his evidence and testimonies, contrary to the principle of equality of arms and its right to be heard, the guarantees enshrined in Article 6 of the ECHR. Moreover, and as noted above, the Applicant also alleges that the decisions of the regular courts did not address and reason his substantive allegations.

50. In considering these allegations, the Court first notes that (i) based on Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the rights guaranteed by international agreements and instruments through it, including the ECHR, are the rights also guaranteed by the Constitution, and apply directly to the Republic of Kosovo and have priority, in case of conflict, to the provisions and laws and other acts of public institutions. In this context, the guarantees of Article 6 of the ECHR, which the Applicant claims to have been infringed by the challenged Judgment, are directly applicable in the legal order of the Republic of Kosovo, and furthermore, in their entirety are also guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution; and (ii) based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court is obliged to interpret the fundamental rights and freedoms in accordance with the ECtHR case law and consequently, in assessing the Applicant's allegations, the Court will apply the relevant principles embedded in the ECtHR case law.

51. The Court further notes that in dealing with the Applicant's allegations, the essential issue relates to the challenged expertise report and that, further allegations, the courts' obligation to examine the evidence and the right to a reasoned court decision, are closely linked to the essential allegation, namely the challenged expertise report and the rejection of the Basic Court to approve the Applicant's request for a second expertise.

52. Therefore, the following Court will initially elaborate (i) the general principles of ECtHR case law with regard to expert reports, expert bias and relevant effects on the principle of equality of arms, applying them at the same time in the circumstances of the present case, to proceed with dealing with other allegations of the Applicant, namely (ii) the obligation of the regular courts to assess the testimonies and evidence; and (iii) the right to a reasoned court decision.

I. With regard to allegations related to the expertise report and bias of the judicial expert

(i) General principles of the ECtHR in relation to expert reports

53. The ECtHR, through its case-law, maintains that their admissibility and/or refusal is in principle a matter of domestic courts. (For more details on the expert opinions, see the Guide on Article 6 of the ECHR, Right to a Fair Trial (civil limb) of 31 December 2018, IV. Procedural requirements; A. Fairness; 6. Administration of evidence; b. Expert opinions). In addition and in principle, the ECtHR case-law maintains that the refusal to order an expert opinion is not, in itself, unfair. However, the reasons given for the refusal must be reasonable. (See the ECtHR case, *H. v. France*, Judgment of 24 October 1989, paragraphs 61 and 70). Nevertheless, the ECtHR through its case-law, has also developed a number of principles pertaining to expert opinions, the adherence of which is important for the compatibility of the process with the ECHR. In principle, the ECtHR maintains that (i) the litigants must be afforded a possibility to challenge the expert evidence effectively (see the ECtHR case, *Letinčić v. Croatia*, Judgment of 3 May 2016, paragraph 50); and (ii) where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. What is essential is that the parties should be able to participate properly in the proceedings. (See the ECtHR cases *Letinčić v. Croatia*, cited above, paragraph 50; and *Devinar v. Slovenia*, Judgment of 22 May 2018, paragraph 46).

54. In addition, the ECtHR case-law is also developed pertaining to the following aspects (i) the neutrality/impartiality of the expert; and (ii) the predominance of the expert opinion. Pertaining to the first, it maintains that paragraph 1 of Article 6 of the ECHR, does not expressly require an expert heard by a "*tribunal*" to fulfill the same independence and impartiality requirements as the tribunal itself. (See the ECtHR cases, *Sara Lind Eggertsdóttir v. Iceland*, Judgment of 5 July 2007, paragraph 47; and *Letinčić v. Croatia*, cited above, paragraph 51). However, it also maintains that the lack of neutrality

on the part of an expert, together with his or her position and role in the proceedings, can tip the balance of the proceedings in favor of one party to the detriment of the other, in violation of the equality of arms principle. (See the ECtHR cases, *Sara Lind Eggertsdóttir v. Iceland*, cited above, paragraph 53; and *Letinčić v. Croatia*, cited above, paragraph 51). While, pertaining to the second, it maintains that when the expert opinion occupies a preponderant position in the proceedings and exerts a considerable influence on the court's assessment, the position occupied by the expert throughout the proceedings, the manner in which his or her duties are performed and the way the judges assess his or her opinion are relevant factors to be taken into account in assessing whether the principle of equality of arms has been complied with. (See the ECtHR cases *Devinar v. Slovenia*, cited above, paragraph 47; *Yvon v. France*, Judgment of 24 July 2003, paragraph 37; *Letinčić v. Croatia*, cited above, paragraph 51; and *Mantovanelli v. France*, Judgment of 18 March 1997, paragraph 36).

55. The Court notes that the issues that have arisen most frequently within the ECtHR case-law pertaining to the expert reports in administrative and judicial proceedings, relate to their neutrality and the process through which their opinions/reports were issued. Taking into account that these issues are also the most relevant for the particular case at stake, the Court will also dwell deeper into the ECtHR case-law in order to determine a common denominator relevant and applicable pertaining to the allegations of the Applicant. In this respect, the Court will further elaborate cases (i) *Letinčić v. Croatia* which reflects questions of both neutrality and process, finding a violation on the second but not the first; (ii) *Sara Lind Eggertsdottir v. Iceland*, reflecting questions of neutrality of an expert, finding violation of Article 6 of the ECHR in this respect; (iii) *Mantovanelli v. France*, which reflects questions of process, finding violation of Article 6 of the ECHR in this respect; and for comparison (iv) *Devinar v. Slovenia*, which also reflects questions of process, not finding violation of Article 6 of the ECHR in this respect.

56. Case *Letinčić v. Croatia* involves an Applicant whose father, a war veteran, killed the Applicant's mother and her parents and then committed suicide. The family sought disability benefits in connection with the suicide of his father, arguing that the suicide was a consequence of mental derangement caused by his participation in the war. Throughout the proceedings, an expert report was commissioned from a public health care institution authorized to give expert opinions on matters related to war veterans' psychiatric disorders. The report concluded that his suicide could not be attributed to his wartime

service. This expert report was not forwarded to the Applicant. The Applicant has contested the findings of the report throughout all the administrative and judicial proceedings, all of whom rejected his claims, with the Croatian Constitutional Court finally declaring the case manifestly ill-founded. (For the facts of the case, refer to paragraphs 5 to 22 of the *Letinčić v. Croatia* case). The ECtHR reviewed the case and found violation of Article 6 of the ECHR. The ECtHR reviewed two particular issues in this respect (i) the fact that the Applicant could not participate effectively through the process of the expert report; and (ii) the neutrality of the expert, namely whether the fact that the expert opinion was prepared by a public authority, affected his neutrality.

57. In developing the general principles in this particular case, the ECtHR as usual, maintained that while Article 6 of the ECHR guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national courts. (See paragraph 47 in case *Letinčić versus Croatia*, and the references therein). It added however that the principle of equality of arms which, with respect to litigation involving opposing private interests, implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. (See paragraph 48 of the ECtHR case *Letinčić versus Croatia*, and the references therein). In particular, it noted that where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. (See paragraph 50 of the ECtHR case *Letinčić versus Croatia*, and the references therein). It also added, that the lack of neutrality on the part of a court-appointed expert may in certain circumstances give rise to a breach of the principle of equality of arms inherent in the concept of a fair trial. (See paragraph 51 of the ECtHR case *Letinčić versus Croatia* and the references therein).

58. Specifically pertaining to the case, the ECtHR recognized that the experts' findings had a preponderant influence on the assessment of the facts by that court since it pertained to a medical field that was not within the judges' knowledge. It also recognized that it is understandable that doubts could have arisen in the mind of the Applicant as to the experts report impartiality given that the experts were designated by the state, namely his opponent in the administrative and judicial proceedings at issue. However, it maintained that the very fact that an expert is employed in a public

medical institution, does not in itself justify the fear that the experts employed in such institutions will be unable to act neutrally and impartially in providing their expert opinions. Therefore, the ECtHR did not find the violation pertaining to the allegations related to the lack of neutrality of the experts' report. However, the ECtHR noted that the Applicant was excluded from the procedure of commissioning and obtaining the experts report and he learned of its substance only after the adoption of the decision dismissing his claim for family disability benefit. In such circumstances, the ECtHR concluded that the Applicant's position in the proceedings was seriously hampered by the fact that he was excluded from the procedure of commissioning and obtaining the expert report, and thus found violation of Article 6 of the ECHR. (For the reasoning of the ECtHR pertaining to this case, see paragraphs 44 to 68).

59. On the other hand, case of *Sara Lind Eggertsdottir versus Iceland*, involves an Applicant born with disabilities, which resulted into a process of proceedings led by her parents complaining that her disability was a result of improper treatment at the hospital. The respective district court found the state liable to pay compensation. The decision was overturned by the Supreme Court however, after having requested and heard the opinion of a State Medico-Legal Board (hereinafter: the Board). The applicants had consistently contested the opinion. (For the facts of the case, refer to paragraphs 5 to 25 of the case of *Sara Lind Eggertsdottir versus Iceland*). The allegations of the Applicant were summarized by the ECtHR into two categories: impartiality of the Supreme Court and that of the Board, the expertise respectively. The ECtHR did not find violation pertaining to the Supreme Court's decision to request an expert opinion from the Board, even without the parties consent. However, it found violation pertaining to the second, specifically the composition of the Board, taking into account that four of its members were also doctors at the hospital were the medical negligence allegedly happened, in addition to their hierarchical superior, having taken a clear stance against the District Court's judgment. Furthermore, in the ECtHR view, the board members were tasked to analyze and assess the performance of their colleagues at the hospital with the aim of assisting the Supreme Court in determining the question of their employer's liability. Therefore, the ECtHR maintained that the fears of the Applicant for the impartiality of the Board were objectively justified in this circumstances of this case. (For the reasoning of the ECtHR pertaining to this case, see paragraphs 31 to 55).

60. Case *Mantovanelli versus France* involves applicants who alleged that the respective hospital was liable for their daughters' death.

Throughout the administrative proceedings against the hospital they requested the appointment of an expert to determine the circumstances of the death and liability of the hospital. The expert was appointed and the report was presented to the respective court, however the applicants alleged that neither they nor their lawyer had been informed of the dates of the steps taken by the expert and that his report referred to documents which they had not been able to inspect. They alleged that the process was in breach of the equality of arms principle and requested that a new expert be appointed. The regular courts refused such a request. (For the facts of the case, refer to paragraphs 8 to 23 of the *Mantovanelli versus France* case). The ECtHR found a violation of Article 6 of the ECHR in this particular case. It pointed out, among others, that the applicants had been unable to attend the expert's interviews with the witnesses and the report referred to documents which they had not seen. In this respect, it also noted that "*where an expert has been appointed by a court, the parties must in all instances be able to attend the interviews held by him or to be shown the documents he has taken into account*". What is essential is that the parties should be able to participate properly in the proceedings before the "*tribunal*" and that in the respective case, the ECtHR emphasized that it "*is not convinced that this afforded them a real opportunity to comment effectively on it* [the expert report]". (For the reasoning of the case, refer to paragraphs 30 to 36 of the *Mantovanelli versus France* case).

61. On the other hand, and for comparison, the ECtHR found no violation in case *Devinar versus Slovenia*. The case involved an applicant that alleged to have developed a partial disability while working as a cleaning lady. A disability commission issued a report not maintaining the same. The applicant contested the commission's findings and proposed a medical expert to be appointed. The courts refused the applicant's request for the appointment of a medical expert as unnecessary. The decisions of the regular courts were approved by the Constitutional Court. (For the facts of the case, refer to paragraphs 5 to 21 of the *Devinar versus Slovenia* case). In initiating her case before the ECtHR, the applicant maintained that the principle of equality of arms was violated in her case, because she was denied the opportunity to obtain an independent court-appointed expert. She also maintained that the Commission releasing the report was not independent as it was appointed by the opposing party, namely the state. In reviewing the applicant's allegations, the ECtHR initially maintained that it must be considered that the expert opinions provided by the disability commission had a decisive role in the court's assessment of the merits of the case. The ECtHR also recognized that while legitimate doubts could have arisen in the mind of the applicant as to the impartiality of

the medical experts, given that they were appointed and employed by the Institute – her opponent in the proceedings, in the circumstances of the case, these doubts were not objectively justified. As it pertains to the request for an independent expert, namely a new expertise, the ECtHR observed that the applicant had an opportunity to challenge the commission's opinion before the courts; she was made aware of them and did have an opportunity to challenge them in writing, as well as at an oral hearing before the court. The Court also noted that she could have submitted specific objections concerning the findings of the expertise report, but the applicant failed to submit any argument questioning the disability commissions' findings, other than disputing them. The applicant hence failed to substantiate to the minimum necessary degree her request for the appointment of a new expert. (For the reasoning of the case, refer to paragraphs 37 to 59 of the *Devinar versus Slovenia* case).

62. Having said the above, the Court also notes however, that in certain circumstances, the ECtHR has also found violation, when the court rejected the requests for appointment of a new expert, and therefore the ECtHR also maintains that in certain circumstances, the refusal to allow further or an alternative expert examination of experts may be regarded as a breach of paragraph 1 of Article 6 of the ECHR. (See the ECtHR case *Van Kück versus Germany,* Judgment of 12 June 2003*).* Case *Van Kuck versus Germany* is an example in this respect. It involves a claim of transsexual against a health insurance company for reimbursement of medical expenses, including the gender reassignment operation. The respective German court ordered an expert report on the questions of the applicant's transsexuality and the necessity of gender reassignment measures. The expert report was not conclusive on the gender reassignment surgery. The courts, both regional and appeals, therefore rejected the applicant's claims, noting that the operation was not the only possible treatment and that the expertise did not clearly affirm the "*necessity*" of an operation. (For the facts of the case, refer to paragraphs 8 to 38 of the *Van Kuck v. Germany* case). The ECtHR found violation of Article 6 of the ECHR in this particular case, focusing on the need for additional clarifications pertaining to the respective expertise based on which the regular courts made their decisions. The ECtHR concluded that the expertise based on which the courts rejected the applicants claims was not conclusive on the main question of "necessity" of the respective medical treatment, and therefore clarifications must have been requested and/or a new expertise on the specific question must have been ordered. (For the reasoning of the case, refer to paragraphs 38 to 65 of the *Van Kuck v. Germany* case).

63. Having elaborated the main principles developed by the ECtHR case-law pertaining to the expert reports ordered in administrative and judicial proceedings, the Court emphasizes again that the ECtHR, in principle, maintains that the proceedings have to be evaluated in their entirety in order to determine their compatibility with Article 6 of the ECtHR. More specifically pertaining to the expert reports, it in principle maintains that (i) the refusal to order an expert opinion is not, in itself, unfair; (ii) this refusal must be reasoned and reasonable; (iii) if ordered, the litigants must be afforded a possibility to challenge the expert evidence effectively and must in all instances be able to attend the interviews held by him or her or to be shown the documents he or she has taken into account. This is particularly important when the expert report is considered to have a dominant effect for the final decision; and that (iv) the lack of neutrality on the part of an expert, together with his or her position and role in the proceedings, can tip the balance of the proceedings in favor of one party to the detriment of the other, in violation of the equality of arms principle. The Court will in continuation apply these principles, to the circumstances of the present case and the applicant's allegations.

(ii) Application of these principles to the circumstances of the present case

64. The Court recalls that the Applicant essentially alleges that expert S.B. was biased; that his report had a dominant impact on proceedings before the regular courts, and that his request for new expertise should have been approved, on the contrary, according to the Applicant, the principle of equality of arms was violated to its detriment, thus resulting in a violation of paragraph 1 of Article 6 of the ECHR.

65. With regard to the expertise, the Court first recalls that based on Judgment [IC. No. 660/2013] of 31 March 2016 of the Basic Court, it was scheduled for a hearing of 15 July 2015. The relevant judgment reflects that (i) the decision to issue proof of construction expertise was rendered upon the proposal of the litigants; (ii) it has appointed S.B. a judicial expert for this expertise; and that (iii) his report was presented at the hearing and the parties had the opportunity to ask questions and provide additional explanations. According to the case file, it results that the relevant expert was assigned the task of (i) the finding that "*claimant-mounted aluminum profiles have complied with construction standards*"; and (ii) "*of the calculation of the value of the works performed in the collective residential-business facility*".

66. The abovementioned judgment of the Basic Court, in this context, states:

> "*At the hearing on 15.07.2015, the court, upon the proposal of the parties, decided to issue evidence of construction expertise. For construction expertise, the court has appointed the judicial expert Mr. Selman Buqolli. The forensic expert carried out the forensic report and was heard at the hearing where he answered questions put by the parties and provided additional clarification on the issues raised during the trial*".

67. It appears from the case file that the expertise was challenged by the Applicant at the hearing of 3 February 2016 and it was proposed to extract another construction expert. This proposal was rejected by the court through the relevant Decision pursuant to Article 366 of the LCP. The latter specifies two options on the basis of which additional clarification may be required or a new expert is appointed - if in the court's assessment the expert's report is "*deficient or unclear*" or has "*difference of opinions among experts*". In the court's assessment this was not the case in the circumstances of the present case. In this respect, the Basic Court explained:

> "*At the hearing of 03.02.2016, the authorized representative of the counter-claimant proposed to extract another construction expertise, through the group of construction experts, but the court rejected such a proposal. Article 366 of the LCP stipulates that if the expertise report is incomplete or unclear, and the expert fails even after the court's summons to eliminate the shortcomings of the expertise report, the court appoints another expert. So the legal requirement for other expertise is that the finished expertise is incomplete or unclear. In the present case, the court held that the content of the construction expertise report and the expert's explanations made during the hearing, have made clear judicial expertise, without deficiencies and without any flaws that would call into question its accuracy. Therefore, there were no legal requirements and it was unnecessary for the process to assign another expertise*".

68. The Basic Court further clarified that based on Article 356 of the LCP, it is at its discretion, assessing the circumstances of each case, whether there is a need for expertise or even for its repetition, stating that in the circumstances of the present case "*the court has held that the construction expertise employed in this litigation has met the legal criteria to be treated as evidence, whereas as to its content, the court made its free assessment pursuant to Article 8.2 of the LCP. For the aforementioned reasons and circumstances, the court has concluded*

that another construction expertise proposed by the claimant is unnecessary, redundant, and only delays the contested process".

69. The Court of Appeals and the Supreme Court examined the issue of expertise raised before them through the appeal and the request for the protection of legality, and both upheld the position of the Basic Court. The Court of Appeals confirmed the latter's position that the expertise was not "*deficient or unclear*" and that on all contentious issues, the relevant expert provided his explanations beyond his expertise, both at the hearing on 24 December 2015 and in the submission of 28 January 2016, where according to the Court of Appeals "*has sufficiently and convincingly explained its findings, which findings support the evidence contained in the case file*". On the other hand, the Supreme Court has also specifically addressed the Applicant's allegations regarding the Basic Court's refusal to assign new expertise. It, through the Judgment [IC. No. 660/2013] of 31 March 2016, in this respect, *inter alia*, stated:

> *"The allegations of the revision of substantive procedural violations which, according to the respondent, lie in the fact that the first instance court did not accept the respondent's proposal to extract new evidence by three experts in the relevant field, the court of revision rejected it as ungrounded, because in this legal matter the court of first instance has rightly rejected the proposal to present the expertise of three experts as new evidence, as the construction expertise in the case file was not unclear and incomplete. That the content of the construction expertise report and the expert explanations given at the court hearing made the forensic expertise in the field of construction clear, without deficiencies and without any flaws that would call into question its approval, and consequently, the same court rightly concluded that there were no legal requirements, and that it was unnecessary extract a new expertise for the same issue. For the purposes of Article 319.3 LCP, only the court decides what evidence will be taken in order to establish the decisive facts. In this legal case, the construction expert was summoned to a court hearing in which he provided further explanations for his opinion and findings, which were sufficient to establish and clarify the facts and circumstances for which the trial of the case does not have professional knowledge".*

70. The Court in this context first recalls that, as a general principle, based on the ECtHR case law, refusal to grant a request for an expertise is not necessarily unfair and does not in itself result in a breach of paragraph 1 of Article 6 of the ECHR. However, such a refusal must be

justified and the Court, in the light of the foregoing, considers that this is the case in the circumstances of the present case. Referring to Article 366 of the LCP, the Basic Court, also supported by the Court of Appeals and the Supreme Court, held that in the circumstances of the present case, and taking into account that the challenged expert report is not "*deficient and unclear*", the circumstances for assigning a new expertise are not met.

71. However, and as noted above, based on the ECtHR case law, the bias of the expert concerned and the impossibility of one party to effectively challenge the expert's report may, in certain circumstances, result in a violation of paragraph 1 of Article 6 of the ECHR.

72. In the context of the former, namely the impartiality of the expert, which constitutes one of the main allegations of the Applicant in this case, the Court recalls the ECtHR case law, based on which the lack of expert's neutrality/impartiality, analyzed in the entirety of its role in the process, may favor one party to the detriment of the other. In this context, the ECtHR also states that paragraph 1 of Article 6 of the ECHR does not expressly state that an expert heard by a court, must necessarily meet the criteria of independence and impartiality required for the court itself. However, similar to the case law of the ECtHR regarding the impartiality of a court, even in the context of experts engaged in the court process, the ECtHR assesses whether there are legitimate doubts about the expert's impartiality and whether these doubts are objectively justified.

73. The ECtHR case-law on allegations related to expert impartiality is also reflected in the ECtHR cases cited above, and in particular the case *Letinčić v. Croatia* and *Sara Lind Eggertsdottir v. Iceland.* In the first case, the ECtHR found no violation of paragraph 1 of Article 6 of the ECtHR with regard to the expert's impartiality, emphasizing, *inter alia*, that the mere fact that the expert was employed by a public institution, and that in the circumstances of the case, he was the Applicant's opposing party, does not result in a violation of the ECHR. The ECtHR emphasized that while such a fact may raise legitimate doubts about his impartiality, it is not sufficient to be objectively justified. On the other hand, and in contrast, the ECtHR found violations of the expert's impartiality in the case *Sara Lind Eggertsdottir v. Iceland*, but because, as explained above, the majority of the Board members who had given their opinion/report to the relevant court were part and subordinate of the opposing party to the court process.

74. The Applicant, in the circumstances of the present case, does not raise any concrete argument relating to the alleged bias of the expert concerned. The Applicant does not substantiate his legitimate doubts as to his impartiality and why they may be objectively justified. The Applicant's arguments regarding the expert's bias are in fact related to the content of the expertise report. The latter, based on the case law of the ECtHR, cannot serve to establish that the expert concerned was not impartial in the judicial process. However, they can be used to substantiate that the Applicant was not able to participate effectively in the process of drafting the report nor to effectively challenge its findings.

75. In this context, the Court relates to the second case identified above, namely whether the Applicant had the opportunity to participate and effectively challenge the findings of the contested expert report in accordance with the guarantees embodied in Article 6 of the ECHR.

76. The Court reiterates once more that the Applicant challenges the content of the expertise report and the fact that a new expertise was not approved by the regular courts. Furthermore, the Applicant's substantive allegation relates to the subject matter of the expertise. He alleges that the disputed expertise fails to establish the substantive fact regarding the disputed issue and, namely, whether the aluminum profiles/glass holders are suitable for contracted glass and not their compliance with the construction standards in the Republic of Kosovo.

77. The Court in this regard emphasizes the importance of the parties' participation in the process of assigning, drawing and examining an expert report. This is also guaranteed by the LCP, the ECHR, the ECtHR case law and the Constitution.

78. With regard to the LCP, the Court highlights Articles 357, 361 and 367 thereof. According to them, the parties beyond the possibility of proposing the expertise also have the opportunity to propose the object, volume and person responsible for the expertise. From the case file and the allegations of the Applicant, it does not appear that the Applicant has challenged the subject matter of the expertise. On the contrary, the Judgment of the Basic Court reflects that the parties had agreed in this respect at the hearing on 15 July 2015. Furthermore, it appears from the case file and the expertise report itself that the parties were involved in the process of drafting it. Further, based on Article 367 of the LCP, the court is obliged to send the parties a written finding and opinion at least 8 (eight) days before the main hearing begins. The Applicant does not allege to have had no access to the expertise report or to have not received it in a timely manner.

79. Furthermore, based on the case file, it follows that (i) a review session regarding this report was held on 24 December 2015, in which the expertise report was discussed and the parties were able to ask questions and provide explanations; (ii) an additional submission was submitted by the expert on 28 January 2016; and (iii) on 3 February 2016, another review session was held in which the relevant expert's report was discussed.

80. In this regard, the Court notes that the Applicant had a reasonable and effective opportunity to challenge the findings of the expert report. Such an opportunity relates to the determination of expertise, including its scope, the process of drafting this expertise, and its discussion in the review sessions of the Basic Court. Accordingly, the Court must find that the Applicant had an effective opportunity to participate in the process of drafting it and an effective opportunity to challenge the latter.

81. The Court in support of this finding recalls the ECtHR case law. The latter found a violation of paragraph 1 of Article 6 of the ECHR in the case *Letinčić v. Croatia*, not because the Applicant's arguments were considered in relation to the expert report during the court proceedings, but because the Applicant had no access to the expert report at all. Similarly, in the case *Mantovanelli v. France*, the ECtHR found a violation of Article 6 of the ECHR because the respective Applicants did not have access to the expert report before it was presented to the court. On the contrary, the ECtHR did not find a violation of Article 6 of the ECHR in case *Devinar v. Slovenia*, because in that case the Applicant had access to the relevant report but did not agree with its findings, and requested the appointment of a new expert, a request which was rejected. In this case, the ECtHR emphasized that the Applicant was able to challenge the findings of the expert report before the court, in writing and orally at the court hearing. The ECtHR stated that the latter challenged the expertise report but had not sufficiently substantiated the objection to the existing report and the rationale for appointing a new expert. The Applicant's circumstances coincide with the case *Devinar v. Slovenia* in this respect, and not with those of *Letinčić v. Croatia* and *Mantovanelli v. France* in which the ECtHR found a violation of Article 6 of the ECHR, because the Applicants concerned had no access to the relevant expert reports at all and therefore, they were unable to challenge the findings of the expert reports effectively.

82. The Court also emphasizes that, based on the case law of the ECtHR, the non-approval of the request for a new expertise may result in a

violation of paragraph 1 of Article 6 of the ECHR. Beyond cases of lack of decision on judicial reasoning, an example of such a circumstance is the case explained above, *Van Kück v. Germany*. The Court notes, however, that in this case, the expertise had failed to provide a definitive answer to one of the issues involved in its object, namely "*the need for a gender reassignment surgery*", the issue that was crucial in the rejection of the Applicant's claim for compensation.

83. The Court notes that this case differs from the circumstances of the present case. This is because despite the Applicant's allegations that the essence of the dispute in its case is whether the aluminum profiles/glass holders were suitable for contracted glasses, and not if the same were consistent with "*standards applicable in the Republic of Kosovo*" and "*generally in line with modern construction standards*", based on the case file it turns out that the latter are exactly the task assigned to the relevant expert, a task which, based on the case file, was not contested at the hearing on the determination of the subject matter of expertise and the expert concerned at the Basic Court. More specifically, and as noted above, the case file shows that the expert was assigned two tasks: (i) "*ascertain whether the claimant's mounted aluminum profiles have complied with construction standards*", and "*calculation of the value of the works performed in the collective residential-business premise where the investor was N.T. "CEIKU ROLLERS" (the Respondent – Counterclaimant), whereas the Executor - Contractor was the Claimant-Counter-respondent (N.P. "VAll AL-PVC")*". Consequently, the disputing of the expertise's report relates to the subject matter of the expertise, and which the Applicant, based on the above provisions of the LCP, was able to challenge at the stage of its determination by the court.

84. In addition, case *Dombo Beheer B.V v. the Netherland*, cited above, and to which the Applicant refers in support of his arguments, is not applicable to the circumstances of the present case. Case *Dombo Beheer B.V v. the Netherland*, is a case in which the ECtHR found a violation of Article 6 of the ECHR on the basis of the principle of equality of arms, but not on matters related to expertise, but because only the key witness of only one party was heard before the court, placing the other party at a distinctive disadvantage. (See the reasoning of the relevant case in paragraphs 30 to 35 of the case *Dombo Beheer B.V v. the Netherland* in relation to its facts in paragraphs 7 to 22).

85. Therefore, and finally, the Court finds that in the context of (i) the impartiality of the expert, the Applicant does not substantiate the

legitimate doubts about the expert's impartiality, although they may be objectively justified in the circumstances of the present case, moreover, based on the case law of the ECtHR, it cannot be concluded that the expert concerned was not netural or impartial; (ii) the procedure followed for the drafting of the expert report, the Applicant had the effective opportunity to participate and contest the findings; and (iii) in determining the new expertise, the Applicant has not sufficiently substantiated the deficiencies and uncertainties of the contested report during the review sessions and has not sufficiently substantiated his request to determine a new expertise.

I. As to allegations related to the examination of evidence and the lack of a reasoned judicial decision

86. The Court will further examine the Applicant's allegations related to (i) the violation of his right to be heard; and (ii) the lack of a reasoned court decision.

(i) As to allegations of a violation of the right to be heard

87. The Applicant alleges, in essence, that his right to be heard has been violated as a result of the courts' failure to examine the evidence presented by it during the proceedings. In this context, the Applicant emphasizes the obligation of the courts to properly assess the submissions, arguments and evidence submitted by the parties. As explained above, it alleges that the Court of Appeals and the Supreme Court failed to consider the evidence submitted by the Applicant in support of the deficiencies and uncertainties of the contested report of expertise made in the Basic Court, and consequently their request for a new expertise. The Applicant specifically refers to the statement of the general representative of "*Alumil*" and of the opinion of expert I.M. submitted to the Court of Appeals and private expertise submitted to the Supreme Court.

88. In this respect, the Court notes first of all that the ECtHR case law emphasizes that the ECHR does not lay down rules on evidence as such and that the admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts. Nevertheless, the case law of ECtHR also determines that the Court's task under the ECHR is to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken. The purpose of the ECHR, according to the ECtHR, is to guarantee not rights that are "*theoretical or illusory*" but rights that are "*practical and effective"* and that this right can only be seen to be effective if the observations are actually "*heard*", that is duly

considered by the trial court. It must therefore establish whether the evidence was presented in such a way as to guarantee a fair trial. The ECtHR also emphasizes that it is duty of the national courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties. (For more pertaining to the administration of evidence, see the ECtHR Guide on Article 6 of ECHR, Right to a fair trial (civil limb) of 31 December 2018; IV. Procedural requirements; 6. Administration of evidence).

89. The Court notes that the duty of the regular courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties was also emphasized, among others, on two cases of the ECtHR, *Kraska versus Switzerland* and *Perez versus France*, respectively, judgments these that have also been referred to by the Applicant. The Court notes however, that while these two cases, establish the basic principles pertaining to the administration of evidence and the duty of the regular courts to properly examine this evidence, the ECtHR did not find a violation in any of these two cases.

90. More specifically, the ECtHR case *Perez versus France*, involves an applicant who alleges to have been assaulted by her two children as a consequence of a non-payment of maintenance to which she was entitled because of her ill-health. In the first instance proceedings, the investigating judge determined that there was insufficient evidence pertaining to her allegations and determined that it was not practical to interview her son, including but not limited to the fact that he lived abroad. The applicant appealed. The Court of Appeals ruled that her appeal was inadmissible on the grounds that she had missed the legal deadline for an appeal and had failed to sign the notice of appeal. Her further appeal was also dismissed from the Court of Cassation. (For the facts of the case see paragraphs 8 – 17 of the ECtHR case *Perez versus France*).

91. In reviewing the case, the ECtHR noted that the right to a fair trial as guaranteed by paragraph 1 of Article 6 of the ECHR includes the right of the parties to the trial to submit any evidence/observations that they consider relevant to their case. The purpose of the ECHR, according to the reasoning of this case, is to guarantee not rights that are "*theoretical or illusory"* but rights that are "*practical and effective"* emphasizing that the effect of Article 6 of the ECHR is, among others, to place the "*tribunal*" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (See paragraph 80 and the references therein in case *Perez versus France*). Nevertheless, the ECtHR found no violation in this particular case. It

emphasized that in the circumstance of the case, it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the ECHR and found that the Court of Cassation took due account of and effectively addressed all of the applicant's grounds of appeal. (For the reasoning of the case see paragraphs 76 to 84 of the case *Perez v. France*).

92. Similarly, in case *Kraska versus Switzerland*, involves an applicant, whose authorization to practice his medical profession was withdrawn because he no longer lived in the respective canton. He had treated a patient in the meantime and a prosecution was subsequently brought against him for, among others, fraud, charges which were subsequently dropped. However, his next application for an authorization was rejected, because he was not considered "*trustworthy*" within the meaning of the applicable law. In the proceedings before the Court, his claims were dismissed. However, during the deliberations in the court hearing, one of the judges stated among others, that he was not able to read and analyze the entire file. Nevertheless, the judgments was delivered. The applicant subsequently requested four times the reopening of proceedings, complaining that the judgment against him was delivered without the judges' sufficient knowledge of the file. (For the facts of the case see paragraphs 6 to 17 of *Kraska versus Switzerland*). In reviewing the case, the ECtHR emphasized that the effect of paragraph 1 of Article 6 entails the intention to place the "*tribunal*" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision. Nevertheless, it also held that in the circumstance of the particular case there was no evidence to suggest that the members of the Court failed to examine the appeal with due care before taking their decision and, therefore, dismissed the applicants complaint for not having proven to be well-founded, finding no violation of paragraph 1 of Article 6 of the ECHR. (For the reasoning of the case see paragraphs 28 to 34 of *Kraska versus Switzerland*).

93. In the context of the Applicant's allegations, the Court first notes that it does not appear from the case file that, despite challenging the report, it had presented evidence before the Basic Court, to counter argue the expertise report. The Court notes that from the hearing of 15 July 2015, the hearing of 16 October 2015, that of 24 December 2015, pending the issuance of the Basic Court's decision of 31 March 2016 from the case file and based on the Applicant's allegations, it does not appear that the Applicant has provided concrete evidence of disputing

the expert report. In the appeal submitted to the Court of Appeals, the Applicant included two evidence in contradiction to the expertise's report, the opinion of expert I.M. of 27 April 2016 and the letter of the general representative of "*Alumil*" of Greece in Albania of 26 June 2016and through revision submitted to the Supreme Court submitted the private expertise on 2 June 2017.

94. The Court of Appeals by Judgment [Ae. No. 133/2016] of 14 April 2017, held that the Basic Court acted correctly when it based its decision on the expert report, the explanations given at the hearing on 24 December 2015 and the submission of 28 January 2016. In this context, the Court of Appeals, among other things, emphasized:

> "*This court assesses that the first instance court correctly applied the substantive law because, from the evidence in the case file, it is not disputed that the claimant has performed the contracted works for which the amount of the debt was approved by the first instance court. This amount is also confirmed by the opinion and findings of the construction expert Mr. Selman Boqolli, given in his expertise of 27.09.2015, and the explanations of the latter in the session of 24.12.2015 and the submission of 28.01.2016, where he has sufficiently and convincingly explained his findings, which conclusions are based on the evidence contained in the case file*".

95. On the other hand, the Supreme Court, by its Judgment, [E. Rev. No 14/2017] of 14 September 2017, clarified three issues: (i) upheld the lower court decisions that the expertise report was not "*incomplete nor unclear*" and that the same, including the explanations given in the review sessions was sufficient to establish the factual situation; and (ii) other evidence as to the accuracy and conclusions of the expert report not obtained at the hearing of the case could not be considered under Articles 324 and 214 of the LCP because, the revision cannot be filed due to an incorrect or incomplete determination of the factual situation.

96. More precisely, with regard to the first case, the Supreme Court stated:

> *"The allegations in the revision of substantive procedural violations which, according to the respondent, lie in the fact that the first instance court did not accept the respondent's proposal to extract new evidence by three experts in the relevant field, the court of revision rejected it as unfounded, because in this legal case the court of first instance has rightly rejected the proposal to present the expertise of three experts as new evidence, as the construction expertise in the case file was not unclear and*

incomplete. That the content of the construction expertise report and expert explanations given at the court hearing, have made the judicial expertise in the field of construction clear, without deficiencies and without any flaws that would call into question its approval, and consequently, the same court has rightly concluded that there were no legal requirements, and that it was unnecessary to extract new expertise in the same matter. For the purposes of Article 319.3 of the LCP, only the court decides what evidence will be taken with a view to establishing the decisive facts. In this legal matter, the construction expert was summoned to a court hearing in which he provided further explanations for his opinion and finding, which were sufficient to establish and clarify the facts and circumstances of which the trial judge has no professional knowledge".

97. As to the second issue, it emphasized:

"In this regard, always regarding this expertise, the Supreme Court also rejected other claims of the revision concerning the accuracy of the findings of that expertise and its approval, the accuracy of which the respondent attempts to call into question with other expertise performed on a private basis and out of court session , as the court upholds its decision only on the basis of the evidence administered at the hearing, in accordance with Article 324.1 of the LCP".

"Other claims about this expertise pertain to the factual situation, so as such these claims of the revision were not assessed at all, as, within the meaning of Article 214.2 of the LCP, the revision may not be filed on the grounds of an erroneous or incomplete determination of the factual situation".

98. In this respect, and having regard to the explanations given above, the Court cannot find that the Applicant's submissions, arguments and evidence were not properly examined by the regular courts. The court has already held that (i) the rejection of the Applicant's request in the Basic Court was reasoned; (ii) it cannot be held, based on the ECtHR case law, that there were legitimate doubts as to the impartiality of the expert concerned; and (iii) the Applicant was not prevented from effectively participating and contesting the expertise's report during the court proceedings. The Court further notes that the circumstances of the present case do not support a finding of a violation of the Applicant's right to be heard because his submissions and evidence were not examined by the court. Such a finding is not supported by the applicable law nor by the case law of the ECtHR. As noted above, the

relevant ECtHR cases referred to in the Referral in support of its arguments do not support such a finding. Both have found no violation of Article 6 of the ECHR with regard to the proper assessment of the respective Applicants' submissions, including the case *Kraska v. Switzerland*, where one judge had expressly stated that he had not assessed the case file in its entirety. The ECtHR, within the meaning of paragraph 1 of Article 6 of the ECHR, assesses the proceedings in their entirety, and in the circumstances of the case, in the context of the examination of evidence, the court proceedings in the Applicant's case, in their entirety, in the Court's assessment, do not appear to be contrary to paragraph 1 of Article 6 of the ECHR.

(i) As to the allegations of lack of a reasoned court decision

99. In this respect, the Court initially reiterates that it has already established a consolidated case law with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This practice was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. In addition, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant "*IKK Classic*", Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; and KI124/17, Applicant *Bedri Salihu,* Judgment of 27 May 2019.

100. In principle, the case law of the ECtHR and that of the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*indicate with sufficient clarity the reasons on which they base their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to each argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments

of the Applicants are to be addressed and the reasons given must be based on the applicable law.

101. In addition, the ECtHR uses also the concept of "*sufficiency of reasoning*" even where desirable could be a wider and more detailed reasoning is a concept developed and also used by the ECtHR itself. (See case *Merabishvili v. Georgia*, No. 72508/13, Judgment of the Grand Chamber of 28 November 2017, paragraph 227). Although the circumstances of the present case are not the same as those of the ECtHR case, the concept of "*sufficiency of reasoning*" through this case of the Grand Chamber of the ECtHR implies that the reasoning of the relevant decisions of the regular courts, in certain circumstances, though not desirable, may be sufficient. In this respect, in the abovementioned Judgment of the ECtHR, the latter stated the following: "*Whilst more detailed reasoning would have been desirable, the Court* [the ECtHR] *is satisfied that this* [reasoning] *was enough in these circumstances*". (See, also case No. KI48/18, Applicant, *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 4 February 2019, paragraph 186).

102. The Court recalls the Applicant's specific allegations concerning the lack of a reasoned court decision as reflected in paragraph 35 of this Judgment. The Court notes that the allegations relating to the expert report, namely the amount of the obligation set out in this report; finding that the compensation by apartment for half of the value of the contracted works has been converted into cash compensation; and the opinion of '*Alumil*" and that of expert I.M. submitted to the Court of Appeals and the private expertise submitted to the Supreme Court, relate to the contents and procedure of extracting the expertise report. The Court has already dealt with all the Applicant's allegations related to the disputed expertise, however, further, it will also address the Applicant's remaining allegations concerning the alleged lack of a reasoned court decision.

103. In this context, and with regard to the extent of the obligation, based on the expert's report, the Basic Court found and reasoned, *inter alia*, as follows:

> "*From the data cited in this judgment, it was found that the claimant in the capacity of a contractor has completed all construction works obtained by the date agreement of 10.06.2013, dealing with the placement of plastic windows in the counter-claimant's business premises. The claimant also carried out work on the installation of aluminum facade and profiles, on the ground floor and the first floor, as well as on the demolition*

and reassembly of aluminum profiles. The total value of the works performed by the claimant is in the amount of 120,975.00 €. The counter-claimant paid the claimant the amount of € 38,000.00. Also on behalf of unrepaired remarks, this amount is deducted by 2%, amounting to 1,659.50 €. Therefore, the court has concluded that the counter-claimant owes the claimant a total amount of € 81,279.50, which amount was obliged to pay to the claimant in this judgment".

"*The counter-claimant's allegations filed by the counter-claim that the counter-claimant paid the claimant the amount of 133,000.00 €, are not proven by material evidence, since the evidence examined during the course of the main trial found that the counter-claimant paid the claimant the amount of 38,000.00 €. While the value of the works performed by the claimant is in the amount of 120,875.00 €. The Court also finds that the allegations in the counter-claim that the material used were of poor quality, and not in accordance with the dimensions used of the aluminum profiles, have not been tested by any test. The expertise report showed that the material used complies with professional standards in the field of construction".*

104. Such a position of the Basic Court was also confirmed by the Court of Appeals and the Supreme Court. Consequently, the Court emphasizes that the allegations concerning the amount of compensation, namely the Applicant's obligation, were sufficiently reasoned by the regular courts.

105. As to the Applicant's allegations that the regular courts had not established that the compensation by apartment for half of the value of the contracted works was converted into cash compensation, The Court recalls the reasoning of the Basic Court in this regard, which states:

"*On 10.06.2013, the counter-claimant, has provided written agreement to the claimant whereby:*

- *The counter-claimant is free to sell the apartment (thus canceling the flat compensation as per contract);*
- *It is found that the works performed by the claimant amount to 79,247.00 €;*
- *It is found that the counter-claimant paid the claimant the amount of 38,000.00, so there is debt in the amount of 41,247.00 €.*

The agreement was not signed by the parties to the proceedings but was conclusively accepted by the parties and its facts were not contested by either party. The claimant has, among other things, renounced the apartment, exactly as provided by this document".

106. The Court also notes in this respect that this case was not specifically raised by the Applicant either through the appeal before the Court of Appeals or through the revision before the Supreme Court. Whereas issues related to the opinion of '*Alumil*", that of the expert I.M. and private expertise, The Court has already dealt with them in the preliminary parts of this Judgment. Consequently, the Court notes that the allegations concerning the compensation in cash in relation to the compensation by the apartment, they were sufficiently reasoned by the regular courts in relation to the Applicant's allegations submitted through the appeal and the relevant revision.

107. The Court also recalls that the Applicant alleges that there was no reasoning in the regular courts' decisions with regard to the allegations raised in the counterclaim, with respect to the claimant's delay, regarding the lack of profit, and the request to appoint an economic expert to calculate the damage in question.

108. In this respect, the Court notes that the aforementioned issues were raised by the Applicant only through a counterclaim in the Basic Court and which the latter rejected. The latter were not filed either before the Court of Appeals through an appeal or before the Supreme Court by a request for revision.

109. The Court notes in this context that the courts are required to reason the Applicants' substantive allegations, but this obligation does not imply that the courts must respond to each argument put forward by the respective Applicants. This obligation furthermore does not apply to the allegations which have not been brought before the regular courts by appropriate legal remedies. In the circumstances of the present case, the Court considers that the Applicant's substantive allegations throughout the regular courts' decisions, in their entirety, were sufficiently reasoned.

Conclusions

110. In the circumstances of the present case, the Court found that Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court is in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR and more specifically in

compliance with (i) principle of equality of arms; (ii) the right of the Applicant to be heard; and (iii) general principles regarding the right to a reasoned court decision.

111. The Court, when assessing the Applicant's allegations, based on the case law of the ECtHR, found that (i) the contested expertise report was not extracted by a biased expert, because with regard to his bias neither legitimate doubts were substantiated nor why the latter may be objectively justified; (ii) the Applicant had an effective opportunity to participate in the process of drafting an expertise report and an effective opportunity to contest it; (iii) the rejection of the request for assigning new expertise is sufficiently reasoned and reasonable; (iv) the regular courts have examined the Applicant's evidence; (v) the decisions of the regular courts are sufficiently reasoned; and (vi) based on the case law of the ECtHR, the proceedings in their entirety were fair.

112. Therefore, the Court finds that the Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court in conjunction with the Judgment [Ae. No. 133/2016] of 14 April 2017 of the Court of Appeals and the Judgment [IC. No. 660/2013] of 31 March 2016 of the Basic Court are in compliance with the Constitution and remain in force.

Request for interim measure

113. The Court recalls that the Applicant requests the imposition of interim measure by the Court, stating that the imposition of the interim measure is "*in the public interest*" and arguing among other things that, the legal effects of the Judgments, allegedly contrary to the Constitution, and their consequences for the party to the proceedings, should be prevented.

114. The Court notes in the first place that based on the Law, the Rules of Procedure, and the consolidated case law of the Court, the requests for interim measures shall be rejected in cases the referrals are declared inadmissible or even when cases are decided on merits by the Court, finding no violation of the constitutional provisions, as is the case in the circumstances of the present case.

115. Therefore, in accordance with paragraph 1 of Article 27 of the Law and Rule 57 of the Rules of Procedure, the Applicant's request for interim measure is to be rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113. 1 and 7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 39, 57 and 59 of the Rules of Procedure, in the session held on 18 December 2019, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that Judgment [E. Rev. No. 14/2017] of 14 September 2017 of the Supreme Court is in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR;

III. TO NOTIFY this Judgment to the parties;

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

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI14/18, Applicant, Hysen Kamberi, Constitutional Review of the Judgment of the Supreme Court of Kosovo, PML.No.241/2017, of 5 December 2017

KI14/18, Judgment of 15 January 2020, published on 3 February 2020

Keywords: *individual request, right to a fair and impartial trial, examination of witnesses, admissible request, violation of constitutional rights*

The essence of the present case relates to the inability of the accused, namely the Applicant and/or his defense, to question the witnesses against him, at any stage of the criminal proceedings, despite the guarantee of such a right established by paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the European Convention on Human Rights. The circumstances of the present case involve a criminal process against the Applicant regarding the criminal offense of trafficking in human beings, for which the Applicant was initially found guilty by a decision of the District Court, sentenced to 3 (three)) years of imprisonment, a decision which, through the Supreme Court, was returned for retrial. In the new trial, the Applicant was again found guilty of the same criminal offense, being sentenced to 2 (two) years of imprisonment, by a Judgment of the Basic Court of 2016, and which was subsequently upheld by the Court of Appeals and the Supreme Court in 2017.

The guilt of the accused was established through the statements read by 4 (four) injured/witnesses and another witness, witnesses who, the accused and/or his defense were not able to examine at any stage of the proceedings. The regular courts also referred to the testimony of another accused, namely the accused S.R given at the court hearing, noting that their decisions were "*partially*" based on the testimony of the latter as well.

In order to assess whether a trial which was conducted without the presence of witnesses at the court hearing but was based solely on the reading of the statements of the latter, in its entirety, was fair, the Court elaborated the general principles of the case law of the European Court of Human Rights regarding the absence of witnesses in the court hearing. In this respect, the Court also elaborated on the general principles of the European Court of Human Rights recognized through the *Al-Khawaja and Tahery* test, under which, in such circumstances, the following three issues must be addressed: (i) whether there were reasonable grounds for the non-attendance of the witness at the court hearing and, consequently, the admission of extrajudicial testimonies of the witnesses in absentia as evidence in the court; (ii) whether the testimony of the absent witness is the "*sole*" or "*decisive*" basis for the

conviction of the accused; and (iii) whether there is "*sufficient counterbalancing factor*", including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of extrajudicial evidence. The Court also elaborated and clarified the report and the order of examination of the above three issues based on the relevant case law of the European Court of Human Rights, and then applied these principles, supported also by the relevant case law, in the circumstances of the present case.

Regarding the first criterion of the test, the Court, based on the case law of the European Court of Human Rights, stated that the reasons which resulted in the non-attendance of a witness at the court hearing must be consistent and that the assessment of this consistency is preliminary question, and consequently is the first issue to be considered by a court. In this regard, in the circumstances of the present case, the Court held that there is no consistent reason for the non-attendance of the witnesses at the court hearing, and that therefore, only the reading of the statements given previously, based on the reasoning that the witnesses "*are not found in Kosovo*" and "*their location is not known"*, based on the case law of the European Court of Human Rights, and as elaborated in detail in this Judgment, does not meet the criteria established through the case law of the European Court of Human Rights, and consequently, the first criterion of the *Al-Khawaja and Tahery* test was not fulfilled in the circumstances of the case.

Regarding the second criterion of the aforementioned test, namely whether the testimony of the absent witness is "*sole*" or "*decisive*" basis for the conviction of the accused, the Court held that the evidence of the witnesses who did not attend the court hearing, is the "*sole*", "*decisive*" evidence and "*carry significant weight*" in the conviction of the accused, namely the Applicant, especially given the fact that other evidence at a court trial, in particular that of accused S.R., and which, based on the courts' decisions only "*partially*" influenced their decisions, not carrying "*incriminating*" weight. The Court also clarified that, in addition to the case law of the European Court of Human Rights, even the procedural codes of the Republic of Kosovo, and applied in the circumstances of the present case, do not enable the conviction of an accused based on decisive evidence and which cannot be challenged by the defendant or his defense counsel at any stage of the criminal proceedings. Moreover, the regular courts had never addressed or reasoned this issue in their decisions. Therefore, even the second criterion of the *Al-Khawaja and Tahery* test has not been met in the circumstances of the case.

Finally, and regarding the third criterion of the test, namely the existence of "*sufficient counterbalancing factors*", the Court clarified that the regular

courts had neither taken nor applied any alternative measures to ensure the additional credibility of the evidence/statements read by the injured/witnesses in their absence at the court hearing, and that they also did not in any way clarify the relationship between the testimonies of the absent witnesses and other incriminating evidence, and furthermore did not take any procedural measures, including additional reasoning, which could have compensate the disadvantage created for the accused, namely the Applicant, being unable to directly examine the witnesses against him. Accordingly, even the third criterion of the *Al-Khawaja and Tahery* test has not been met in the circumstances of the case.

In this respect, the Court clarified that in the circumstances of the present case, the Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court, were rendered contrary to the procedural safeguards guaranteed by paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights, because despite these guarantees, the witnesses against the accused, namely the Applicant, did not attend the court hearing and the Applicant and/or his defense, at no stage of the criminal proceedings, were able to examine the witnesses against him, moreover, the decisions of the regular courts, in the circumstances of the present case, fail to meet all three criteria of the test known as *Al-Khawaja and Tahery*.

JUDGMENT

in

Case No. KI14/18

Applicant

Hysen Kamberi

Constitutional review of
Judgment PML. No. 241/2017 of the Supreme Court of Kosovo
of 5 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral was submitted by Hysen Kamberi, residing in the village Slivova, Municipality of Ferizaj, represented by Selman Bogiqi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Serious Crimes

Department of the Basic Court in Ferizaj (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution); Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 10 (Full equality to a fair and public hearing) of the Universal Declaration of Human Rights (hereinafter: the Universal Declaration).

4. The Applicant also requests the Court that his identity be not disclosed.

Legal basis

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

6. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court will refer to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Court

7. On 31 January 2018, the Applicant submitted the Referral to the Court.

8. On 5 February 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of

Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

9. On 9 February 2018, the Court notified the Applicant about the registration of the Referral and requested him to submit the completed referral form, power of attorney and the acknowledgment of receipt of the Judgment which he challenges. A copy of the Referral was also sent to the Court of Appeals.

10. On 28 February 2018, the Applicant submitted the documents requested by the Court.

11. On 13 April 2018, the Court requested the Applicant to submit to the Court two more decisions of the regular courts, namely Decision [AP. No. 347/2003] of 24 February 2004 of the Supreme Court in conjunction with Judgment [P. No. 424/2002] of 17 January 2003 of the District Court in Prishtina (hereinafter: the District Court).

12. On 27 April 2018, the Applicant submitted to the Court the requested documents and Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court.

13. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

14. On 2 July 2018, the Court requested the Basic Court to submit to the Court the full case file.

15. On 23 July 2018, the Basic Court submitted to the Court the relevant file.

16. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

17. On 14 May 2019, as the mandate of the four abovementioned judges to serve as judges of the Court ended, the President of the Court, based on the Law and the Rules of Procedure, rendered Decision KSH. KI14/18 on the appointment of the new Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Radomir Laban and Remzije Istrefi-Peci.

18. On 11 December 2019, the Judge Rapporteur presented the preliminary report before the Review Panel and it was unanimously decided to request the Applicant's representative to notify the Court of the status of enforcement of Judgment [P.nr. 162/2004 PR1] of 2 December 2016 of the Basic Court. On 13 December 2019, the Court requested from the Applicant's representative the abovementioned information.

19. On 20 December 2019, the Applicant submitted to the Court the requested clarification stating that (i) the Applicant had been in detention on remand from 20 October 2002 until 17 January 2003; while (ii) "*he was not summoned to serve the sentence for the remainder of the judgment of conviction*".

20. On 15 January 2020, the Review Panel reviewed the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

21. On the same date, the Court voted by majority that (i) the Referral is admissible; and that (ii) Judgment [PML.nr.241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR.nr.55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P.nr.162/2004 PR1] of 2 December 2016 of the Basic Court, are incompatible with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a Fair Trial) of the ECHR. Judge Selvete Gërxhaliu- Krasniqi voted against the admissibility of the Referral and the findings of the abovementioned constitutional violations. The judgment will be supplemented by her dissenting opinion.

Summary of facts

22. On 18 November 2002, the District Public Prosecutor's Office in Prishtina filed an Indictment [PP. No. 774/2002] against the Applicant and others, based on the grounded suspicion that they had committed the criminal offense of trafficking in persons as set forth in paragraph 1 of Article 2 (Trafficking in Persons) in conjunction with paragraph 1 of Article 1 (Definitions) of UNMIK Regulation No. 2001/4, On the Prohibition of Trafficking in Persons in Kosovo (hereinafter: UNMIK Regulation).

23. On 17 January 2003, the District Court by Judgment [P. No. 424/2002] found the Applicant guilty of committing the criminal

offense which he was charged with, and sentenced him to imprisonment of 3 (three) years. According to the case file, it follows that the statements of the injured/witnesses V.K; V.S; N.M; L.B; B.V; T.K., citizens of Moldavia and Ukraine and A.M. were taken during the investigation stage, and that the factual situation was determined based on the statements of the abovementioned witnesses who were not present at the court hearing.

24. On an unspecified date, the Applicant filed an appeal with the Supreme Court against the aforementioned Judgment, alleging essential violations of the provisions of criminal procedure, erroneous determination of factual situation, violation of criminal law and the decision on punishment. The Public Prosecutor, on the other hand, by the letter [PPA. No. 347/2003] of 8 October 2003, proposed that the defense counsel's appeals be rejected as ungrounded, thereby upholding the aforementioned Judgment of the District Court.

25. On 24 February 2004, the Supreme Court, by Decision [AP. No. 347/2003] quashed the Judgment of the District Court and remanded the case for retrial, considering that it contains substantial violations of the provisions of the criminal procedure. The Supreme Court in its reasoning, *inter alia*, stated that, "a common factual description of all the accused, given that they are not co-executors", results in a vague enacting clause of the respective Judgment.

26. On 2 December 2016, the Basic Court, by Judgment [P. No. 162/2004 PR1] found the Applicant guilty of committing the criminal offense of Trafficking in Persons, sentencing him to imprisonment of two (2) years. According to the case file, the Basic Court based the abovementioned Judgment on (i) the testimonies of witnesses V.K; V.S; N.M; and A.V, given to the investigating judge on 7 November 2002 and the statement of witness A.M given to the investigating judge on 17 October 2002; and (ii) "*in part on the defense of accused S.R given in the court hearing*". The witnesses were not present during the court hearing. According to the Judgment of the Basic Court, the testimonies of the aforementioned witnesses, given in the investigative procedure before the investigating judge, was admitted as evidence at the main trial based on item 1 of paragraph 1 of Article 368 of the Provisional Criminal Procedure Code (hereinafter: hereinafter: PCPC), according to which the minutes on the statements of witnesses according to the decision of the trial panel may be read, *inter alia*, when the interrogated persons cannot be found or their access to court is impossible. During the court hearing the Applicant stated that (i) the reading of the statements of the witnesses in the

court hearing is contrary to Article 368 of the PCPC; and (ii) the testimonies of the injured/witnesses could not be challenged by him either during the investigation procedure or at the court hearing. Finally, based on the case file, it follows that the State Prosecutor in the Serious Crimes Department of the Basic Prosecution in Ferizaj, following the completion of the court review modified the Indictment [PP. No. 774/2002] of 18 November 2002, accusing the Applicant and others of the criminal offense of Trafficking in Persons in co-perpetration.

27. On an unspecified date, the Applicant filed an appeal with the Court of Appeals against the aforementioned Judgment of the Basic Court, alleging essential violations of the provisions of criminal procedure, erroneous determination of factual situation, violation of the criminal law and the decision on punishment, on proposal to annul the challenged Judgment and remand the case for retrial. The Applicant specifically alleged that the challenged Judgment was rendered in violation of Article 262 (Evidence as a Basis of Guilt) of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK) because he was found guilty on the basis of evidence which he was not able to challenge at any stage of the criminal proceedings through the examination of relevant witnesses. On the other hand, the Appellate Prosecutor, through the submission [PPA/I. No. 67/2017], proposed that the Applicant's appeal be rejected as ungrounded.

28. On 13 July 2017, the Court of Appeals by Judgment [PAKR. No. 55/2017] rejected as ungrounded the Applicant's appeal and upheld the Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court. In relation to the Applicant's allegation regarding the impossibility of challenging the evidence, the Court of Appeals held that based on Article 368 of the CPCK, the minutes on witness statements can be read when the interrogated persons cannot be found or their access to court is impossible.

29. On an unspecified date, the Applicant filed a request for protection of legality with the Supreme Court against Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals, alleging essential violation of the criminal procedure provisions and violation of the criminal law. The Applicant reiterated the same allegations he filed in his appeal with the Court of Appeals. On the other hand, the State Prosecutor, through submission [KMLP. II. 166/2017] proposed that the appeal of the accused, namely the Applicant, be rejected as ungrounded.

30. On 5 December 2017, the Supreme Court by Judgment [PML. No. 241/2017] rejected the request for protection of legality as ungrounded. The Supreme Court in its Judgment, *inter alia*, stated that there were no obstacles to the reading of evidence because the proceedings against the Applicant were conducted under the Law on Criminal Procedure of the Former Yugoslavia (No. 26/86) and in accordance with Article 333 thereof, the witness testimonies can be read if witnesses are unable to appear before the court.

Applicant's allegations

31. The Court recalls that the Applicant alleges that the challenged Judgment of the Supreme Court is rendered in breach of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 54 [Judicial Protection of Rights] of the Constitution; Article 6 (Right to a fair trial) of the ECHR; and Article 10 (Full equality to a fair and public hearing) of the Universal Declaration.

32. The Applicant alleges in substance that he was convicted on the basis of evidence which he was not able to challenge at any stage of the criminal proceedings, contrary to his fundamental rights and freedoms guaranteed by paragraphs 1 and 4 of Article 31 of the Constitution in conjunction with paragraphs 1 and point d of paragraph 3 of Article 6 of the ECHR.

33. Specifically, the Applicant alleges that the challenged Judgments were rendered in violation of (i) paragraph 1.8 of Article 384 (Substantial Violation of the Provisions of Criminal Procedure) of the CPCRK, because they are based on inadmissible evidence; (ii) paragraph 1.3 of Article 338 (Reading of other previously entered statements) of the CPCRK, because instead of directly interrogating the witness, the record on his previous testimony can only be read when the parties agree ; and (iii) paragraph 1 of Article 262 of the CPCRK, according to which the court does not find the accused guilty by relying on evidence which cannot be challenged by the defendant or the defense counsel at any stage of the criminal proceedings.

34. Finally, the Applicant requests the Court to declare the Referral admissible; to declare invalid the challenged Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court, remanding the case for retrial.

Assessment of admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

37. The Court further examines whether the Applicant has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

> Article 47 of Law
> [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 […]".

38. As regards the fulfillment of these criteria, the Court finds that the Applicant filed the Referral in the capacity of the authorized party, challenging an act of a public authority, namely the Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court, after exhausting all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms, which he claims to have been violated in accordance with Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements established in paragraph 3 of Rule 39 of the Rules of Procedure.

40. Furthermore and at the end, the Court considers that the Referral cannot be considered as manifestly ill-founded as provided for by paragraph (2) of Rule 39 of the Rules of Procedure and therefore, it is to be declared admissible. (See, in this context, the case of the ECtHR, *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144).

Relevant legal provisions

The 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.
(…)

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.
(...)

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

Criminal Procedure Code No. 04/L-123 of the Republic of Kosovo of 2012

Article 260
Consideration of Admissible Evidence at Main Trial

1. Once the single trial judge or presiding trial judge excludes evidence in accordance with Article 249 of the present Code, that evidence may only be considered by the court upon retrial if the decision by the single trial judge or presiding trial judge to exclude is reversed on appeal.

2. Evidence may be considered by the single trial judge or the trial panel during the main trial if it is not excluded under Article 249 or is not inadmissible under Article 259 of the present Code..

3. The single judge, presiding judge or a member of the trial panel, shall assess the credibility, relevance and probative value of evidence that is admitted under paragraph 2 of the present Article.

Article 262
Evidence as a Basis of Guilt

1. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

2. The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the state prosecutor.

3. The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.

4. The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness.

Article 338
Reading of other previously entered statements

1. *Except in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnesses may be read according to a decision of the trial panel only in the following cases:*

1.1. if the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
1.2. if the witnesses or expert witnesses refuse to testify at the main trial without lawful reasons; or
1.3. if the parties agree that the direct examination of a witness or expert witness who has failed to appear, irrespective of

whether he or she has been summoned or not, be replaced by reading the records of his or her previous examination.

2. Records of previous examinations of persons exempt from the duty to testify may not be read if such persons were not summoned to the main trial or if they exercised their right not to testify at the main trial. If such persons exercised their right not to testify at the main trial after they had already been examined or if they did not come to court when summoned, the record of their prior examination shall be inadmissible evidence.

3. The reasons for the reading of the record shall be indicated in the record of the main trial and during the reading it shall be announced whether or not the witness or expert witness took the oath.

Article 384
Substantial Violation of the Provisions of Criminal Procedure

1. There is a substantial violation of the provisions of criminal procedure if:

(...)
1.8 the judgment was based on inadmissible evidence;
(...)

2. Substantial violation of provisions of criminal procedure shall be considered if during the course of criminal proceedings, including pretrial proceedings, the court, the state prosecutor or the police:
2.1. omitted to apply a provision of the present Code or applied it incorrectly; or
2.2. violated the rights of the defense; and this influenced or might have influenced the rendering of a lawful and fair judgment.

Provisional Criminal Procedure Code of Kosovo of 2003
Article 157

(1) The court shall not find the accused guilty based solely, or to a decisive extent, on testimony or other evidence which could not be challenged by the defendant or defence counsel through questioning during some stage of the criminal proceedings.

(2) The court shall not find the accused guilty based solely, or to a decisive extent, upon statements given by the defendant to the police or the public prosecutor (Article 156 paragraph 1 of the present Code).
(3) The court shall not find the accused guilty based solely, or to a decisive extent, on testimony given by a single witness whose identity is anonymous to the defence counsel and the accused.
(4) The court shall not find any person guilty based solely on the evidence of testimony given by the cooperative witness. (Articles 298 through 303 of the present Code).

Article 368

(1) Except in cases provided for in the present Code, records containing the testimony of witnesses, the co-accused or participants who have already been convicted of the criminal offence as well as records and other documents regarding the findings and opinions of expert witnesses may be read according to a decision of the trial panel only in the following cases:

1) If the persons who have been examined have died, become afflicted with mental disorder or disability or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
2) If the witnesses or expert witnesses refuse to testify at the main trial without lawful reasons; or
3) If the parties agree that the direct examination of a witness or expert witness who has failed to appear, irrespective of whether he or she has been summoned or not, be replaced by reading the records of his or her previous examination.

(2) Records of previous examinations of persons exempt from the duty to testify (Article 160 of the present Code) may not be read if such persons were not summoned to the main trial or if they exercised their right not to testify at the main trial. If such persons exercised their right not to testify at the main trial after they had already been examined or if they did not come to court when summoned, the record of their prior examination shall be inadmissible evidence. Article 154 of the present Code shall apply mutatis mutandis.

(3) The reasons for the reading of the record shall be indicated in the record of the main trial and during the reading it shall be

announced whether or not the witness or expert witness took the oath.

Law on Criminal Procedure of Former Yugoslavia (No. 26/86)

Article 333

(1) Except in cases specified in the present Code, records containing the statements of witnesses, the co-defendants or already convicted participants in the criminal offense, as well as records and other documents regarding expert witness findings and opinions may be read pursuant to ruling of the Trial Chamber only in the following cases:

1) if the persons who gave the statements have died, become afflicted with mental illness or cannot be found, or if their appearance before the court is impossible or involves considerable difficulties due to old age, illness or other important reasons;
2) if the witnesses or expert witnesses refuse to testify at the trial without legal cause.

(2) With the consent of the parties, the Panel may decide that the records of the previous testimony of the witness or expert witness or his written findings and opinion be read, although the witness or expert witness is not present, regardless of whether he has been summoned to the trial or not. Exceptionally, after the interrogation of the parties, the Panel may decide that even without the consent of the parties, the records of testimony of the witness or expert witness given at the previous trial before the same Chair of the Panel be read, although the term referred to in Article 305, Paragraph 3 has expired, or that the written findings and opinion of the specialised institution or state authority whose expert fails to appear at the trial be read, provided that the Panel finds that in connection with other examined evidence it is necessary to be informed on the contents of the records or written findings and opinion. After the records or written findings and opinion have been read and parties' objections have been heard (Article 335), the Panel shall, taking into account other examined evidence, decide whether to examine the witness or expert witness directly.

(3) Records of the previous testimony given by persons granted exemption from the duty to testify (Article 227) may not be read

if those persons have not been summoned to the trial at all or if, before the first interrogation at the trial, they have availed themselves of their right to refuse to testify. After the presentation of evidence, the Panel shall decide that such records be excluded from the files and be kept separately (Article 83). The Panel shall proceed in the same way with respect to other records and information referred to in Article 83 of the present Code if a decision on their exclusion has not been previously rendered. An interlocutory appeal may be filed against the ruling of the exclusion of the records. After the ruling becomes final, the excluded records and information shall be sealed in a separate cover and handed over to the investigative judge to keep them apart from other files and they may not be examined or used in the course of the proceedings. The exclusion of records and information must be performed before the file is submitted to the higher Court upon an appeal filed against the verdict.

(4) The provision of paragraph 3 of this Article shall not apply in respect of the minutes which the trial panel has ruled pursuant to Article 84 of this Law for use in the main trial. The reasons for reading the records shall be stated in the records of the trial, and in the course of reading, it shall be stated whether the witness or expert witness had taken an oath.

Merits

41. The Court initially recalls that the Applicant was found guilty of the criminal offense of trafficking in human beings established in paragraph 1 of Article 2 of UNMIK Regulation. Based on the indictment filed in 2002, the Applicant was initially found guilty by the Judgment of the District Court, but which was quashed by the relevant Decision of the Supreme Court. In the retrial, the Applicant was again found guilty by a Judgment of the Basic Court, which, after the rejection of the appeal and the request for protection of legality, was upheld by the Court of Appeals and the Supreme Court, respectively. The Court recalls that even in the retrial, the Applicant was found guilty on the basis of the testimonies of witnesses who were not present during the main trial. This fact was challenged by the accused, namely the Applicant in all court proceedings. The regular courts rejected his allegations based on the procedural provisions applicable throughout his court proceedings, namely Article 333 of the Criminal Procedure Code of the former Yugoslavia; Article 368 of the PCCK and Article 338 of the CPCRK, according to which the reading of the testimony of witnesses may be allowed at the court hearing by a

court decision, if the relevant witnesses cannot be found or their appearance before the court is impossible. The Applicant also files the same allegations before the Court, noting that his constitutional rights were violated, because he was found guilty by the regular courts, based on the evidence of witnesses in absentia and consequently, never having the opportunity to examine the latter and challenge their arguments.

42. The Court notes that the circumstances of the present case relate to the Applicant's right to question witnesses against him, a right guaranteed by paragraph 4 of Article 31 of the Constitution. The right of an accused to examine witnesses against him is also guaranteed by item d of paragraph 3 of Article 6 of the ECHR. (For more details on the right to examine witnesses, see ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6, paragraph 6) 3 (d)).

43. The Court further notes that the procedural guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR reflect specific aspects of the right to a fair and impartial trial, established in paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR. In their review, the European Court of Human Rights (hereinafter: the ECtHR) looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and the victims in proper prosecution and, where necessary, to the rights of witnesses. (See, *inter alia*, in this regard, the case of the ECtHR, *Schatschaschwili v. Germany*, Judgment of 15 December 2015, paragraphs 100-101). With regard to the latter, namely witnesses, the Court recalls that based on the ECtHR case law, the term "*witness*" has an autonomous meaning in the ECHR system, regardless the classifications under national law. According to the ECHR, where a statement/deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR apply.

44. The Court recalls that the circumstances of the present case include (i) the right of the accused, namely the Applicant, to examine witnesses against him; and (ii) decisions of the regular courts, which allegedly were rendered based on witnesses who were absent in the court hearing. Both of these cases were elaborated in detail through the

ECtHR case law, and in particular in two cases of the Grand Chamber of the ECtHR, namely cases *Al-Khawaja and Tahery v. the United Kingdom*, Judgment of 15 December 2011; and *Schatschaschwili v. Germany*, cited above.

45. Therefore and following this, based on its obligation under Article 53 [Interpretation of Human Rights Provisions] of the Constitution to interpret the fundamental rights and freedoms in accordance with the ECtHR case law, the Court will (i) elaborate the general principles of the ECtHR case law concerning the absence of witnesses in the court hearing and the relevant inability of the accused and his defense counsel to question the latter, a right guaranteed by the Constitution and the ECHR; and (ii) apply the same principles in the circumstances of the present case, in order to assess whether the Applicant has, in its entirety, has been a subject to fair and impartial trial.

(I.) General principles regarding the right of the accused to examine witnesses against him

46. The Court initially reiterates that based on the case law of the ECtHR, given that the admissibility of evidence, is in principle a matter of regulation by law and of the national courts, based on paragraphs 1 item d of paragraph 3 of Article 6 of the ECHR, it only examines whether the proceedings, in their entirety, have been conducted in a fair manner. (See ECHR, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Schatschaschwili v. Germany*, cited above, paragraph 101; and *Seton v. the United Kingdom*, Judgment of 12 September 2016, paragraph 57). These provisions, however, incorporate the presumption against the use of extrajudicial evidence against the accused in criminal proceedings. The same applies when such evidence may be in favor of the defense.

47. Furthermore, based on item d of paragraph 3 of Article 6 of the ECHR and the relevant case law of the ECtHR, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument (See the ECtHR case *Al-Khawaja and Tahery v. the United Kingdom,* cited above, paragraph 118; *Schatschaschwili v. Germany,* cited above, paragraph 101; and *Seton v. the United Kingdom*, cited above, paragraph 57). Exceptions to this principle are possible but must not infringe upon the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings. (See

ECtHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Hümmer v. Germany*, Judgment of 19 July 2012, paragraph 38; *Lucà v. Italy*, Judgment of 27 February 2001, paragraph 39; *Solakov v. the former Yugoslav Republic of Macedonia*, Judgment of 31 October 2001, paragraph 57; and *Schatschaschwili v. Germany,* cited above, paragraph 105). However, the ECtHR, also stated that the use of the statements obtained during police inquiry and judicial investigation at a hearing is not in itself in contradiction with paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR, provided that the rights of the defense are respected. As a general rule, the accused and his or her defense should have adequate opportunity to challenge and question the relevant witness, either when the latter made a statement or at a later stage of the court proceedings. (See ECHR cases *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 118; *Trampevski v. the former Yugoslav Republic of Macedonia*, Judgment of 10 July 2012, paragraph 44; and *Schatschaschwili v. Germany*, cited above, paragraph 105).

48. The ECtHR also reiterated that considering the importance of the right to a fair administration of justice in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied. (See the ECtHR case, *Van Mechelen and Others v. the Netherlands*, Judgment of 23 April 1997, paragraph 58). Possibility for the accused to confront a material witness in the presence of a judge is an important element of a fair trial. (See, *inter alia*, the ECtHR case, *Tarău v. Romania*, Judgment of 24 February 2009, paragraph 74).

49. Considering the importance of the right of the accused to examine witnesses against him, a considerable case law of the ECtHR is focused on cases where witnesses have not participated in the court hearing, thus preventing the accused and his defense, questioning them, and challenging relevant arguments. Among other things, in the cases of the ECtHR, *Al-Khawaja and Tahery v. the United Kingdom* and *Schatschaschwili v. Germany*, it has established the general principles applicable to such cases, and the test, known as the *Al-Khawaja and Tahery test*, which should be applied by the courts in all cases where witnesses have not participated in the court hearing.

50. Based on these cases, the ECtHR has developed principles applicable in the circumstances of the absence of witnesses at the court hearing,

but also the abovementioned test, including the manner in which it was applied..

51. Regarding general principles, the ECtHR noted that (i) the Court should first examine the preliminary question, namely whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance; (ii) when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort; (iii) admitting as evidence statements of absent witnesses results in a potential disadvantage for the criminal defendant, who, in principle, should have an effective opportunity to challenge the evidence against him. In particular, he should be able to test the truthfulness and reliability of evidence given by the witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings; (iv) according to the "*sole or decisive rule*", if the conviction of a defendant is solely or mainly based on evidence provided by witnesses whom the accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted; (v) however, as item d of paragraph 3 of Article 6 of the ECHR should be interpreted in a holistic examination of the fairness of the proceedings, "*sole or decisive rule*" should not be applied in an inflexible manner; and (vi) in particular, where a hearsay statement is "*sole or decisive rule*", against a defendant, its admission as evidence will not automatically result in a breach of paragraph 1 of Article 6 ECHR. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of the relevant evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance to the case. (See ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial).

52. Whereas, with regard to the test developed in the case of *Al-Khawaja and Tahery*, to assess the compatibility with the guarantees embodied in item d of paragraph 3 of Article 6 of the ECHR, based on the case law of the ECtHR, it is necessary to consider three basic issues, in each case where the statements of absent witnesses in the trial were admitted as evidence in court. The court must consider whether (i) there were reasonable grounds for the non-attendance of the witness at the court hearing and, consequently, the admission of the extrajudicial testimonies of the absent witness as evidence in court; (ii) the testimony of the absent witness is the *"sole or decisive"* basis for the conviction of the accused; and (iii) there is sufficient counterbalancing factor, including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of extrajudicial evidence and to ensure that the trial, in its entirety, was fair. (See ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; and see also the cases of the ECHR *Schatschaschwili v. Germany*, cited above, paragraph 107; and *Seton v. the United Kingdom*, cited above, paragraph 58). The Court will further elaborate the three cases identified in more detail.

(i) Good reason for non-attendance of a witness at trial

53. In the light of the ECtHR case law, the reasons which have resulted in non-attendance of a witness at the trial must be justified. The rationale for the absence of a witness, based on the ECtHR case law, is considered to be a preliminary question, and is therefore the first issue to be considered by the court, and before any consideration as to whether the testimony of the absent witness is "*the sole or decisive*" based on the "*single or decisive"* rule. According to the ECtHR, when witnesses do not attend to give live evidence, there is a duty to enquire whether their absence is justified. (See ECtHR cases, *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraph 120; and *Gabrielyan v. Armenia*, Judgment of 10 April 2012, paragraphs 78, 81- 84).

54. The issues surrounding the good reason of the absence of witness have been clarified beyond the ECtHR case, *Al-Khawaja and Tahery v. the United Kingdom*, and also in the case of the ECtHR *Schatschaschwili v. Germany*. According to the latter, the lack of good reason for the non-attendance of a witness could not, of itself, be decisive for the lack of fairness of a trial, although it remained a very important factor to

be weighed in the balance when assessing the overall fairness of a trial. The Court notes that the ECtHR case law has evolved in terms of finding violations in cases where there has been no good reason for the lack of a witness at trial. While initially violations were found only on this fact, later, the reasonableness of the absence was considered only as one of the factors to be considered in assessing the fairness of the process as a whole. (For a superficial description of the matter, see, *inter alia*, the case of ECHR *Schatschaschwili v. Germany*, cited above, paragraphs 111-113).

55. The case law of the ECtHR recognizes various cases why the appearance of a witness in the court hearing cannot be accomplished. But insofar as it is relevant to the circumstances of the present case, in the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence. (See ECHR cases, *Karpenko v. Russia*, Judgment of 13 March 2012, paragraph 62; *Damir Sibgatullin v. Russia*, Judgment of 24 April 2012, paragraph 51; *Pello v. Estonia*, Judgment of 12 April 2007, paragraph 35; *Bonev v. Bulgaria*, Judgment of 8 June 2006, paragraph 43; *Tseber v. the Czech Republic*, Judgment of 22 November 2012, paragraph 48; *Schatschaschwili v. Germany*, cited above, paragraph 119; *Bobeş v. Romania*, Judgment 9 July 2013, paragraph 39; and *Vronchenko v. Estonia*, Judgment of 18 July 2013, paragraph 58*)*. The fact that a court was not able to locate the relevant witness or the fact that this witness was not in the state in which the proceedings are conducted is not a sufficient reason to satisfy the requirements of item d paragraph 3 of Article 6 of the ECHR. (See, in this regard, the ECtHR cases, *Gabrielyan v. Armenia*, cited above, paragraph 81; *Tseber v. the Czech Republic*, cited above, paragraphs 48 and 78; *Lučić v. Croatia*, Judgment of 27 February 2014; *Schatschaschwili v. Germany*, cited above, paragraph 120; *Seton v. the United Kingdom*, cited above, paragraph 61; *Tseber v. the Czech Republic*, cited above, paragraph 48; and *Kostecki v. Poland*, Judgment of 4 June 2013, paragraphs 65 and 66). The latter requires that the relevant states should take concrete steps to enable the accused to cross-examine the witness against him. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraph 120; *Gabrielyan v. Armenia*, cited above, paragraph 78; *Tseber v. Czech Republic,* cited above, paragraph 48; and *Kostecki v. Poland,* cited above, paragraph 65 and 66).

56. According to the case law of the ECtHR, it is not for the latter to compile a list of specific measures which the domestic courts must

have taken in order to secure the attendance of a relevant witness, however, it is clear that the relevant authorities must have actively searched for the witness with the help of domestic authorities including the police and must, have resorted to international legal assistance where a witness resided abroad. Moreover, the need for all reasonable efforts on the part of the authorities to secure the witness's attendance at trial further implies careful scrutiny by domestic courts of the reasons given for the witness's inability to attend trial, having regard to the specific situation of each witness. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraphs 120 and 121).

57. Good reason for the absence of a witness must exist from the trial court's perspective, that is, the court must have had good factual or legal grounds not to secure the witness's attendance at trial. In such a case, it follows that there was a good reason for the court to admit the untested statements of the absent witness as evidence. (See the ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraphs 119 and 122).

(ii) The importance of the testimony for the conviction

58. An issue concerning admission into evidence of statements of witnesses who did not attend the trial arises only if the witness statement is the "*sole*" or "*decisive*" evidence, or it "*carried significant weight*" in the accused conviction. (See the ECtHR casea, *Seton v. the United Kingdom*, cited above, paragraph 58; *Sitnevskiy and Chaykovskiy v. Ukraine*, Judgment of 10 November 2016, paragraph 125; and *Schatschaschwili v. Germany*, cited above, paragraph 123).

59. Based on the ECtHR case law, the "*sole*" evidence is to be understood as the only evidence against the accused. The term "*decisive*" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is "*decisive"* will depend on the strength of the supportive evidence: the stronger the other incriminating evidence, the less likely that the evidence of the absent witness will be treated as decisive. The evidence that carries "*significant weight*" is such that its admission may have handicapped the defence in the trial. (See, moreover in this regard, See EtCHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; b. The importance of the

witness statement for the conviction; see also the ECHR case, *Schatschaschwili v. Germany,* cited above*,* paragraphs 116 and 123).

60. The Court notes that the foundations of the "*sole or decisive rule*" are laid down in case *Unterpertinger v. Austria* (Judgment of 24 November 1986), which establishes the rationality of the relevant test: whether the conviction of the accused is based solely or mainly on the evidence of a witness whom the accused could not examine because of his absence, his rights of defense have been limited. Furthermore, in case *Doorson v. the Netherlands* (Judgment of 26 March 1996), the ECtHR further developed its case law, noting that, even where the court finds that there is good reason for the absence of a witness at trial, a conviction based on the "*sole or decisive*" evidence of this witness, would not be fair and would result in a breach of the procedural safeguards guaranteed by paragraph 1 and item d of paragraph 3 of Article 6 of the ECHR.. However, in case *Al-Khawaja and Tahery v. the United Kingdom*, the ECtHR found that the admission as evidence of the statement of a witness who had been absent from the trial and whose pre-trial statement was the sole or decisive evidence against the defendant did not automatically result in a breach of paragraph 1 of Article 6. (See ECtHR case, *Schatschaschwili v. Germany*, cited above, paragraph 128). It reasoned that applying this rule in an inflexible manner would run counter to the traditional way in which it approached the right to a fair hearing under Article 6 of the ECHR, namely to examine whether the proceedings as a whole had been fair. However, the admission of such evidence, because of the inherent risks for the fairness of the trial, constituted a very important factor to balance through the counterbalancing factors. (See ECtHR cases, *Schatschaschwili v. Germany*, cited above, paragraph 106; and *Al-Khawaja and Tahery v. the United Kingdom*, cited above, paragraphs 126, 128 and 147).

61. In this regard, as it is not for the Court to act as a court of fourth instance, its starting-point for deciding whether the conviction of an accused was based solely or to a decisive extent on the depositions of an absent witness is the judgments of the domestic courts. (See, in this regard, case of ECtHR *Kostecki v. Poland*, cited above, paragraph 67; and *Horncastle and Others v. the United Kingdom*, Judgment of 16 December 2014, paragraphs 141 and 150). The Court however, based on the ECtHR case law, must (i) review the assessment of the regular courts regarding the weight of the evidence given by an absent witness and ascertain for itself whether the assessment of the regular courts was unacceptable or arbitrary; and (ii) make its own assessment of the weight of the evidence given by an absent witness if the regular courts

did not indicate their position on that issue or if their position is not clear. (Shih, in this regard, the ECHR Guide on Article 6 of the ECHR (Criminal limb) of 30 April 2019; Part VI. Specific Guarantees; B. The rights of the defence (Article 6, paragraph 3); 4. Examination of witnesses (Article 6 paragraph 3 (d)); ii. Non-attendance of witnesses at trial; b. The importance of the witness statement for the conviction, paragraph 466; and see also the cases of the ECtHR, *Schatschaschwili v. Germany*, cited above, paragraph 124; *McGlynn v. United Kingdom*, Judgment of 16 October 2012, paragraph 23;*Tseber v. the Czech Republic*, cited above, paragraphs 54 and 56; and *Fąfrowicz v. Poland*, Judgment of 17 April 2012, paragraph 58).

(iii) Counterbalancing factors

62. The need for the existence of counterbalancing factors in order to ensure a fair assessment of the credibility of evidence in cases where the latter is decisive for the conviction of the accused has also been addressed in the cases of the ECtHR, *Al-Khawaja and Tahery v. United Kingdom* and *Schatschaschwili v. Germany*. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would initially depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence. (See the ECtHR case *Schatschaschwili v. Germany*, cited above, paragraphs 126-131).

63. In case *Schatschaschwili v. Germany*, the ECtHR identified certain elements that may be relevant in this context and as follows: (i) whether the domestic courts approached the untested evidence of an absent witness with caution, having regard to the fact that such evidence carries less weight, and whether they provided detailed reasoning as to why they considered that evidence to be reliable, while having regard also to the other evidence available (see ECtHR cases, *Przydział v. Poland*, Judgment of 24 May 2016, paragraph 53; and *Dastan v. Turkey*, Judgment of 10 October 2017, paragraph 31); (ii) existence of a video recording of the absent witness's questioning at the investigation stage, so that the court, prosecution and defense create relevant impressions on the credibility of the testimony; (iii) availability at trial of corroborative evidence supporting the untested witness statement, such as statements made at trial by persons to whom the absent witness reported the events immediately after their occurrence; (iv) further factual evidence, forensic evidence and expert

reports; (v) description of events by other witnesses, in particular if such witnesses are cross-examined at trial;; (vi) the possibility for the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial, or, where appropriate, in the pre-trial stage of the proceedings (see ECtHR case, *Paić v. Croatia*, Judgment of 29 March 2016, paragraph 47); and (vii) possibility for the accused or defence counsel to question the witness during the investigation stage. (See, in the context of this paragraph, ECtHR cases, *Palchik v. Ukraine*, Judgment of 2 March 2017, paragraph 50; *Al-Khawaja and Tahery v. United Kingdom*, cited above, paragraph 156; *Schatschaschwili v. Germany*, cited above, paragraphs 126-131; *Brzuszczyński v. Poland*, Judgment of 17 September 2013, paragraphs 85-89; *Chmura v. Poland*, Judgment of 3 April 2012, paragraph 50; *D.T. v. the Netherlands*, Judgment of 3 April 2012, paragraph 50; *Rosin v. Estonia*, Judgment of 19 December 2013, paragraph 62; and *González Nájera v. Spain*, Judgment of 11 February 2011, paragraph 54).

64. In essence, based on the ECtHR case law, the accused must be afforded the opportunity to give his or her own version of the events and to cast doubt on the credibility of the absent witness. However, this cannot, of itself, be regarded a sufficient counterbalancing factor to compensate for the handicap under which the defence laboured. (See ECtHR case *Palchik v. Ukraine*, cited above, paragraph 48). Moreover, domestic courts must provide sufficient reasoning when dismissing the arguments put forward by the defence. (See ECtHR case, *Prăjină v. Romania*, Judgment of 7 January 2014, paragraph 58). Also, in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witness' statement relates. (See ECtHR case, *Yakuba v. Ukraine**, Judgment of 12 February 2019, paragraphs 49-51; and *Schatschaschwili v. Germany,* cited above*,* paragraph 131).

(iv) The relationship and order of consideration of three issues identified by Al-Khawaja and Tahery test

65. As regards the relationship, the ECtHR considers that the application of the principles developed in case *Al-Khawaja and Tahery* in its subsequent case-law discloses a need to clarify the relationship between the abovementioned three steps of the *Al-Khawaja and Tahery* test when it comes to the examination of the compliance with the ECtHR of a trial in which untested incriminating absent witness evidence was admitted. It is clear that each of the three steps of the

test must be examined if – as in *Al-Khawaja and Tahery* – the questions in step one, namely whether there was a good reason for the non-attendance of the witness at trial and two, namely whether the evidence of the absent witness was the "*sole*" or "*decisive*" basis for the defendant's conviction, are answered in the affirmative. The Court is, however, called upon to clarify whether all three steps of the test must likewise be examined in cases in which either the question in step one or that in step two is answered in the negative. (See, in this context, and moreover, paragraph 110 of case *Schatschaschwili v. Germany*). The ECtHR case law has evolved in this respect, but in case *Schatschaschwili v. Germany*, it has determined that in principle all three cases must be examined in order to assess the fairness of a procedure in its entirety, accordingly, that the issue of counterbalancing factors should also be considered in cases where there may have been a justifiable reason for the absence of witnesses in the court hearing or even if this evidence has not been "*sole*" or "*decisive*". (See, in this context, the ECtHR explanation in paragraphs 110 to 116 of the case *Schatschaschwili v. Germany*).

66. Regarding the order, the ECtHR notes that in *Al-Khawaja and Tahery v. United Kingdom*, the requirement that there be a good reason for the non-attendance of the witness (first step), and for the consequent admission of the evidence of the absent witness, was considered as a preliminary question which had to be examined before any consideration was given as to whether that evidence was "*sole*" or "*decisive*". The term "Preliminary", in that context, may be understood in a temporal sense: the trial court must first decide whether there is good reason for the absence of the witness and, if yes, as a consequence, the evidence of the absent witness may be admitted. Only once that witness evidence is admitted can the trial court assess, at the close of the trial and having regard to all the evidence adduced, the significance of the evidence of the absent witness and, in particular, whether this evidence is the "*sole*" or "*decisive*" basis for convicting the defendant (second step). It will then depend on the weight of the evidence given by the absent witness how much weight the counterbalancing factors (third step) will have to carry in order to ensure the overall fairness of the trial. (See, in this context, and moreover, paragraph 117 of case *Schatschaschwili v. Germany*).

67. Therefore, it will, as a rule, be pertinent to examine the three steps of the *Al-Khawaja and Tahery* test. They are interrelated and, taken together, serve to establish whether the criminal proceedings have, as a whole, been fair. It may therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps

proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings. (See more on the report and the order of issues identified for the *Al-Khawaja dhe Tahery* test, the ECtHR case *Schatschaschwili v. Germany*, cited above, paragraphs 110-118).

(II.) Application of these principles to the circumstances of the present case

68. The Court initially reiterates that the guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR, based on the case law of the ECtHR, are assessed in the light of the fair trial and impartial in its entirety. Moreover, as noted above, the issues concerning the admissibility of evidence are, in principle, issues of law and, consequently, of the assessment of the regular courts. However, before an accused can be convicted, he must have the opportunity to challenge the evidence at some stage of the criminal proceedings and question the witnesses against him. Exceptions are possible, but they should be strictly necessary. The circumstance in which such an exception may be necessary and which is relevant to the circumstances of the present case is that the witnesses cannot attend the trial because, among other things, they cannot be found. However, in such cases, based on the case law of the ECtHR, the relevant court should take positive steps and take reasonable measures to ensure the presence of witnesses in the judicial process.

69. In order to assess whether a trial which was conducted without the presence of witnesses, in its entirety, was fair, as noted above, the ECtHR developed the *Al-Khawaja and Tahery* test, and on the basis of which, the following three issues should be addressed: (i) there was a good reason for the witness's non-attendance at the trial and, consequently, the admission of the extrajudicial evidence of the absent witness as evidence in court; (ii) the testimony of the absent witness is the "*sole or decisive*" basis for the conviction of the accused; and (iii) there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the disadvantage of defense as a result of the admission of extrajudicial testimony.

70. In applying such a test in the circumstances of the present case, the Court recalls the ECtHR view that matters relating to testimonies in a court hearing are in principle a matter of law and of the regular courts. However, based on the case law of the ECtHR, the Court should (i) review the assessment of the regular courts of the importance of testimony of the absent witness and decide whether that assessment

of the regular courts is inadmissible or arbitrary; and (ii) assesses the importance of the testimony of a witness who was not present at the trial, if the regular courts have not clarified their position on the matter or if such clarification is unclear.

(i) As to the good reasons for the absence of the witness at trial

71. The Court first reiterates that, based on the case law of the ECtHR, the reasons which have resulted in non-attendance of a witness at the trial must be good. Assessing the reasonableness of a witness's absence is a preliminary question, and is therefore the first issue to be considered by a court.

72. As noted above, and relevant to the circumstances of the present case, the fact that the courts are unable to locate the relevant witness or the fact that this witness is not found in the state in which the proceedings are conducted is not a sufficient reason to fulfill the requirements of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR. In such a case, the relevant authorities should make reasonable efforts to ensure their presence in court and should take concrete steps to enable the accused to examine the witness. (See ECtHR case *Schatschaschwili v. Germany*, cited above, paragraph 120). As noted above, these measures include but are not limited to cooperation with the police, and international legal assistance, when, as far as relevant to the circumstances of the present case, a witness lives abroad.

73. The Court recalls that in the circumstances of the present case the Applicant's case was initially adjudicated in the District Court and which, by Judgment [P. No. 424/2002] of 17 January 2003, found him guilty. Based on the case file, the factual situation was determined based on the deposited statements of seven (7) witnesses. None of them had been present at the court hearing. This Judgment was quashed by Decision [Ap. No. 347/2003] of 24 February 2004 of the Supreme Court on matters not related to the absence of witnesses in the main trial, and the Applicant's case was remanded for retrial.

74. In the retrial, the Applicant was found guilty by Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Basic Court. Based on the case file, the factual situation was determined based on the deposited statements of four (4) absent witnesses; partly another witness, also absent; and partly in the statements of the other accused, namely, S.R.

75. According to the Basic Court, the use of these statements as evidence in the court hearing, pursuant to item 1 of paragraph 1 of Article 368 of the PCPCK, in cases where the persons examined "*cannot be found or if their appearance before the court is impossible*". The Basic Court, by the relevant Judgment, more specifically stated:

> *"The witnesses' testimonies of V.K, V.S, N.M, B.V dhe A.M, given in the investigation procedure before the investigation judge were read and as evidences were used in the court hearing in compliance with Article 368 paragraph 1 subparagraph 1 of CCK, because the appearance of witnesses in the court hearing in order to testify was impossible for the fact that the four witnesses – injured parties are citizens of a foreign country and we do not know their residing addresses, whereas for the witness A.M it was found that is not present in Kosovo".*

76. The Court recalls that the impossibility of the accused, namely the Applicant to examine the witnesses against him, was raised through an appeal, namely the request for protection of legality, and was therefore considered by the Court of Appeals and the Supreme Court.

77. In the present case, the former, namely the Court of Appeals, reasoned as follows:

> "*it is evident that during the time the investigations were launched and during the time this matter was adjudicated for the first time, the criminal procedure law of former Yugoslavia was applied. ... According to this law, the minutes on testimonies of the witnesses could be read in cases when they are not able to appear in the court as this matter was remanded for retrial in compliance with the legal transitional provisions of the Criminal Procedure Code of 2013, the case was adjudicated according to the procedural code of 2004, whereas the court in accordance with the provision of Article 368, paragraph 1 of CPCK has read the minutes on statements of the injured parties who could not be brought to the court in the trial process because they are citizens of another country and their addresses were not known and in such cases pursuant to paragraph 1 of this provision, their statements may be read without consent of the parties".*

78. Whereas, the second, namely the Supreme Court, stated that:

> "*the allegation of the defence counsels of the convicts Hysen Kamberi [...] is not grounded that the statements of the injured*

parties [...] were read in violation of Article 260 of the PCCK, for the facts as the reasons are given for this legal basis by the first and second instance courts, the proceedings in this criminal case have fixed and was conducted under the old law (of the former Yugoslavia) and therefore these statements could have been read under Article 333 paragraph 1 item 1 of CPC (338 paragraph 1 item 1.1 of the applicable code), so there were no legal obstacles to their reading".

79. The Court also notes that in the initial trial against the Applicant the provisions of the Criminal Code of the former Yugoslavia were applied, pursuant to Article 333, according to which, the statements of absent witnesses can be read at the court hearing only by a court decision, *inter alia*, in cases where witnesses cannot be found or their appearance before the court is not possible. The retrial was based on the provisions of the PCPCK, which based on Article 368 thereof, provides the same possibility. The same applies to Article 338 of the CPCRK.

80. Therefore, the Court notes that, as the regular courts have found, the relevant procedural provisions enable the admission of testimonies of witnesses in the court hearing, if it is impossible to appear before the court. However, based on paragraph 4 of Article 31 of the Constitution, in conjunction with item d of paragraph 3 of Article 6 of the ECHR, and the relevant case law of the ECtHR, there must be a good reason for this impossibility of witnesses to attend in the trial and that the relevant courts need to take concrete steps to secure their presence in the court hearing.

81. The reasoning given by the Basic Court, and upheld by the Court of Appeals and Supreme Court, states that "*the appearance of these witnesses in the court hearing in order to testify was impossible for the fact that the four witnesses – injured parties are citizens of a foreign country and we do not know their residing addresses, whereas for the witness A.M it was found that is not present in Kosovo*".

82. The Court notes that in view of the importance of the right of an accused to challenge evidence and to examine witnesses against him at any stage of the proceedings, such reasoning is not consistent. This is also the case through the ECtHR case law, and according to which, specifically, the fact that the domestic court was unable to locate the relevant witness or the fact that this witness was not found in the state in which the proceedings are conducted, is not a sufficient reason to

meet the requirements of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR.

83. To illustrate the inconsistency of such a finding of the regular courts, the Court will next present the assessment of the ECtHR in two similar cases as to whether the absence of witnesses at the court hearing was based on a good reason. In the former, the ECtHR found that there was one, while in the second it did not. More specifically, as follows:

84. In the case of *Schatschaschwili v. Germany*, the ECtHR found that there was a good reason for the absence of two witnesses in the court hearing. In this case, witnesses O. and P., two Latvian nationals, were the victims and witnesses of an aggravated theft while temporarily living in Germany, engaging in prostitution activities. During the investigation procedure, they were questioned several times by the police and the prosecution. With the beginning of the court proceedings, the relevant regional court in Germany had initially contacted the relevant witnesses who refused to appear before the court on the grounds of health and serious emotional and psychological conditions. The court rejected their reasoning as ungrounded and further, the same court had given some alternatives to the relevant witnesses as an opportunity to appear before the court. The latter refused. The German court, based on the mechanisms of international legal assistance, in cooperation with the relevant authorities of the State of Latvia, had organized the possibility for witnesses to appear and be questioned in a court in Latvia in order to secure the accused right to examine relevant witnesses. The scheduled court hearing was canceled a few days before the hearing based on the health certificates of the relevant witnesses. The German court further suggested to the Latvian authorities that the health status of the witnesses be verified by a public health official or that they be compelled to testify at the trial. The public authorities of the state where the witnesses were located had no further cooperation. Consequently, the relevant regional court in Germany, based on the procedural provisions of the Code of Criminal Procedure, accepted the evidence of the relevant witnesses given at the investigation stage as evidence in the trial. In examining the grounds and reasonableness of the absence of witnesses O. and P. in this judicial process, in which they were not the only witnesses, the ECtHR found that the relevant court had taken reasonable steps to ensure their presence at the trial and that, consequently, in the circumstances of the present case, there was a good reason to admit the evidence of witnesses O. and P. at the court hearing. (For the facts of the case, see paragraphs 11 to 53, and for the assessment of whether there was a good reason for the absence

of witnesses O. and P. in the trial, see paragraphs 132-140 of case *Schatschaschwili v. Germany*). The Court puts emphasis on the fact that in the present case, the ECtHR found a violation of Article 6 of the ECHR, finding that (i) there were a good reason for the absence of witnesses at the trial, thus responding to the first step in affirmative manner; (ii) the testimony of the relevant witnesses was "*sole*" and "*decisive*", affirmatively responding to the second step; whereas (iii) there were no sufficient counterbalancing factors in the court hearing to compensate for the disadvantage in which the defense was placed as a result of extrajudicial evidence.

85. On the other hand, in case *Seton v. the United Kingdom*, the ECtHR found that the relevant court had not taken all the appropriate measures, and therefore there was no good reason for the absence of a witness in the relevant trial. The case relates to a murder, the accused for whom he had refused to testify, while the relevant court had admitted as evidence in court, *inter alia* and among other witnesses, also the calls and telephone conversations of the accused. In this case, the relevant court had sufficient information from prison officials that the accused had refused to attend the trial, and the latter had not taken any additional steps to ensure his presence in the trial. The ECtHR in this Judgment also distinguished between the right to attend a trial and the right to examine witnesses in relation to the right not to incriminate themselves and consequently to remain silent. In such a circumstance, when the court was satisfied only with the fact that the accused refuses to take part in the trial, and had taken no further action to secure his presence at the trial, the ECtHR found that there was no good reason for the non-attendance of the witness/accused in the trial, pointing out that, consequently, the circumstances of the present case fail to meet the first requirement of the *Al-Khawaja and Tahery* test (For the facts of the case, see paragraphs 3 to 38, whereas regarding the assessment if there was a good reason for the absence of a witness in the main trial, see paragraphs 61 and 62 of case *Seton v. the United Kingdom*). The Court emphasizes that in the present case, the ECtHR did not find a violation of Article 6 of the ECHR, although (i) there was no good reason for the absence of witnesses at the trial, thus responding to the first step negatively; (ii) the testimony of the relevant witnesses was not "*sole*" or "*decisive*", responding negatively to the second step; and that (ii) there were sufficient counterbalancing factors in the judicial process to compensate for the disadvantage in which the defense was placed as a result of extrajudicial evidence.

86. In contrast to the case law of the ECtHR, and the circumstances of the case of the Grand Chamber of the ECtHR *Schatschaschwili v. Germany*, and similarly to the circumstances of the case *Seton v. the United Kingdom*, in the circumstances of the present case, from the case file it does not follow that the regular courts have taken or justified any concrete steps to ensure the presence of witnesses at the court hearing. The Court notes that beyond referring to the relevant provisions of the applicable procedural codes throughout the examination of the case against the Applicant, the decisions of the regular courts do not result in the later taking any concrete steps in support of the finding that the presence of witnesses in the trial cannot be secured. As noted above, based on the case law of the ECtHR, the fact that the witnesses are out of the state in which the court proceedings are conducted is not sufficient and does not constitute a good reason for their absence in the judicial process. Moreover, it does not follow from the case file that the regular courts have taken any action to contact the police or to access international legal assistance mechanisms, nor have they provided any additional justification for the absence of witnesses in the trial, and consequently limiting the right of the accused to examine witnesses against him. As explained above, the ECtHR not necessarily finds violations of Article 6 of the ECHR solely on the fact that the witnesses were not present at the trial, but it analyzes whether there is a good and justified reason for their absence.

87. The Court reiterates that, based on the reasoning of the regular courts, in the circumstances of the present case, this is not the case. Consequently, the Court must find that in the circumstances of the present case, there is no good reason for the non-attendance of the witnesses in the trial, and it follows that the first step of the *Al-Khawaja and Tahery* test has not been fulfilled. However, and as stated above, such a finding does not necessarily result in a violation of paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR. To reach such a finding, the Court must also consider the other two aspects of the *Al-Khawaja and Tahery* test, whether (i) the testimony of the absent witness is the "*sole or decisive*" basis for the conviction of the accused; and (ii) there are sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the disadvantage of the defense as a result of the admission of the testimony of the absent witnesses.

(ii) As to the importance of the testimony for conviction

88. The Court initially recalls that the admission as evidence of the statements of witnesses who did not attend the court hearing raises a particularly important issue as to whether the witness statement is the "*sole*" or "*decisive*" or whether the latter "*carried significant weight*" in the conviction of the accused. In such circumstances, other or supporting evidence gain significant weight. The stronger the other incriminating evidence is, the less likely it is that the testimony of the absent witness will be treated as "*sole*" or "*decisive*".

89. The Court also reiterates that based on the ECtHR case law, in determining the weight of the evidence given by the absent witness and, in particular, whether the evidence was the sole or decisive basis for the conviction of the accused, the Court has regard, in the first place, to the regular courts' assessment. This approach is in line with, *inter alia*, the case *Schatschaschwili v. Germany*. (Concerning the assessment of whether the testimony of the absent witness was sole or decisive for the conviction of the accused, see paragraphs 141-144 of case *Schatschaschwili v. Germany*). In this case, the ECtHR first examined the assessment of the regular courts, namely the relevant German Regional Court, which had considered witnesses O. and P. as key witnesses for the prosecution, but its decision was based also on further evidence. On the other hand, the prosecution reasoned that the evidence of the abovementioned witnesses was neither "*sole*" nor "*decisive*". The ECtHR in this case stated that the domestic courts had determined that the evidence of witnesses O. and P. were not "*sole*" but failed to determine whether this evidence was "*decisive*", that is, whether that evidence was of such importance that they are determinant of the outcome of the case. Beyond examining the assessment of the domestic courts, the ECtHR itself assessed the importance of the evidence of witnesses O. and P. for the conviction of the accused, and in this regard, it focused on assessing the strength of other incriminating evidence. In relation to the latter, the ECtHR emphasized (i) the testimony of witnesses E. and L., namely, the neighbor and friend of the witnesses who had been informed about the event; (ii) the testimony of the accused himself; (iii) geographical data and telephone conversation recordings; and (iv) GPS data indicating the movement of the car of the accused. However, the ECtHR noted that despite these testimonies, the testimonies of witnesses O. and P., whose examination was impossible by the accused and his defense throughout the trial, were "*decisive"* to the conviction of the accused. . Moreover, according to the ECtHR, the other evidence used by the domestic courts was "*either hearsay evidence or merely circumstantial technical and other evidence which was not conclusive as to the robbery and extortion as such*".

On the other hand, in case *Seton v. the United Kingdom*, the domestic courts as well as the ECtHR held that the absence of the accused at trial, namely the lack of his testimony at the trial, constituted neither "sole" nor "*decisive*" evidence, because other evidence against him was "*overwhelming*". (As to the assessment of whether the testimony of the absent witness was the sole or decisive for the conviction of the accused, see paragraphs 63-64 of the case *Seton v. United Kingdom* and references used therein).

90. In assessing whether, in the circumstances of the present case, the testimony of absent witnesses is "*sole*" or "*decisive*" for the conviction of the accused, namely the Applicant, the Court based on the ECtHR case law will initially consider the assessment and the reasoning of the regular courts, and will then proceed with its assessment of the importance of the testimony of the absent witnesses in the conviction of the Applicant.

91. In this respect, the Court first recalls that the factual situation in the Applicant's retrial before the Basic Court was based on (i) the testimonies of witnesses V.K; V.S; N.M; and B.A; all absent in the court hearing; (ii) "*partially*" on the testimony of witness A.M, also absent in the court hearing; and (iii) "*partially*" on the testimony of the accused S.R given at the court hearing.

92. In this context, the Court recalls that the Basic Court itself found that the Applicant's conviction was based on the testimony of absent witnesses. The only other evidence referred to by the Basic Court, and given at the trial, is that of accused S.R. In this respect, the Court also recalls that the Basic Court itself stated that its decision was only "*partially*" based on this evidence. In view of its importance, the Court will quote in full the relevant statement of the accused S.R., below:

> *"In his statement given to the investigation judge on 05.11.2002, that the owner of the business premise "Arizona" was Hysen Kamberi and later the owner of the business premise was [I.R.], also stated that following the orders of [I.V.], the girls that used to work in that business premise were transported with his taxi vehicle up to the bridge on the exit point of Ferizaj to sign the contract, but on the way Ismet has again ordered him to transport girls in the direction of Brezovica, however the girls didn't agree about this thus following their intervention they were returned to the their apartment in Ferizaj".*

93. The Court recalls that the accused, namely the Applicant, raised his allegations of a violation of his right to fair and impartial trial as a result of his inability to challenge the testimonies of absent witnesses even before the Court of Appeals, through appeal and also before the Supreme Court through a request for protection of legality, and both courts dismissed the respective allegations, referring to the relevant provisions of the applicable procedural codes, based on which, *inter alia*, the admission of the witness testimony who cannot be found is possible.

94. However, based on the foregoing statement, the Court notes that (i) the latter is the only evidence against the accused given at the court hearing; (ii) all other evidence against the accused was given by witnesses who were not present at the trial and, consequently, whose evidence the accused could not challenge at any stage of the criminal proceedings; (iii) the Basic Court itself determines that it based its decision only "*partially*" on the statement of the accused S.R.; moreover, the Basic Court refers only to one more testimony, namely the victims' defense counsel from the Office for the Protection of Victims of Violence, who merely states that "*he joins the closing argument submitted by the State Prosecutor*".

95. The Court in this context notes that the Basic Court, but neither the Court of Appeals nor the Supreme Court, have determined whether the testimony of the absent witnesses is "*sole*" nor whether it is "*decisive*" for the conviction of the accused. The reasoning of the Basic Court and upheld by the Court of Appeals and the Supreme Court in no way assesses the relationship between the testimonies of absent witnesses and the incriminating weight of the testimony of the other accused S.R and the statement of the Victim Advocate. The first evidence in fact only refers to the Applicant as the owner of the relevant premise, while regarding the second statement, the decision of the Basic Court only states that the latter is attached to the prosecutor's statement, without giving any further explanation as to how it is "incriminating" for the accused, namely the Applicant.

96. In this respect, the Court recalls the ECtHR case law, based on which, in the event that the regular courts did not assess the importance of the testimony of absent witnesses and the incriminating weight of other evidence in the trial for conviction of the accused , the Court itself must assess the relevance of the testimony of witnesses who were not present at the main trial and the incriminating weight of the other evidence.

97. The Court reiterates that (i) the accused, namely the Applicant, at no stage of the criminal proceedings had the opportunity to challenge the evidence of the absent witnesses; (ii) the Basic Court itself held that the conviction of the accused is based only "*partially*" on the testimony of the accused S.R .; (iii) the Court recalls that the incriminating weight of the other evidence should have a particular weight in cases where the main witnesses did not attend the trial, while the testimony of the accused S.R given at the court hearing did not in fact accuse the Applicant of the commission of the criminal offense for which he was convicted. As noted above, this evidence only refers to the Applicant as the owner of the "Arizona" premise; whereas (iv) the case file and the reasoning of the Basic Court also include statements challenging the factual ownership of the Applicant's respective premise and any connection with the activities of this premise, including the statement of I.R and the Applicant himself. The Court does not challenge the fact that the testimonies of absent witnesses accuse the Applicant of the criminal offense for which he was convicted, but, based on the ECtHR case law, emphasizes the importance of the weight of other evidence in case the accused did not have the opportunity to challenge this evidence throughout the trial and was convicted based on extrajudicial evidence given by these witnesses.

98. The Court in this context also recalls the case *Schatschaschwili v. Germany* and in which, as explained above, in spite of a large number of other evidence, the Court declared the evidence of witnesses O. and P. as "*sole and decisive*" evidence for the Applicant's conviction, *inter alia*, because these witnesses were the only ones with direct knowledge of the events which resulted in the charge and conviction of the respective Applicant.

99. The Court also emphasizes the fact that, beyond the ECtHR case law, the procedural provisions of the relevant Criminal Codes themselves lay down the same restrictions as to the conviction of a defendant based on a decisive evidence which cannot be challenged by the defendant or his defense counsel during questioning during any phase of criminal proceedings. This restriction is set out in paragraph 1 of Article 157 of the PCPC and paragraph 1 of Article 262 of the CPCRK. The decisions of the regular courts did not justify the circumstances of the concrete case from the perspective of these Articles, nor did they clarify the relationship between them and Articles 368 of the PCPC and 338 of the CPCRK, respectively. Furthermore, the regular courts also disregarded Articles 15 (Treatment of victims of trafficking in human beings in criminal investigation and proceedings) and 19

(Ensuring safety of the victims or witnesses) of Law no. 04 / L-218 on the Preventing and Combating of Trafficking in Human Beings and Protecting Victims of Trafficking which, despite emphasizing the specific treatment to be given to these victims/witnesses throughout the trial in order to prevent their re-victimization, and listing of a number of procedural options to achieve this purpose, the abovementioned law does not stipulate that these victims/witnesses in trafficking cases cannot be interrogated at least indirectly at any stage of criminal proceedings by the defense counsel of the accused and that the latter may be found guilty on the basis of only their read statements even if they are the "*sole*" and "*decisive*" evidence against him.

100. Consequently and in the same line of argument and in particular considering the lack of other evidence with incriminating weight in the trial, the Court must find that the testimonies of witnesses who did not attend the court hearing are "*decisive*" and "*carried significant weight*" in the conviction of the accused, namely the Applicant.

101. However, the Court reiterates, based on the case law of the ECtHR, that the admission as evidence of the statements of absent witnesses, even if such evidence is "*sole"* or *"decisive*" against the accused, does not automatically result in a violation of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR.

102. The ECtHR, through its case law, has determined that the admission of such evidence, and taking into account the risks it reflects to a fair trial, is very important factor and which must be balanced by counterbalancing factors. Accordingly, and thereafter, the Court will consider the third remaining issue of the *Al-Khawaja and Tahery* test, namely the counterbalancing factors in the Applicant's trial.

(iii) Counterbalancing factors

103. The Court initially reiterates that the extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence. Therefore, considering that the Court has already held that in the circumstances of the present case, the testimonies of the absent witnesses are "*sole*"

and "*decisive*" for the conviction of the accused, namely the Applicant, it must analyze the existence of other counterbalancing factors in this trial, in order to ensure the credibility of the testimonies of the absent witnesses.

104. In this regard, the Court recalls that the ECtHR noted that even in cases where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of paragraph 1 of Article 6 of the ECHR. However, in such cases, the respective court must be subjected to the strongest procedural safeguards. The most essential question in each case is whether there are sufficient counterbalancing factors in place that enable the reliability of the respective evidence. This would permit a conviction to be based on such evidence only if it is sufficiently reliable. (See case of ECtHR *Schatschaschwili v. Germany*, cited above, paragraph 147).

105. Moreover, the general principles elaborated above identify a number of important measures in this context, and which could serve as counterbalancing factors. One of the first important measures is for the regular courts to approach this evidence carefully and provide detailed reasoning as to the credibility of the evidence. Another important measure is the existence of any video recording of this evidence. Moreover, the existence of additional evidence which could indirectly confirm the testimony of absent witnesses is also relevant. Another important element is the possibility for the defense of the accused to contact in writing the absent witnesses. Finally, it is quite important that the accused and his defense have had any opportunity to challenge the evidence of absent witnesses at any stage of the criminal proceedings, including the investigation phase. (See case of ECtHR *Schatschaschwili v. Germany*, cited above, paragraph 147).

106. Also, in assessing the counterbalancing factors, based on the ECtHR case law, the Court should consider some of the following issues: (i) the court's approach to extrajudicial evidence; (ii) the existence and weight of other incriminating evidence; and (iii) measures and procedural safeguards which have made it possible to compensate for the disadvantage created by the inability of the accused to examine witnesses against him. (See, in this regard, the ECtHR approach in case *Schatschaschwili v. Germany*, cited above, paragraph 120).

107. With regard to the first issue, the Court notes that the decisions of the regular courts do not contain any reasoning as to the diligence required in the assessment of this evidence, considering the fact that

the accused and his defense, and also the trial panel itself, did not have the opportunity to ask questions and analyze the behavior of witnesses at the court hearing and to create a clear impression regarding the credibility of witnesses. Moreover, the decisions of the regular courts do not contain a detailed reasoning as to the credibility of this evidence.

108. As to the second issue, namely the existence and weight of the other incriminating evidence, the Court points out three issues. First, as stated above, the Judgment of the Basic Court is based on the testimony of five (5) witnesses who were not present at the trial, and who, the accused and his defense counsel, never had the opportunity to examine. Having regard to the nature of the criminal offense , which the Applicant is charged with, the ECtHR also holds that the relevant authorities should have in mind that witnesses might not be present at the main trial, and that they should have given the opportunity to the defense counsel of the accused, to confront witnesses at the investigation stage. (See ECtHR case *Schatschaschwili v. Germany*, cited above, paragraph 157; *Vronchenko v. Estonia*, cited above, paragraph 60; and *Rosin v. Estonia*, Judgment of 19 December 2013, paragraph 57). Secondly, the Court notes that the Victims' Advocate from the Office for the Protection of Victims of Violence, S.T, was present at the trial and only stated that he joins the statement filed by the State Prosecutor. Thirdly, the Basic Court has also stated that it based its decision "*partly"* on the testimony of the accused, S.R. As noted above, this evidence is not particularly incriminating and the regular courts, including the Supreme Court, have in no way reasoned how such evidence counterbalances the fact that their decisions were based on the testimony of absent witnesses. The Supreme Court, in its Judgment, has stated in this context the following:

> *"In particular, the court assessed the depositions of the heard witnesses which it considered credible because they found support in other evidence and partly in the convictions' defense, for which pages 13-17 provided legal reasons".*

109. However, as noted above, it follows that (i) the Judgment of the Basic Court was based on the testimony of the absent witnesses; (ii) has itself stated that it is based only "*partially*" on the testimony of the accused, S.R, the only testimony given at the court hearing; (iii) never refers to the content of the statement of the Office for the Protection of Victims of Violence; and (iv) the regular courts, including the Supreme Court, have not clarified how the other evidence obtained at

the trial supports the extrajudicial evidence on the basis of which they have found the Applicant guilty.

110. Finally, and with regard to the third case, namely the measures and procedural safeguards which made possible the compensation for the disadvantage created by the inability of the accused to examine the witnesses against him, the Court notes that (i) the accused, namely the Applicant had the opportunity to present his version regarding the criminal charge against him; however (ii) the latter did not have the opportunity, at any stage of the criminal proceedings, to confront the witnesses against him, the "*decisive*" evidence, based on which he was found guilty.

111. The Court, in terms of counterbalancing factors, notes that the Basic Court, in addition to the testimonies of absent witnesses, had some additional evidence concerning the criminal offense for which the Applicant was found guilty. However, the Court notes that the regular courts had in no way clarified the relationship between the testimonies of the absent witnesses and other incriminating evidence, and moreover, had not taken any procedural measures nor provided additional reasoning during the court hearing, measures which would have compensated for the disadvantage created by the accused, namely the Applicant, being unable to directly examine the witnesses against him. Therefore, the Court must find that the counterbalancing factors were not sufficient to enable a fair assessment of the credibility of the extrajudicial evidence on the basis of which the Applicant was convicted.

112. Finally, having regard to the circumstances of the present case, it was held that (i) there was no good reason for the non-attendance of the witnesses in the trial thereby making impossible to the accused, namely the Applicant, to challenge the testimonies and examine the witnesses against him; (ii) the testimonies of absent witnesses is the "*sole*" and "*decisive*" basis for the conviction of the accused, namely the Applicant; and (iii) there is no sufficient counterbalancing factor, including strong procedural safeguards, which could compensate for the disadvantage created to the accused and his defense as a result of the inability to examine the relevant witnesses, the Court states that all three conditions of the ECtHR test, *Al-Khawaja and Tahery*, have been fulfilled, and consequently, the procedural guarantees embodied in paragraph 4 of Article 31 of the Constitution in conjunction with item 6 of paragraph 3 of Article 6 of the ECHR have not been complied with; and, as a consequence, the proceedings as a whole, have not been fair, contrary to paragraph 1 of Article 31 of the Constitution in

conjunction with paragraph 1 of Article 6 of the ECHR. The Court notes that this finding is not related to and does not prejudice the guilt or innocence of the Applicant.

Conclusions

113. Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P. No. 162/ 2004 PR1] of 2 December 2016 of the Basic Court, were rendered contrary to the procedural safeguards guaranteed by paragraph 4 of Article 31 of the Constitution in conjunction with item d of paragraph 3 of Article 6 of the ECHR, because the witnesses against the accused, namely the Applicant, did not attend the court hearing and the Applicant and his defense were not able to examine the witnesses against him at any stage of the criminal proceedings.

114. The Court throughout this Judgment clarified that the non-attendance of witnesses at the trial and the inability of an accused and his defense to examine the relevant witnesses, despite the crucial importance of these two aspects, does not necessarily result in a violation of paragraph 1 of Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, because the fairness of a proceeding must be assessed in its entirety. However, given the crucial importance of these rights, the courts, based on the ECtHR case law, namely the test known as *Al-Khawaja and Tahery*, must establish whether (i) there was a good reason for the non-attendance of witnesses at the trial; (ii) whether the testimony of these witnesses is the "*sole*" or "*decisive*" basis for the conviction of the accused; and (iii) whether there was sufficient counterbalancing factor. The Court in this Judgment clarified that, in the circumstances of the present case, none of these conditions has been fulfilled.

115. Therefore, the Court found that Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court in conjunction with Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals and Judgment [P No. 162/2004 PR1] of 2 December 2016 of the Basic Court, are incompatible with the procedural guarantees set out in Article 31 of the Constitution and Article 6 of the ECHR.

Request for non-disclosure of identity

116. The Court notes that the Applicant in his Referral also requested that his identity be not disclosed.

117. The Applicant in relation to the request for non-disclosure of identity reasons as follows "*The reasons are personal to the Applicant. The referral was filed by the lawyer Selman Bogiqi*".

118. In this respect, the Court refers to paragraph 6 of Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure, which provides:

> *"(6) Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court. The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter".*

119. Based on the reasoning presented by the Applicant, the Court considers that the request for non-disclosure of the identity is not justified and as such, it is not a basis to grant it. (See the case of the Court, KI74/17, Applicant *Lorenc Kolgjeraj*, Resolution on Inadmissibility of 5 December 2017).

120. Therefore, the Applicant's request for non-disclosure of identity is to be rejected.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 15 January 2020, with majority of votes

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE invalid Judgment [PML. No. 241/2017] of 5 December 2017 of the Supreme Court of the Republic of Kosovo;

IV. TO DECLARE invalid Judgment [PAKR. No. 55/2017] of 13 July 2017 of the Court of Appeals of Kosovo;

V. TO DECLARE invalid Judgment [P. No. 162/2004 PR1] of 2 December 2016 of the Serious Crimes Department of the Basic Court in Ferizaj;

VI. TO REMAND the case for retrial in the Serious Crimes Department of the Basic Court in Ferizaj, in accordance with the findings of this Judgment;

VII. TO ORDER the Serious Crimes Department of the Basic Court in Ferizaj to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court;

VIII. TO NOTIFY this Judgment to the Parties and, in accordance with Article 20.4 of the Law, be published in the Official Gazette;

IX. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI 193/18, Applicant: Agron Vula, Constitutional review of Decision Ac. No. 227/18 of the Court of Appeals of 18 September 2018, regarding non-enforcement of Decision A02 158/07 of the Independent Oversight Board of Kosovo of 25 February 2008

KI193/18, Judgment adopted on 22 April 2020, published on 12 May 2020

Keywords: *individual referral, right to fair and impartial trial, right to effective legal remedies, judicial protection of rights, effective remedy, non-implementation of enforceable decision, compensation of damage*

The Applicant requests the constitutional review of Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018, regarding the non-enforcement of Decision A02 158/07 of the Independent Oversight Board of Kosovo, of 25 February 2008, alleging violation of fundamental human rights and freedoms guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 49 [Right to Work and Exercise Profession] and 54 [Judicial Protection of Rights], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Articles 6 (Right to a fair trial] and 13 [Right to an effective remedy], of the European Convention on Human Rights (hereinafter: the ECHR).

The Court found that the substantial aspects of this referral relate to the right to fair and impartial trial (Article 31 of the Constitution in conjunction with Article 6 of the ECHR), the right to effective legal remedies and the right to judicial protection of rights (Articles 32 and 54 of the Constitution, in conjunction with Article 13 of the ECHR).

The factual situation in the present case is presented as follows: in 2003 the Chief Executive Officer of the Municipal Assembly of Gjakova issued Decision 12 no. 01-139, for the "temporary suspension" of the Applicant from the working place - starting from 20 August 2003 until the completion of the procedure for ascertaining his disciplinary responsibility. Meanwhile, the Applicant complained to the Independent Oversight Board of Kosovo (hereinafter, the IOBK). On 25 February 2008 the IOBK, by Decision A 02 158/2005, partially approved the Applicant's complaint and ordered the Municipality of Gjakova to conduct a new disciplinary proceeding against the Applicant, in accordance with the legal provisions in force. The IOBK held that: *"This body examining the written evidence presented finds that: The suspension of the abovementioned was done in contradiction with the procedure provided by the Administrative Direction No. 2003/2 regarding the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo [...]*".

Meanwhile, the Applicant's case was conducted in administrative, contested and enforcement procedures, where a number of decisions were issued in favor but also to the detriment of the Applicant. The final decision in the case of the Applicant was Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018, which rejected the Applicant's statement of claim as inadmissible due to the existence of the litispendence.

In its review, the Court specifically emphasized the fact that the IOBK Decision was upheld in the enforcement proceedings by the Court of Appeals, as a last instance, by Decisions Ac. No. 1459/15 and Ac. No. 516/16, of 26 October 2015, namely 4 December 2017. These decisions of the Court of Appeals also upheld the decisions of the Basic Court in Gjakova, with the same number, E. No. 1100/12, of 31 October 2014, namely 27 February 2015, which allowed the enforcement of the IOBK Decision of 25 February 2008.

Regarding the enforcement of the decision of the IOBK and the connection with Article 31 of the Constitution, the Court emphasized that it would be meaningless if the legal system of the Republic of Kosovo would allow that a final judicial decision in the administrative procedure and enforceable remains ineffective in disfavor of one party. Therefore, non-effectiveness of the procedures and the non-implementation of the decisions produce effects that bring to situations that are inconsistent with the principle of rule of law (Article 7 of the Constitution) – a principle that the Kosovo authorities are obliged to respect.

With regard to the effective resolution of the Applicant's case, the Court held that the non-existence of legal remedies or other effective mechanisms for the enforcement of the IOBK Decision (regardless of what the epilogue would be for the Applicant from the enforcement of that Decision), violates the right to effective legal remedies, guaranteed by Article 32 and the right to judicial protection of rights, guaranteed by Article 54 of the Constitution, in conjunction with the right to an effective remedy, guaranteed by Article 13 of the ECHR.

In the end, the Court found that the non-enforcement of the IOBK Decision by the Municipality of Gjakova, especially after some decisions of the regular courts that allowed its enforcement, have caused violations of Articles 31, 32 and 54 of the Constitution, as well as Articles 6 and 13 of the ECHR.

The Court reiterated that the IOBK Decision did not stipulate that the Municipality of Gjakova, had to reinstate the Applicant to his working place, but ordered the Municipality of Gjakova to conduct disciplinary proceedings against the Applicant in accordance with the legal provisions in force for civil servants. Therefore, the Court did not address the issue of whether or not the

Applicant should be reinstated to working place, namely if Article 49 of the Constitution has been violated.

With regard to the remedy of violations of the constitutional guarantees of the Applicant, the Court, taking into account the special circumstances of the case under consideration, assessed that it is obliged to be satisfied with the finding of violation of Articles 31, 32 and 54 of the Constitution, in conjunction with Article 6.1 of the ECHR and Article 13 of the ECHR, instructing the Applicant in civil proceedings, before the regular courts, for eventual compensation of damage.

JUDGMENT

in

Case No. KI193/18

Applicant

Agron Vula

Constitutional review of Decision Ac. No. 227/18 of the Court of Appeals of 18 September 2018, regarding non-enforcement of Decision A02 158/07 of the Independent Oversight Board of Kosovo of 25 February 2008

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 Agron Vula (hereinafter: the Applicant) from Gjakova.

Challenged decision

2. The Applicant requests the constitutional review of Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018, regarding the non-enforcement of Decision A02 158/07 of the Independent Oversight Board of Kosovo (hereinafter: the IOBK), of 25 February 2008 and the respective decisions of the first and second instance courts, which upheld the Decision of the IOBK.

Subject matter

3. The subject matter is the constitutional review of Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018, regarding the non-enforcement of Decision A02 158/07 of the IOBK, of 25 February 2008, by the Municipality of Gjakova.

4. The Applicant alleges that the challenged decision of the Court of Appeals, regarding the non-enforcement of abovementioned Decision of the IOBK by the Municipality of Gjakova, violates his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 49 [Right to Work and Exercise Profession] and 54 [Judicial Protection of Rights], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Articles 6 (Right to a fair trial] and 13 [Right to an effective remedy], of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 17 December 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 December 2018, the President of the Court appointed Judge Bekim Sejdiu, as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani and Safet Hoxha (members).

8. On 27 February 2019, the Court notified the Applicant about the registration of the Referral and a copy of the Referral was sent to the Court of Appeals.

9. On 25 June 2019, the Court requested the complete case file from the Basic Court in Gjakova.

10. On 5 July 2019, the Basic Court in Gjakova submitted to the Court the case file, which contained only some of the court decisions rendered by the regular courts on the case in question.

11. On 27 November 2019, the Review Panel considered the report of the Judge Rapporteur and decided that the Referral should be reviewed at a later date, after receiving additional documents and clarifications from the Municipality of Gjakova.

12. On 5 December 2019, the Court requested the Municipality of Gjakova to notify it if any disciplinary proceedings was conducted against the Applicant, taking into account Decision A 02 158/07 of the IOBK, of 25 February 2008.

13. On 13 December 2019, the Municipality of Gjakova submitted a summary of various documents related to the case, as well as its comments regarding the allegations of the Applicant.

14. On 11 March 2020 and 22 April 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the admissibility of the Referral.

15. On 22 April 2020, the Court unanimously voted and decided that: (i) the Referral is admissible; and, (ii) the non-enforcement of IOBK Decision A 02 158/2005 of 25 February 2008, which was upheld in the enforcement proceeding by the Court of Appeals, as a last instance, by Decisions Ac. No. 1459/15 and Ac. No. 516/16, of 26 October 2015, namely 4 December 2017, caused violation of Articles 31, 32 and 54 of the Constitution, in conjunction with Articles 6 and 13 of the ECHR.

Summary of facts

16. The Applicant submits for the third time to the Constitutional Court the Referral for non-enforcement of the IOBK Decision, of 25 February 2008. In the first two Referrals, the Court rendered two resolutions on inadmissibility, namely Resolution No. KI57/09, of 14 December 2010 and Resolution No. KI216/13, of 23 January 2014.

17. In Resolution No. KI57/09, the Court found that the Applicant's Referral was premature, because the Municipality of Gjakova appealed to the District Court in Peja and that the case had not yet been resolved by a final decision. Consequently, the Court rejected the Referral No. KI57/09 as inadmissible, due to non-exhaustion of all legal remedies (in accordance with Article 113.7 of the Constitution).

18. In Resolution No. KI216/13, the Court declared the Applicant's Referral as manifestly ill-founded, finding that the IOBK Decision ordered the Municipality of Gjakova to conduct disciplinary proceedings against the Applicant and not to reinstate him to the job position.

19. The Court considers that the Referral under consideration is a new Referral, taking into account that several proceedings have been conducted and the court decisions have been taken, regarding the case in question, following the issuance of both of its resolutions. (KI57/09 and KI 216/13).

20. Therefore, the Court will specifically assess all actions and procedures that have been conducted from 2014 and further, taking into account that the procedures that took place before 2014 were the subject of review in two abovementioned resolutions of the Constitutional Court.

21. In this regard, the Court notes that the regular courts have conducted in parallel several groups of the court proceedings, of a contested, administrative and enforcement nature. These procedures have been conducted in relation to each other, from 2003 to 2018 and as such have been presented chronologically below (with special emphasis on the procedures conducted since 2014).

PROCEEDINGS CONDUCTED BEFORE 2014

A. Administrative and contested procedure

22. From the documents included in the Referral it follows that the Applicant was employed in the Firefighters Unit in the Municipality of Gjakova, as a Head of Fire Prevention and Investigation.

23. On 19 August 2003, the Chief Executive of the Municipality of Gjakova rendered Decision 12. No. 01-139, for "temporary suspension" of the Applicant from his working place, starting from 20 August 2003 until the completion of the procedure for determination of his disciplinary responsibility. According to this decision, during the whole time of the suspension, the Applicant would be suspended ½ (half) of his monthly income.

24. On 20 August 2003, the Applicant filed a complaint with the Municipal Assembly of Gjakova, "to the Chief Executive Officer". From the case file it results that the Disciplinary Commission of the Municipality of Gjakova has never decided regarding the complaint of

the Applicant. Also, the Applicant had never received any decision from the Municipality of Gjakova regarding his complaint.

25. On an unspecified date, the Applicant filed a statement of claim with the Municipal Court in Gjakova, against the abovementioned decision of the Chief Executive Officer of the Municipality of Gjakova.

26. On 17 January, 2005, the Municipal Court in Gjakova, by Judgment C. No. 1357/04, found that the Decision of the Chief Executive Officer of the Municipality of Gjakova was legally invalid because it was not in compliance with Administrative Order No. 2003/2 on the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo and obliged the Municipality of Gjakova to reinstate the Applicant to his working place, as well as to compensate him for the procedural costs in the amount of 446. €, within 8 (eight) days after this judgment becomes final.

27. On an unspecified date, the Municipality of Gjakova filed an appeal against the abovementioned Judgment with the District Court in Peja.

28. On 29 September 2005, the District Court in Peja rendered Judgment Ac. No. 113/05, which modified the abovementioned judgment of the Municipal Court in Gjakova and rejected the Applicant's statement of claim as ungrounded. The District Court reasoned that the Applicant had established a fixed-term employment relationship, starting from 1 January 2003 to 30 June 2003. Consequently, the Applicant's employment relationship was terminated after the expiration of the duration of the employment relationship specified in the contract.

29. On an unspecified date, the Applicant hd filed a revision with the Supreme Court against the abovementioned judgment of the District Court, stating that the disciplinary proceedings had not been conducted.

30. From the case file it is noted that on 25 October 2006, the Supreme Court, by Judgment Rev. No. 10/2006, rejected the Applicant's revision as ungrounded, assessing that it is an irrelevant fact that no disciplinary proceedings have been conducted against the claimant for determination of a serious violation of duties under the employment relationship.

31. While the proceedings were taking place in the Supreme Court, **on 1 December 2005 the Applicant appealed in the IOBK** (the complaint was forwarded through the Ministry of Public Services).

32. On 25 February 2008, the IOBK rendered Decision A02 158/2005, which decided as follows:

> "*I. The complaint A 02 158/2005 of the complainant Agron Vula of 1.12.2005 is APPROVED partially and the case is remanded to the employment authority for review and decision.*
>
> *II. The employment authority the Municipality of Gjakova IS OBLIGED to implement the legal procedure within 15 days from the date of receiving this decision and to approve the decision regarding this administrative issue*".

33. Regarding the proceedings followed for the suspension of the Applicant, the relevant part of the IOBK Decision found: "*This body examining the written evidence presented finds that: The suspension of the abovementioned was done in contradiction with the procedure provided by the Administrative Direction No. 2003/2 regarding the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo […]".*

34. On an unspecified date, the Applicant submitted to the Municipal Court in Gjakova a proposal for repetition of the proceedings, because the legal requirements were not met under Article 421 paragraph 1, items 8 and 9 of the LCP. The Applicant reasoned that the aforementioned decision of the IOBK represents a new fact.

35. The Municipal Court in Gjakova decided to refer the case for the request for repetition of the procedure to the District Court in Peja for adjudication.

36. On 7 April 2009, the District Court in Peja, by Decision C. No. 121/09, decided to: "*The repetition of the procedure completed by final Judgment Ac. No. 113/05 of the District Court in Peja of 29.09.2005 is ALLOWED and Judgment of the District Court in Peja and Judgment Rev. No. 10/2006 of the Supreme Court of Kosovo in Prishtina of 25.10.2006 are QUASHED, and the claim of the claimant in this legal matter is DISMISSED as premature".*

37. On an unspecified date, the Applicant filed a claim against the Municipality of Gjakova, for the payment of personal income.

38. On 23 September 2009, the Municipal Court in Gjakova by Judgment C. No. 555/07, rendered in the repeated procedure according to the Decision of the District Court, approved the Applicant's claim and

obliged the Municipality of Gjakova to pay the Applicant the respective amounts in cash, in the name of the compensation of income.

39. On an unspecified date, the Municipality of Gjakova filed an appeal against the abovementioned Judgment of the Municipal Court in Gjakova.

40. Meanwhile, the case file states that on 18 November, 2009, the Ministry of Local Government Administration (MLGA), in response to a single letter from the Applicant, sent to the president of the Municipality of Gjakova a "Request for implementation of the Decision of the Independent Oversight Board". In this letter (signed by the Minister of MLGA), it was emphasized that the decisions of the IOBK are binding and must be implemented and that the judicial review of the decision in question does not stay its execution.

41. On 22 October 2010, the District Court in Peja, by Judgment Ac. No. 151/10, modified the Judgment of the Municipal Court in Gjakova (C. No. 555/07) and rejected as ungrounded the Applicant's statement of claim to oblige the Municipality of Gjakova to pay him the respective amounts in the name of the compensation of the personal income.

42. From the case file it is noted that Judgment Ac. No. 151/10 of the District Court in Peja, *inter alia*, emphasized that: *"[...] based on the decision of the Independent Oversight Board of Kosovo stated above, it has not been decided on merits regarding the issue of the claimant's employment relationship, because the relevant administrative procedure has not yet been completed in the respondent municipality and there is no decision regarding this issue for the creation of the obligation to compensate the damage, the essential conditions have not been met, because so far it has not been conclusively and convincingly established that the respondent based on the unlawful decision caused damage to the claimant".*

43. On an unspecified date, the Applicant filed a request for revision with the Supreme Court, against the Judgment of the District Court in Peja.

44. On 3 June 2013, the Supreme Court rendered Judgment Rev. No. 22/2011, by which it rejected as ungrounded the revision of the Applicant.

B. Enforcement procedure

45. According to the case file, it follows that on 30 July 2009, the Municipal Court of Gjakova, by Decision E. No. 1268/09, allowed the enforcement of the Decision of the IOBK (of 25 February 2008).

46. On 30 December 2009, the Municipal Court in Gjakova rendered the Decison E. No. 1268/09, approving the objection of the Municipality of Gjakova against the decision of 30 July 2009.

47. In the reasoning of this Decision, the Municipal Court emphasized that the Decision of the IOBK did not present executive title under the Law on the Enforcement Procedure, because it had to do with a procedural obligation of the employing authority, namely the conduct of the disciplinary procedure and had nothing to do with any monetary obligation.

48. From the case file it is noted that against this Decision of the Municipal Court in Gjakova, the Applicant filed an appeal with the District Court.

49. On 22 October 2010, the District Court in Peja rendered Decision Ac. No. 139/10, by which rejected as ungrounded the Applicant's appeal and upheld the Decision of the Municipal Court in Gjakova, of 30 December 2009.

ENFORCEMENT PROCEDURE CONDUCTED FROM 2014

50. The Court notes that following the last decision of the Constitutional Court in this case (Resolution KI 216/13), four groups of enforcement proceedings were conducted.

First group of proceedings

51. It follows from the case file that on an unspecified date, the Applicant submitted to the Basic Court in Gjakova a proposal for enforcement of the IOBK Decision of 25 February 2008. On 19 December 2012, the Basic Court in Gjakova rendered Decision E. No. 1100/12, which allows the enforcement of the IOBK Decision No. A 02-158/2007, obliging the debtor (the Municipality of Gjakova), to act within 7 (seven) days and fulfill the obligation of the final Decision of the Board".

52. On an unspecified date, the Municipality of Gjakova filed an objection against the aforementioned decision of the Basic Court in Gjakova.

53. On 29 October 2014, the Basic Court in Gjakova rendered Judgment E. No. 1100/12, by which it rejected as ungrounded the objection of the

Municipality of Gjakova. The Basic Court reasoned that the debtor's allegation that the IOBK Decision does not constitute an enforceable title is ungrounded. The Basic Court further added that the Constitutional Court, in its case law, as well as the Supreme Court with its principled position, proved that the decisions of the IOBK concerning the reinstatement of the employee to the working place represent an enforcement title for the courts.

54. From the case file it is noted that the Basic Court in Gjakova, acting according to the submission of the authorized representative of the Applicant, on 31 October 2014 rendered Decision (E. No. 1100/12), deciding that: "*The debtor, the Municipality of Gjakova, IS OBLIGED that within 7 days from the date of receipt of this Decision, to implement the decision of the Independent Oversight Board of Kosovo, A. 02 158/2005 of 25.02.2008, at the request of the creditor Agron Vula from Gjakova, allowed by the decision of this Court of 19.12.2012".*

55. On 2 February 2015, the Municipality of Gjakova filed a proposal seeking a return to his previous situation and to be allowed to file an appeal against the Decision of the Basic Court of 29 October 2014. The Municipality of Gjakova reasoned that on 25 March 2104 suspended from work the Municipal Public Attorney, and in his absence, authorized a company of lawyers based in Prishtina to take all actions in all disputes. The law firm did not take the actions for which it was authorized, because in this case they were also authorized by the creditor (the Applicant).

56. On 27 February 2015, the Basic Court in Gjakova rendered Decision E. No. 1100/12 and dismissed the proposal of the debtor, the Municipality of Gjakova, by which it requested that it be allowed to file an appeal against the Decision E. No. 1100/12 of that court of 29 October 2014 and 31 October 2014.

57. Regarding the non-permission of return to the previous situation, the Basic Court in Gjakova reasoned that: *"According to the provision of Article 130.2 of this Law, it is foreseen that the proposal must be submitted within 7 days (subjective deadline), from the date when the cause of inaction ceased, while, according to Article 130. 3 of the LCP, it is foreseen that after 60 days pass, from the date of inaction, the return to the previous situation may (not) be required (objective deadline). The very fact that the public advocacy in Gjakova, with the submission of 17.12.2014 informed the Court that the enforcement procedure of the enforcement title, thus the Decision of the Independent Oversight Board A 02 158/2007 of 25.02.2008, is in the*

enfrcement phase, so that the Public Advocacy has requested the personnel office of the Municipal Assembly of Gjakova to continue the implementation procedure at the request of the creditor, shows that the debtor was aware of the course of the procedure but within the deadlines provided by Article 130.1 and 2 of the LCP has not submitted a proposal for return to the previous situation [...].”

58. On an unspecified date, the Municipality of Gjakova filed an appeal with the Court of Appeals, alleging the existence of violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, as well as erroneous application of the substantive law, with the proposal to annul the challenged decision and to allow the return to the previous situation.

59. On 26 October 2015, the Court of Appeals rendered Decision Ac. No. 1459/15, deciding that: “*The appeal of the authorized representative of the debtor Municipality of Gjakova is REJECTED as ungrounded, while the Decision of the Basic Court in Gjakova - General Department-Civil Division, E. No. 1100/12 of 27.02.2015, and Decision E. No. 1100/12 of 31.10.2014 are UPHELD*”.

60. The Court of Appeals explained that the debtor (the Municipality of Gjakova) lost the subjective and objective deadline for returning to the previous situation and that for that reason the Basic Court in Gjakova rejected the proposal for return to the previous situation.

61. The relevant part of the abovementioned Decision of the Court of Appeals determined as follows: “ *[...] according to the provision of Article 112 of the LCP, the rejection and non-receipt of the submission is considered as legally performed communication, that in the present case the decision on the rejection of the debtor's objection is considered as regular receipt and that from the date of refusal of the receipt of the decision until the date when the proposal for return to the previous situation has been submitted, have passed 94 days, which means that the proposal for return to the previous situation has been exercised in the court after the deadline [...]*”.

Second group of proceedings

62. On an unspecified date, the Applicant submitted to the Basic Court in Gjakova a proposal for the enforcement of the IOBK Decision No. A 02 158/2005, of 25 February 2008, against the debtor (Municipality of Gjakova).

63. On 22 December 2016, the Basic Court in Gjakova by Decision E. No. 1268/09 dismissed the Applicant's request. The Basic Court in Gjakova reasoned that: *"[...] after analyzing the request for the continuation of the procedure, it has found that such a request at this stage of the procedure, namely when the case is completed after the court by Decision E. no. 1268/09 has repealed the decision by which the proposal for enforcement of the creditor Agron Vula was allowed, which decision has become final according to the Decision Ac. No. 139/10 of the District Court in Peja, of 22.10.2010 [...] In accordance with Article 64 of the LEP, which provides, inter alia, that "the postponed enforcement may resume upon request of the party that requested postponement before the expiration of the period", so in the present case the enforcement procedure has not been postponed according to the aforementioned articles, but the decision by which the enforcement was allowed has been repealed, therefore, as a result in this enforcement case the execution cannot be continued as the case has been completed by a final decision".*

64. On an unspecified date, the Applicant appealed to the Court of Appeals against the decision of the Basic Court in Gjakova, alleging essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation, and erroneous application of substantive law.

65. On 28 August 2017, the Court of Appeals, by Decision CA. No. 380/2017, rejected as ungrounded the appeal of the Applicant and upheld the Decision of the Basic Court in Gjakova (of 22 December 2016). The Court of Appeals explained that the Decision of the Municipal Court in Gjakova, E. No. 1268/09, of 30 July 2009, was annulled and that the annulment of that decision was upheld and became final by Decision Ac. No. 139/2010of the District Court in Peja, of 22 October 2010.

66. Regarding the nature and non-enforcement of the IOBK Decision, the Court of Appeals explained: "*The decision of the IOBK deals with two aspects: continuation of the disciplinary procedure initiated by the decision for suspension and payment of compensation in ½ of monthly personal income [...] The court of second instance considers that by the decision of the IOBK dated 25.02.2008, with no. A 02 158/2007, it has not been decided on merits, but the case has been remanded to the employer for repeated proceeding for decision making, so such a decision is not suitable for enforcement, because it does not specify the object of enforcement, the amount and time of fulfillment of the obligation, as provided for in Article 27 of the LEP [...] As the employer authority of the Municipality of Gjakova did not*

act according to the decision of the IOBK, to issue the relevant decision in administrative procedure, the creditor had the opportunity under the conditions provided in paragraph 3 of Article 29 of the Law on Administrative Conflict, No.03/L-202, to address a special request to the IOBK, namely in the requirements provided by this legal provision to start the administrative conflict".

Third group of proceedings

67. On an unspecified date, the Municipality of Gjakova filed an appeal with the Court of Appeals for annulment of Decision E. No. 1100/12 of the Basic Court in Gjakova, which allowed the enforcement of the IOBK Decision No. A 02 158/2007, of 25 February 2008. The Municipality of Gjakova alleged that the case was adjudicated by a final decision Ac. no. 139/10 of the District Court in Peja, of 22 October 2010.

68. On 4 December 2017, the Court of Appeals rendered Judgment Ac. No. 516/16, by which the Municipality of Gjakova rejected as ungrounded the appeal of the debtor and upheld Decision E. No. 1100/12 of the Basic Court in Gjakova. The Court of Appeals reasoned that the allegations of the debtor are ungrounded because the Decision of the Basic Court in Gjakova allowed the enforcement of Decision No. A 02 158/2007 of the IOBK, of 25 February 2008. The Court of Appeals added that the decision was final and enforceable.

Fourth group of proceedings

69. Following the aforementioned Decision of the Court of Appeals (of 26 October 2015), the Applicant submitted to the Basic Court in Gjakova a proposal to allow the enforcement under the IOBK Decision (of 25 of February 2008).

70. On 19 January 2016, the Basic Court in Gjakova, by Decision E. No. 1100/12, decided that: *"The proposal for allowing the enforcement of the creditor Agron Vula, from Gjakova, against the debtor, the Municipality of Gjakova, is DISMISSED, due to existence of the litispendence".*

71. The Basic Court in Gjakova reasoned: *"The court, examining at the case file, and then looking at the evidence of the cases ex officio, noticed that the same creditor against the same debtor for the same object of enforcement previously submitted the same proposal on 30.07.2009. Finding that for the same enforcement case in this court are conducted proceedings against the same parties, with the same*

object of enforcement, based on the same enforcement document, namely Decision No. A 02 158/2005 of the Independent Oversight Board of Kosovo, of 25.02.2008. The case in question bears the number of the Court E. No. 1268/09 and the enforcement was allowed on 30.07.2009".

72. Meanwhile, on an unspecified date, the Applicant filed an appeal with the Court of Appeals against Decision E. No. 1100/12 of the Basic Court of Gjakova, of 19 January 2016, which rejected the proposal to allow the enforcement of the decision of the IOBK due to the existence of litispendence.

73. On 18 September 2018, the Court of Appeals, by Decision Ac. No. 227/18, rejected as ungrounded the appeal of the Applicant and upheld Decision E. No. 1100/12 of the Basic Court in Gjakova, of 19 January 2016. The Court of Appeals reasoned, *inter alia*, that pursuant to Article 17 of the LEP, in conjunction with Articles 262.3 and 262.4 of the LCP, it is provided that: "*At the time of the existence of the litispendence for the same statement of claim, no new trial may be initiated between the same parties. If, however, such a thing is done, the court rejects the lawsuit*".

74. On 30 October 2018, the Applicant submitted a proposal to the Office of the Chief State Prosecutor to initiate a request for protection of legality, against Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018.

75. On 16 November 2018, the Office of the Chief State Prosecutor notified the Applicant that his request was not approved, because there was insufficient legal basis for filing a request for protection of legality.

Applicant's allegations

76. The Applicant alleges that the non-enforcement of the IOBK Decision, No. A 02 158/07, of 25 February 2008, by the debtor Municipality of Gjakova, violates his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 49 [Right to Work and Exercise Profession] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Articles 6 [Right to a fair trial] and 13 [Right to an effective remedy] of the ECHR.

77. The Applicant alleges that decisions E. No. 1100/12 of the Basic Court in Gjakova, of 19 December 2012 and of 29 October 2014, upheld that Decision A 02 158/07 of the IOBK, of 25 February 2008, is "final and enforceable".

78. The Applicant alleges that the Decision of the IOBK and of the courts grants him the right to reinstatement to work: "*...I have acquired the right to return to my previous job, because I was temporarily suspended from my job unlawfully, and for this I am still treated as an active worker of the respondent and which is substantiated by the Board decisions and court decisions [...] substantiated by Decision A 02 158/2007 of the Independent Oversight Board of the Republic of Kosovo in Prishtina of 25.02.2008 because by this decision I am treated as an active worker of the Municipal Assembly of Gjakova [...]*".

79. The Applicant alleges that Decision Ac. No. 1459/15 of the Court of Appeals, of 26 October 2015, rejected the objection of the debtor the Municipality of Gjakova and upheld the decisions of the Basic Court in Gjakova, E. No. 1100/12, of 19 December 2012 and 29 October 2014. According to the Applicant, the aforementioned decisions of the Court of Appeals and the Basic Court in Gjakova have established that Decision A 02 158/07 of the IOBK, of 25 February 2008, is "final and enforceable".

80. The Applicant alleges that the fourth decision of the Court of Appeals, Ac. No. 227/18, of 18 September 2018, annulled the decision of the IOBK, which had previously been upheld by the decisions of the Basic Court in Gjakova, E. No. 1100/12, of 19 December 2012 and of 29 October 2014 and the Decision of the Court of Appeals, Ac. No. 1459/15, of 26 October 2015.

81. The Applicant, in support of his allegations, refers to the case law of the European Court of Human Rights, namely case *Brumarescu v. Romania* (case no. 28324/95, ECtHR, Judgment of 28 October 1999) and the case law of the Constitutional Court of Kosovo, namely case No. KI04/12 (Applicant *Esat Kelmendi*, Judgment of 20 July 2014) and case No. KI112/12 (Applicant *Adem Meta*, Judgment of 5 July 2013). According to the Applicant, the abovementioned cases are important for his case because "*a similar situation has arisen that the courts have not implemented the administrative decisions*".

82. Finally, the Applicant requests the Court: (i) to declare the Referral admissible; (ii) to find that there has been a violation of Articles 31, 32, 49 and 54 of the Constitution, in conjunction with Articles 6 and 13 of the ECHR and Article 13 of Protocol No. 11 of the ECHR; (iii) to declare invalid Decision Ac. No. 227/18 of the Court of Appeals, of 18 September 2018, which "violated Article 54 of the Constitution and Article 13 of the ECHR"; and, (iv) to remand Decision Ac. No. 227/18

of the Court of Appeals, of 18 September 2018, "*for reconsideration in accordance with the judgment of this Court, pursuant to Rule 74 (1) of the Rules of Procedure, also to take into account that the Decision of the Independent Oversight Board for Civil Servants of Kosovo in Prishtina, must be enforced*".

Reply of the Municipality of Gjakova

83. In its response requested by the Court, the Municipality of Gjakova stated as follows: (i) no disciplinary proceedings have been conducted against the Applicant; (ii) as the Applicant had a fixed-term contract (from 01.01.2003 to 30.06.2003), the Municipality did not have a legal basis to conduct the procedure, because the disciplinary procedure cannot be conducted against the employees to whom the "employment relationship" was terminated; (iii) the Applicant was invited by the Commander of the Fire Brigade to report for work at the fire station but he did not respond to the invitation; and, that (iv) the Applicant has not exhausted all possibilities in administrative proceedings against the administrative silence guaranteed by law.

84. Regarding the exhaustion of all possibilities in the administrative procedure, the Municipality of Gjakova alleges that: "*The Municipality of Gjakova was obliged to act according to the law, always based on its evidence and competencies, so that the clarifications confirmed that the employment body-the Municipality has not conducted the disciplinary proceedings as required by the Independent Board by Decision A 02 158/2005, due to the situation created (termination of the employment relationship), according to the case file Agron Vula was obliged to act against the silence of the administration (for not implementing the Decision of the Independent Board), and that such a fact is proved that Agron Vula has never exercised-acted according to the Law on Administrative Conflict – administrative silence of the municipal body, he has not exhausted all his possibilities in the administrative procedure guaranteed by law, but he has continuously acted with judicial, enforcement procedures without exhausting all the procedures-remedies as provided by the administrative procedure, therefore it follows that he has lost all disputes in all judicial instances*".

85. The Municipality also points out that the Applicant "*has continuously filed various complaints whenever the local government changes, but this issue has nothing to do with the will of the President of the Municipality or the Municipal Public Advocate, as the Applicant claims*".

Relevant legal provisions

UNMIK REGULATION FOR KOSOVO CIVIL SERVICE, No. 2001/36

Section 11
Appeals

11.3 Where the Board is satisfied that the challenged decision breached the principles set out in section 2.1 of the present regulation, it shall order an appropriate remedy by written decision and order directed to the Permanent Secretary or chief executive officer of the employing authority concerned, who shall be responsible for effecting the employing authority's compliance with the order.
11.4 Where the employing authority concerned does not comply with the Board's decision and order, the Board shall report the matter to the Prime Minister and the Special Representative of the Secretary-General.

ADMINISTRATIVE DIRECTION NO. 2003/2 IMPLEMENTING UNMIK REGULATION NO. 2001/36 ON THE KOSOVO CIVIL SERVICE

Article 31
Disciplinary proceedings

31.5 In cases of serious violations, the civil servant may be suspended for payment until investigations and/or disciplinary proceedings are in progress. The payment suspension order is made only by the staff leader of the employment authority.

Law NO.03/L -192 ON INDEPENDENT OVERSIGHT BOARD FOR CIVIL SERVICE OF KOSOVO

Article 12
Appeals

4. Where the Board is satisfied that through challenged decision there are breached the principles or rules set out in Civil Service of the Republic of Kosovo, it shall issue a written decision directed to the senior managing officer or the chief executive officer of the

respective employing authority, who shall be responsible for implementation of Board's decision.

Article 13
Decision of the Board

Decision of the Board shall represent a final administrative decision and shall be executed by the senior managing officer or the person responsible at the institution issuing the original decision against the party. Execution shall be effected within fifteen (15) days from the day of receipt of the decision..

Article 15
Procedure in case of non-implementation of the Board's decision

1. Non-implementation of the Board's decision by the person responsible at the institution shall represent a serious breach of work related duties as provided in Law on Civil Service in the Republic of Kosovo.

Admissibility of the Referral

86. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, foreseen by the Law and further specified by the Rules of Procedure.

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

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

[...]

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

88. The Court notes that the Applicant claims to be a victim of a constitutional violation, due to non-execution of the decision of a public authority, namely the IOBK. Therefore, he is an authorized party.

89. The Court also notes that the Applicant has exhausted all legal remedies provided by law and in the absence of any other effective remedy available to protect his rights, he addressed the Constitutional Court.

90. The Court also refers to Article 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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...".

91. The Court notes that the final decision in this proceeding is Decision Ac. No. 227/18 of the Court of Appeals of 18 September 2018, and that the Referral was submitted to the Court on 17 December 2018. It results that the Referral was submitted in accordance with the legal deadline provided by Article 49 of the Law.

92. The Court also considers that the Applicant has accurately indicated what rights, guaranteed by the Constitution and the ECHR, he claims to have been violated to his detriment, due to non-enforcement of the IOBK Decision A 02 158/07, of 25 February 2008.

93. Therefore, the Court concludes that the Applicant is an authorized party; that he has exhausted all legal remedies; that he respected the requirement of submitting the referral within the legal deadline; has accurately clarified the alleged violations of fundamental human rights and freedoms, and has shown what is the challenged specific act of the public authority.

94. Moreover, in light of the allegations of the Referal and their argumentation, the Court considers that the Referral raises serious constitutional issues and their addressing depends on the consideration of the merits of the referral. Also, the referral cannot be considered as manifestly ill-founded, within the meaning of Rule 39 of

the Rules of Procedure, and no other basis has been established to declare it inadmissible.

95. Therefore, the Court declares the Referral admissible for review of its merits.

Merits of the Referral

96. The Court initially notes, once again, that in the Applicant's case it has already rendered two resolutions on inadmissibility, with numbers KI57/09 and KI216/13. In case no. KI57/09, the Court declared inadmissible the Applicant's Referral due to non-exhaustion of legal remedies. Whereas in case No. KI216/13, the Court declared the Applicant's Referral as manifestly ill-founded, finding that the IOBK Decision did not order the Municipality of Gjakova to reinstate the Applicant to the working place, but to conduct disciplinary proceedings against him in accordance with the law on civil servants in force.

97. The Court also reiterates that following the recent decision of the Constitutional Court in this case (Resolution KI 216/13, of 23 January 2014), in the same case four other sets of proceedings were conducted and several court decisions were taken. Those procedures have to do with the (non) enforcement of the IOBK decision and as such are subject to review by the Constitutional Court in this case.

98. Thereforer, in examining the merits of the Referral, the Court notes that the Applicant's Referral raises two basic issues: (i) whether the IOBK decision in the present case is binding and executable; and, (ii) if the non-enforcement of the decision of the IOBK caused a violation of the Applicant's right to fair and impartial trial (Article 31 of the Constitution), in conjunction with the right to legal remedies (Article 32 of the Constitution) and the right to protection of the judicial rights (Article 54 of the Constitution).

(i) Regarding the effect of IOBK decisions

99. Regarding the legal nature of the IOBK decisions, the Court considers it important that it first refers to Article 101 [Civil Service] of the Constitution, which stipulates:

> *"1. The composition of the civil service shall reflect the diversity of the people of Kosovo and take into account internationally recognized principles of gender equality.*
>
> *2. An independent oversight boardfor civil service shall ensure the respect of the rules and principles governing the civil service, and shall itself reflect the diversity of the people of the Republic of Kosovo".*

100. In light of these constitutional provisions, the Court emphasizes its principled position that the IOBK is an independent institution established by the Constitution, in accordance with Article 101.2 of the Constitution. Therefore, all obligations arising from decisions of this institution, regarding the matters that are under its jurisdiction, produce legal effects for other relevant institutions, where the status of employees is regulated by the Law on Civil Service of the Republic of Kosovo. In this regard, the IOBK has the features of a court, namely a tribunal for civil servants, within the meaning of Article 6 of the ECHR.

101. In this regard, the Court refers to the case law of the ECtHR, according to which *"'a 'tribunal' is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (*See, Judgment of 30 November 1987 in the case of *H v. Belgium*, Series A no. 127,p. 34, paragraph 50)";. see also ECtHR case *Belilos v. Switzerland*, Application No. 10328/83), Judgment of 29 April 1988, paragraph 64).

102. In the present case, the Court notes that the IOBK Decision of 25 February 2008 was rendered at a time when the establishment of the IOBK and the enforcement of its decisions were governed by UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo and Administrative Direction No. 2003/2 on the implementation of UNMIK Regulation No. 2001/36 on the Civil Service of Kosovo, which entered into force on 22 December 2001, namely on 25 January 2003 (which had exclusive legislative, executive and judicial powers in Kosovo).

103. In this regard, the Court emphasizes its consistent position that it has maintained in all cases decided by it, which have to do with the decisions of the IOBK, from 2012 onwards. The Court has consistently pointed out that a decision of the IOBK produces legal effects for the parties and, therefore, such a decision is a final decision in administrative and enforceable proceedings. (See decision of the Constitutional Court in cases KI04/12 *Esat Kelmendi*, Judgment of 20 July 2012 and No. KI74/12, *Besa Qirezi*, Judgment of 4 April 2015 and the references cited therein).

104. The Court brings to attention the fact that among the first cases where it was found that the decisions of the IOBK are final and binding for enforcement is the Judgment of the Constitutional Court in case No. KI04/12, of 24 July 2012. In the judgment in question, the Court dealt with the effect of the IOBK decision of 18 March 2011 - which means that after the entry into force of the Law on the IOBK No. 03/L-192, which was later, on 10 August 2018, replaced and repealed by the Law on the IOBK 06/L-048. Both laws in question were approved by the Assembly of the Republic of Kosovo.

105. The Court has consistently reiterated that the relevant constitutional and legal provisions, in addition to the subject matter jurisdiction of the IOBK to resolve labor disputes for civil servants, constitute a legal obligation for the respective institutions to respect and implement the decisions of the IOBK.

106. In this context, the Court also refers to its case law regarding the non-enforcement by the courts of the administrative decisions - including the decisions of the IOBK - which did not provide for an exclusive obligation in cash. (See, *inter alia*, decisions of the Constitutional Court in cases: KI94/13, Applicant *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014; KI112/12, Applicant *Adem Meta*, Judgment of 2 August 2018 and KI04/12, Applicant *Esat Kelmendi* , cited above, Judgment of 24 July 2012). In these cases, the Court concluded that a decision issued by an administrative body established by law produces legal effects for the parties and, consequently, such a decision is final and enforceable administrative decision".

107. In this case, the Court notes that the IOBK Decision is of 25 February 2008. However, the Court also notes that that decision had remained the subject of the court proceedings from 2008 to 2018.

108. In addition, based on the case file available, the Court specifically emphasizes the fact that the IOBK decision was upheld in the enforcement proceedings by the Court of Appeals, as a final instance, by decisions Ac. No. 1459/15 and Ac. No. 516/16, of 26 October 2015, of 4 December 2017. These decisions of the Court of Appeals upheld the decisions of the Basic Court in Gjakova, with the same number, E. No. 1100/12, of 31 October 2014, namely of 27 February 2015, which allowed the enforcement of the IOBK Decision of 25 February 2008.

109. The Court considers that the treatment of the IOBK Decision of 25 February for more than ten years in the court proceedings and, in particular, the confirmation of its binding character by the regular courts, has made that the decision in question does not have the current character but continuous.

110. Therefore, the Court concludes that the IOBK decision in this case was final and binding to be enforceable.

(ii) If there is a violation of the Applicant's right to fair and impartial trial in conjunction with the right to legal effective remedies, and the right to judicial protection of rights

111. The Court recalls that the Applicant alleges violations of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial], 32 [Right to Legal Remedies], 49 [Right to Work and Exercise Profession] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 6 (Right to a fair trial), and Article 13 (Right to an effective remedy) of the ECHR.

112. In light of the facts and allegations of the Referral, the Court considers that its essential aspects relate to the rights of the Applicant to fair and impartial trial, in conjunction with the right to legal effective remedies and the right to judicial protection of rights.

Regarding the right to fair and impartial trial

113. Initially, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which establishes:

> *"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".*

114. In addition, the Court refers to paragraph 1, of Article 6 [Right to a fair trial] of the ECHR, which stipulates:

> *"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".*

115. The Court also refers to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, which stipulates:

> *"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".*

116. The Court reiterates that since it is master of the characterisation to be given to the facts of the case, it does not consider itself bound by the characterisation given by an applicant. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties. In other words, according to the ECtHR case law, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (See, *mutatis mutandis, Talpis v. Italy,* appeal no. 41237/14, ECtHR, Judgment of 18 September 2017, paragraph 77 and the references cited therein).

117. In this background, the Court initially brings to attention (as stated in Resolution KI 216/13), the decision of the IOBK did not stipulate that the Municipality of Gjakova must reinstate the Applicant to his working place. However, the IOBK ordered the Municipality of Gjakova to conduct the disciplinary proceedings against the Applicant in accordance with the law on civil servants.

118. Therefore, the Court wishes to emphasize the fact that the enforcement of the IOBK Decision did not involve the reinstatement of the Applicant to his working place (from where he was suspended), but the completion of disciplinary proceedings against him.

119. Further, based on the case file it possesses, the Court notes that despite repeated efforts by the Applicant that the IOBK decision is enforced,

that decision has never been enforced or repealed. So, more than 10 (ten) years have passed from the issuance of the IOBK Decision (25 February 2008) until the last decision of the Court of Appeals (Decision Ac. No. 227/18, of 18 September 2018).

120. In light of these facts, the Court highlights the main allegation of the Applicant regarding the violation of his right guaranteed by Article 31 of the Constitution and Article 6 of the ECHR. In this regard, the Court refers to its judgment in case no. KI94/13, where he stated that "*the execution of a final and executable decision should be taken as an integral part of the right to a fair trial, as guaranteed by Article 31 of the Constitution and Article 6 of ECHR* (See the Constitutional Court, case No. KI94/13, Applicant*, Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj,* Judgment of 16 April 2014).

121. The Court notes that such a position is based on the case law of the ECtHR, which states that the enforcement of a final decision must be seen as an integral part of the right to a fair trial. Moreover, in the case *Hornsby v. Greece*, the ECtHR highlighted that the enforcement of a final decision is of greater importance within the administrative procedure regarding a dispute, which result is of special importance for the civil rights of the party to the dispute (*Hornsby v. Greece*, No. 18357/91, Judgment of 19 March 1997, paragraphs 40-41). In the case above, the ECtHR found that the Applicants should not have been deprived of the benefit of the enforcement of the final decision, which was taken in their favor.

122. Therefore, the Court emphasizes that the implementation of a final and binding decision, within a reasonable time, is a guaranteed right under Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR.

123. In this regard, the Court notes that the ECtHR in its consolidated case law found that by avoiding for more than 5 (five) years to take the necessary measures to implement a final and binding decision, the state authorities had stripped the provisions of Article 6 of all their beneficial effect (See *Hornsby v. Greece,* paragraph 45).

124. In the present case, the Court considers that the Applicant's dispute with the Municipality of Gjakova was not particularly complicated, as the IOBK had ordered disciplinary proceedings against the Applicant in accordance with applicable law. The decision of the IOBK has remained unimplemented by the Municipality of Gjakova to this date.

125. The Court takes into account the response of the Municipality of Gjakova that, since the duration of the Applicant's employment contract had expired, the disciplinary proceedings could not be conducted against him. However, the Court emphasizes the finding given in the IOBK Decision that the suspension of the Applicant from working place by the Municipality of Gjakova was rendered in violation of the relevant legal provisions in force. Therefore, the effect of the unlawful Decision of the Municipality of Gjakova (of 2003), on the "temporary suspension" of the Applicant from his working place, should be remedied by implementing the IOBK Decision. All the more so when the enforceability of the IOBK Decision was upheld by several decisions of the Basic Court in Gjakova and the Court of Appeals.

126. In connection with this, the Court emphasizes that it would be meaningless if the legal system of the Republic of Kosovo would allow that a final judicial decision to remain ineffective in disfavor of one party. Therefore, non-effectiveness of the procedures and the non-implementation of the decisions produce effects that bring to situations that are inconsistent with the principle of Rule of Law (Article 7 of the Constitution) – a principle that the Kosovo authorities are obliged to respect (see, *mutatis mutandis*, Judgment of the Constitutional Court in case KI04/12).

Regarding the allegations of violation of the right to effective legal remedies and judicial protection of rights

127. The Court takes into account the Applicant's allegations relating to the right to effective legal remedies and judicial protection of rights.

128. Therefore, the Court refers to Articles 32 and 54 of the Constitution, as well as Article 13 of the ECHR.

Article 32 [Right to Legal Remedies]

"*Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law* ".

Article 54 [Judicial Protection of Rights]

"*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

Article 13 of the ECHR [Right to an effective remedy]

> "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

129. The Court initially underlines that each person has the right to use legal remedies against the judicial and administrative decisions, which violate his rights or interests as provided by law. (See, *mutatis mutandis*, *Voytenko v. Ukraine*, No. 18966/02, Judgment of 29 June 2004, paragraphs 46-48).

130. Considering its findings regarding Article 31 of the Constitution, in conjunction with Article 6 (1) of the ECHR, the Court considers that the complaints concerning those articles are "arguable" for the purposes of Articles 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, in conjunction with Article 13 [Right to an effective remedy] of the ECHR (see, *mutatis mutandis, Boyle and Rice v. United Kingdom,* 27 April 1998, paragraph 52).

131. The Court reiterates that Articles 32 and 54 of the Constitution, in conjunction with Article 13 of the ECHR, stipulate that the legal system must make available an effective legal remedy authorizing the competent authority to address the merits of an allegation of violation of the Constitution and the ECHR (see the ECtHR, *Sharxhi and others v. Albania,* Judgment of 11 January 2018, paragraph 81 and the references referred to therein).

132. The ECtHR has in some cases emphasized that the effect of Article 13 is an obligation for states to provide effective legal remedies that enable them to examine the substance of an arguable claim under the Convention and to grant an appropriate relief. (see decisions of the ECtHR: *Kudla v. Poland*, Judgment of 26 October 2000*; Kaya v. Turkey,* Judgment of 19 February 1999). The ECtHR emphasized that Article 13 must be "effective" in law as well as in practice (see, for example, *Ilhan v. Turkey,* Judgment of 27 June 2000). The ECtHR, also, emphasized that "effectiveness of a legal remedy", within the meaning of Article 13 of the ECHR, does not depend on the certainty of a favourable outcome for the applicant (*Kudla v. Poland*).

133. In the present case, the Court notes that, by requesting the enforcement of the IOBK Decision, the Applicant has addressed several times the regular courts and the Constitutional Court. Furthermore, the Court reiterates that, in the enforcement

proceedings, the regular courts (the first and second instance) have rendered several decisions in favor of the Applicant - which allowed the enforcement of the IOBK Decision - and some contradictory decisions.

134. Thus, the Applicant has exhausted all available legal remedies for the enforcement of the IOBK Decision. However, despite his efforts, that Decision has not been implemented, either by the competent bodies of the Municipality of Gjakova or by the competent courts. In fact, the legal remedies used by the Applicant, as well as the court decisions in his favor, have not had any practical effect on his situation.

135. Related to this, the Court refers to the case law of the ECtHR, which in case *Klass v. Germany* stated that "*where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus Article 13 must be interpreted as guaranteeing an effective remedy before a national authority to everyone who claims that his rights and freedoms under the Convention have been violated*" (See *Klass v. Germany*, Judgment of 6 September 1978, paragraph 64).

136. Non-existence of legal remedies or other effective mechanisms for the enforcement of the IOBK Decision (regardless of what the epilogue would be for the Applicant from the enforcement of that Decision), violates the right to effective legal remedies, guaranteed by Article 32 and the right to judicial protection of rights, guaranteed by Article 54 of the Constitution, in conjunction with the right to an effective remedy, guaranteed by Article 13 of the ECHR.

137. This position is in line with the practice of the Court, which in this case KI 94/13 stated that "*the inexistence of legal remedies or of other effective mechanisms for the execution of the Decision of [Municipal] Directorate affects the right to an effective legal remedy, as guaranteed by Articles 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights] of the Constitution, and Article 13 of the ECHR. According to these provisions, each person has the right to use legal remedies against the judicial and administrative decisions, which violate his rights or interests as provided by law"* (see decision of the Constitutional Court: KI94/13, Applicants *Avni Doli, Mustafa Doli, Zija Doli and Xhemile Osmanaj*, Judgment of 16 April 2014, paragraph 90; see *mutatis mutandis, Voytenko v. Ukraine*, No. 18966/02, Judgment of 29 June 2004, paragraphs 46-48).

138. In this regard, the Court emphasizes that it is not its duty to determine what would be the most appropriate way for the regular courts and the Municipality of Gjakova, within the competencies they have, to find effective mechanisms to fulfill completely the obligations established by law and the Constitution.

139. The burden of the enforcement of the final and binding decision of the IOBK falls on the regular courts and the Municipality of Gjakova. The lack of enforcement mechanisms of this public authority should in no way be a reason for denying the right of the Applicant to enforce the final and binding decision in his favor.

140. Therefore, the Court considers that it is intolerable that the Applicant - despite his efforts for more than ten years - has not enjoyed the rights recognized to him by the IOBK decision.

141. The Court also emphasizes that it is unacceptable that the Applicant's Referral has not been dealt with due seriousness and efficiency for more than ten years, by the regular courts and the Municipality of Gjakova. Furthermore, the decisions of the regular courts regarding the enforcement of the IOBK Decision are contradictory and have placed a disproportionate burden on the Applicant, for example, requiring him to use one remedy instead of the other. In this regard, the Court notes the reasoning of the Court of Appeals (Decision CA. No. 380/2017 of 28 August 2017), which, *inter alia*, stated that: "*As the employer authority the Municipality of Gjakova did not act according to the decision of the IOBK, to issue the relevant decision in administrative procedure, the creditor had the opportunity under the conditions provided in paragraph 3 of Article 29 of the Law on Administrative Conflict, No. 03/L-202, to address a special request to the IOBK, namely under the requirements provided by this legal provision to initiate the administrative conflict".*

142. The Court refers to the case law of the ECtHR, which makes it clear that if one or more potentially effective legal remedies are available, the Applicant is obliged to use only one of them. (*Aquilina v. Malta*, [GC], paragraph 39). In fact, when a legal remedy has been used, the use of another legal remedy that essentially has the same purpose is not required. (*Micallef v. Malta* [GC], paragraph 58). It is the right of the Applicant to choose the remedy that is most appropriate in his case (*O'Keeffe v. Ireland* [DHM], paragraphs 110-11). Thus, if domestic law offers a number of legal remedies in parallel in different spheres of law, and Applicant who has sought a remedy of an alleged violation of the Constitution and the ECHR, through one of those remedies, should

not necessarily use other remedies that essentially have the same objective (*Jasinskis v. Latvia*, paragraphs 50 and 53-54).

143. The Court also considers it necessary to emphasize to the Applicant cannot be blamed for the delay of the proceedings and non-enforcement of the decision of the IOBK, because he only used the legal remedies and pursued the court ways, in accordance with the law in force (see, *mutatis mutandis*, *Erkner and Hofauer v. Austria,* paragraph 68).

144. Therefore, the Court concludes that the inability to take further legal action to enforce the IOBK Decision also constitutes a violation of Articles 32 and 54 of the Constitution and Article 13 of the ECHR.

145. Finally, the Court considers that it should not deal further with allegations of violations of Article 49 of the Constitution, because such allegations and requests are consumed by the Court's finding of violations of Articles 31 and 32 and 54 of the Constitution in conjunction with Article 6.1 of the ECHR and Article 13 of the ECHR (see, *mutatis mutandis*, case No. KI65/15, Applicant*, Tatjana Davila, Ljubiša Marić, Zorica Kršenković, Zlatoj Jevtić,* Judgment of the Constitutional Court of the Republic of Kosovo, of 14 September 2016). Furthermore, the Court reiterates its finding that the IOBK Decision does not recognize the Applicant the right to reinstate to his working place, but obliges the Municipality of Gjakova (as a public authority) to apply disciplinary proceedings against the Applicant.

Conclusion

146. The Constitutional Court emphasizes its constitutional obligation to ensure that the proceedings before the public authorities, especially before the courts, respect the fundamental human rights guaranteed by the Constitution.

147. In the present case, the Court finds that the non-enforcement of the IOBK Decision by the Municipality of Gjakova, especially after some decisions of the regular courts that allowed its enforcement, have caused violation of Articles 31, 32 and 54 of the Constitution, as well as Articles 6 and 13 of the ECHR.

148. The Court reiterates that the IOBK Decision did not stipulate that the debtor, namely the Municipality of Gjakova, had to reinstate the Applicant to his working place. The IOBK ordered the Municipality of Gjakova to conduct disciplinary proceedings against the Applicant in accordance with the legal provisions in force for civil servants.

Therefore, the Court did not address the issue of whether or not the Applicant should be reinstated to his working place.

149. In this regard, the Court emphasizes that, based on the consolidated case law of the ECtHR, whenever a violation of the right to a fair trial from Article 6 of the ECHR is found, the Applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the ECHR requirements (see case of the ECtHR, *Kingsley v. United Kingdom*, Judgment of 28 May 2002, paragraph 40 and the references cited therein).

150. However, the Court considers that the case under consideration is special because, although the non-enforcement of the IOBK Decision constitutes a violation of the procedural guarantees provided by the Constitution and the ECHR, its implementation may be impossible for objective reasons. Thus, it may be objectively impossible to conduct disciplinary proceedings, as required by the IOBK Decision of 2008, especially because the Applicant had a fixed-term employment relationship.

151. Therefore, taking into account the special circumstances of the case under consideration, the Court is obliged to be satisfied with the finding of a violation of Articles 31, 32 and 54 of the Constitution, in conjunction with Article 6.1 of the ECHR and Article 13 of the ECHR, instructing the Applicant in civil proceedings, before the regular courts, for eventual compensation of damage (see the case law of regular courts in the case of Gëzim Kastrati and Makfire Kastrati, Judgment C. No. 1209/13 of the Basic Court in Prizren, of 03.07.2019).

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 59 (1) and 66 of the Rules of Procedure, on 22 April 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that the non-enforcement of the IOBK Decision A 02 158/2005, of 25 February 2008, caused violation of Articles 31, 32 and 54 of the Constitution, in conjunction with Articles 6 and 13 of the ECHR;

III. TO INSTRUCT the Applicant in civil procedure for eventual compensation of damage;

IV. TO ORDER that this Judgment be notified to the parties and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

V. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI123/19, Applicant "Suva Rechtsabteilung", Constitutional review of Judgment Ae. No. 146/17 of the Court of Appeals of Kosovo, of 26 February 2019, Judgment adopted on 13 May 2020 and published on 18 June 2020

Keywords: *individual referral, legal person, violation of constitutional rights, Article 31 – the right to fair and impartial trial, the right to a reasoned judicial decision, the principle of legal certainty, divergence in the case law of regular courts*

As a result of an accident caused by the insured person of the Kosovo Insurance Bureau in 2012, the Applicant's insured person M.B. had sustained injuries. In 2013, the Applicant's insured person had received medical treatment and compensation due to incapacity to work for an indefinite period in the Swiss Confederation, which had been paid by the Applicant. On 13 January 2015, the Applicant, on the basis of his right to subrogation, filed a claim for reimbursement with the Basic Court in Prishtina in the amount of 8,918.61 Euros. On 25 January 2015, the KIB and the Applicant's insured person had reached an extrajudicial agreement [certified in the Basic Court in Peja, C. No. 185/13, 25 January 2015], where the latter was reimbursed by the KIB in the amount of 1,000 Euros. On 14 April 2017, the Basic Court by Judgment [II.EK. no.8/15] rejected the claimant's statement of claim in its entirety. The Basic Court found that following the conclusion of the extrajudicial agreement, the Applicant's insured person had exhausted his right to claim compensation of damages. On 26 February 2019, the Court of Appeals, [Judgment Ae.No.146/17] rejected as unfounded the appeal of the Applicant and confirmed the Judgment of the Basic Court.

The Applicant alleged that the Judgment [Ae. no. 146/17] of the Court of Appeals of Kosovo, of 26 February 2019 has been rendered in violation of its rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to lack of the reasoning of the court decision , and in breach of the principle of legal certainty, because according to it, the Supreme Court when issuing this Judgment had acted contrary to its case law in at least six (6) cases which he had submitted to the Court in support of his arguments.

When examining the merits of the case, the Court elaborated on (i) the case law on the right to a reasoned court decision and (ii) the basic principles relating to the consistency of case law, as well as the relevant criteria on the basis of which the European Court of Justice Human Rights assesses whether the lack of consistency, namely the divergence in the case law is a violation of Article 6 of the ECHR, respectively the three basic criteria to determine whether an alleged divergence constitutes a violation of Article 6 of the ECHR, including if: (a) divergences in the case law are "profound and long-

standing"; (b) domestic law defines mechanisms capable of resolving such divergences, and (c) if those mechanisms have been enforced and to what effect.

I. The Court, having applied the above-mentioned principles and criteria, with regard to the first claim of the Applicant concerning the lack of a reasoned court decision, found that in the issuance of the Judgment [Ae. no. 146/17] of 26 February 2019 of the Court of Appeals, the Court of Appeals failed to reason the Applicant's substantive allegations, and consequently its guaranteed right under Article 31 of the Constitution in respect of paragraph 1 of Article 6 of the ECHR has been violated.

II. As for the second allegation of the Applicant concerning the principle of legal certainty as a result of the conflicting decisions of the case law of the Court of Appeals and the Supreme Court, the Court after having elaborated on the basic principles and criteria set by the Court and the ECtHR in this respect, and applied them in the circumstances of the present case, found that neither the number of alleged contradictory judgments nor the time period within which these judgments were issued create sufficient grounds to justify the allegation for a violation of the principle of certainty, as a result of contradictory decisions.

JUDGMENT

in

Case No. KI123/19

Applicant

"SUVA Rechtsabteilung"

Constitutional review of Judgment Ae.no.146/17, of the Court of Appeals of Kosovo, of 26 February 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 the insurance company *"Suva Rechtsabteilung"* based in Lucerne, Switzerland, represented by ICS Assistance LLC, through Visar Morina and Besnik Mr. Nikqi, attorney at law from Prishtina (hereinafter: the Applicant).

Challenged Decision

2. The Applicant disputes the constitutionality of the Judgment Ae.no.146/17 of the Court of Appeals of Kosovo, of 26 February 2019 (hereinafter: the Court of Appeals). The challenged decision was received by the Applicant on 23 April 2019.

Subject Matter

3. The subject matter of the Referral is the constitutional review of the aforementioned Judgment of the Court of Appeals, which as alleged

by the Applicant has violated his right 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 on Human Rights (hereinafter: the ECHR).

Legal Basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, on Articles 22 [Processing Referral] and 47 [Individual Request] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Court (hereinafter: the Rules of Procedure)).

Proceedings before the Constitutional Court

5. On 26 July 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 August 2019, the President of the Court appointed Judge Safet Hoxha as Judge Rapporteur and the Review Panel, composed of judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and RemzijeIstrefi-Peci (members).

7. On 9 September 2019 the Court notified the Applicant about the registration of the Referral and sent a copy thereof to the Court of Appeals.

8. On 6 December 2019, the Court notified the Kosovo Insurance Bureau about registration of the Referral.

9. On 7 February 2020, the Court requested from the Basic Court in Peja to submit a copy of the extrajudicial agreement of 25 January 2015.

10. On 18 February 2020, the Basic Court in Peja submitted the requested copy of the extrajudicial agreement.

11. On 13 May 2020 the Review Panel considered the report of the Judge rapporteur and unanimously made a recommendation to the Court to declare the Referral KI123 / 19 inadmissible for review and to assess its merits.

12. On the same day, the Court by a majority of votes found that the Judgment Ae. no. 146/17 of the Court of Appeals, of 26 February 2019, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

13. On 19 January 2012, M.B., the Applicant's insured person (hereinafter: the Applicant's insured person), had suffered injuries in a traffic accident caused by B.A. For the fact that B.A. had no insurance for the damage caused to third parties under the Law on Road Traffic Safety, the latter was represented by the Kosovo Insurance Bureau (hereinafter: the KIB).

14. In 2013, the applicant's insured had received medical treatment and compensation due to incapacity to work for an indefinite period in the Swiss Confederation, which had been paid by the Applicant.

15. On 13 January 2015, the Applicant filed a claim with in the Basic Court in Prishtina, Department for Commercial Matters (hereinafter: the Basic Court) seeking compensation in the amount of 8,918.61 Euros, in the late payment(interest) rate of 12%, starting from 24 December 2012 until the final payment. KIB had submitted a response to the claim, whereby it had stated that it had entered into an extrajudicial agreement with the Applicant's insured person, for all forms of damage, in which case it had also carried out the payment to the Applicant's insured person.

16. On 25 January 2015, the KIB and the Applicant's insured person reached an extrajudicial agreement [certified at the Basic Court in Peja, C. No. 185/13, on 25 January 2015], where the latter was compensated by KIB in the amount of 1,000 Euros.

17. On the basis of the Court settlement:

> *"The Respondent Kosovo Insurance Bureau based in Prishtina was OBLIGED [...] to pay to the claimant [the insured M.B.], [...] for all categories of damage, be it material or non-material, relating to the accident that occurred on 19.01.2012 [...] the amount of 1000 Euros [...]. "*
>
> *[...]*
> *"Since the court considers that we are dealing with a request which the litigants can freely have in disposal and that their*

request is not contrary to the provisions of Article 3, para.3 of the LCP, the court after this in support of the provision of Article 412 and 414 of the LCP, renders:

DECISION

APPROVING the Court settlement reached in today's session between the litigants' authorized persons and the same represents a valid enforcement title."

[...]

18. On 14 April 2017, the Basic Court by Judgment [II.EK. no. 8/15] rejected the claimant's statement of claim in its entirety.

19. The Basic Court found that with the extrajudicial agreement concluded on 25 January 2015 in the Basic Court in Peja *"[...] a Court settlement was concluded between [the Applicant's insured person] and the respondent [KIB]. Therefore, since this agreement is concluded for all categories of material and non-material damage, it clearly implies that all possible claims arising from the compensation of the damage for which this contract was concluded, as well as the respondent [KIB] within the meaning of Article 940 of the LOR, was obliged to compensate the [Applicant's] insured person for the claimed damage and it is not disputable that following the conclusion of the above mentioned agreement [the KIB] has paid for the claimed damage, as well as the claimant's insured person in the sense of Article 941 of the LOR, based on the fault of the respondent's insured person was entitled to claim compensation directly from the respondent.""*

20. In the end, the Basic Court found that following the conclusion of the extrajudicial agreement, the Applicant's insured person had consumed his right, to claim compensation of damages, while as for the Applicant's allegations regarding the transfer of the right, according to this the Court they are unfounded. Consequently, the Basic Court found that no one can transfer to another person/entity the right which he had previously realised, and consequently this right has ceased to exist.

21. On an unspecified date, the Applicant lodged an appeal with the Court of Appeals against the above-mentioned Judgment of the Basic Court, alleging violations of the provisions of the contested procedure, erroneous and incomplete determination of the factual situation and erroneous application of substantive law, by proposing to have the

challenged Judgment annulled and the case to be remanded for retrial. The KIB submitted a response to the appeal and proposed that the Applicant's appeal be declared unfounded.

22. Initially, the Applicant in his appeal, in relation to the allegation for essential violations of the provisions of contested procedure, had stated that "the challenged judgment is unclear, respectively, there are distinct contradictions in the reasoning of the judgment regarding the content of the evidence on which the decision is based, especially on the decisive facts which concern the active legitimacy of the Applicant and his insured person on the occasion of the resolution of the case which has directly preceded the subrogation proceeding. This makes the decision of this judgment, to be confusing, incomprehensible and contradictory to its reasoning and the evidence administered."

23. Secondly, in relation to the allegation of erroneous determination of the factual situation, the Applicant in his complaint had specified the following:

> *"Since there is no concrete reasoning or reference in the evidence which proves such a thing relating to this position of the court of first instance, for the claimant remains unknow the answer to the following questionss;*
> *What were the requests of the claimant's insured person [M.B.] in the civil dispute C. No. 185/13 which was concluded by a court settlement on 25.02.2015?*
> *If eventually in the civil dispute C. Nr. 185/13 the subject of the statement of claim were the medical expenses and compensation for incapacity ti work, what did they consist of and what were they proved with?*
> *Since the [Applicant's] claims for reimbursement on the basis of the subrogation of the in the current dispute were filed against the respondent on 24.12.2012, respectively they were definitely specified on 12.02.2013, how is it possible that these requests are subject to court settlement dated 25.02.2015?*
> *How is it possible that for the costs of medical treatment and compensation for temporary incapacity for work [...] paid by the [Applicant] in 2012/2013, its insured person [M.B] still had active legitimacy to sign the court settlement on 25.02.2015?"*

24. Based on the above, the Applicant stated that in the present case the Judgment of the Basic Court contains an erroneous determination of the factual situation, which results in the denial of the Applicant's right to subrogation. Consequently, the Applicant addresses the Court of Appeals with a request to remand the case for retrial, where the Basic

Court, in order to prove the issue of the active legitimacy of the Applicant, must reconsider the factual situation regarding the compensation of the costs of medical treatment and payment for the period of incapacity to work of Applicant's insured person. In the following, the Applicant also requests clarification explaining what was the injured party M.B. compendated by the KIB, and if the latter has been notified about the medical expenses and incapacity to work, paid by the Applicant.

25. Thirdly, as regards the allegation of erroneous application of substantive law, the Applicant claimed that the Basic Court in its judgment referred only to Articles 940 and 941 of the Law on Obligational Relationships (hereinafter: the LOR), provisions which according to the Applicant define the obligation of the liability insurer and install the right in "actiodirecta" of the injured party, but this Court has not based upon the relevant provisions referring to the right to subrogation, respectively Articles 301 and 939 of the LOR.

26. Në vijim, parashtruesi i kërkesës pretendon se: *"[...] një raport me karakter juridik detyrimor mes dy palëve mund te ketë efekt juridik jo vetëm "Interpartes" por edhe ndaj palëve të treta çështje kjo, që ne një rast te ngjashëm, ku incidentalisht kishte mbërritur te trajtohej edhe nga Gjykata Supreme e Kosovës."*

27. On 26 February 2019, the Court of Appeals, by Judgment No. 146/17, rejected as unfounded the appeal of the Applicant and confirmed the Judgment of the Basic Court.

28. The Courts of Appeals initially found that the challenged judgment of the Basic Court did not contain substantial violations of the provisions of the contested provisions and that the Basic Court has correctly applied the substantive law.

29. The Court of Appeals stated that the Basic Court had provided sufficient and convincing reasons, finding that an extrajudicial agreement was concluded between him and the KIB for the compensation of all forms of damage resulting from the traffic accident. Based on this finding, the Court of Appeals found that the Applicant's insured person had exercised his right to compensation under the legislation of the Republic of Kosovo and consequently had no legal right to claim compensation also from the Applicant. Moreover, the Court of Appeals, on the basis of the case file, found that the Applicant had not been notified by its insured person that he had exercised this legal right to compensation in the Republic of Kosovo, specifically through judicial proceedings.

30. Finally, the Court of Appeals, having referred to Article 391, item e) of the Law on Contested Procedure (hereinafter: the LCP), found that court settlement has the characteristics of a final judgment and as such produces the same legal effects a judgment, and consequently in relation to the legal issue, for which the parties have reached a court agreement, no dispute can be conducted. Further, the Court of Apppeals, referring to Article 418 of the LCP, which stipulates that *"Court settlement can be reached only if charges are raised"* and that "[...] *that court settlement is annulled if reached by flattering, deceit or force"*, found that in the present case there have not been met the legal conditions for compensation pursuant to Article 941 of the LCT, as the Applicant's insured person has exercised his legal right before the courts of the Republic of Kosovo. The Court of Appeals concluded that if the Basic Court would upheld the Applicant's claim, it would infringe the "legal certainty" of (in) the Republic of Kosovo by stripping the country's judicial decisions of legal effect.*"*

Applicant's allegations

31. The Applicant alleges that the challenged Judgment of the Court of Appeals has been rendered in violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair teial) of the ECHR. The Applicant specifically claims a violation of: (i) his right to a reasoned court decision; and (ii) the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals and the Supreme Court.

In relation to the non-reasoning of the court decision

32. With regard to his claim for violation of his right to a reasoned judicial decision, the Applicant states that the challenged Judgment [Ae.No.146/2017] of the Court of Appeals of Kosovo is characterized by a lack of adequate reasoning because the Court of Appeals did not provide any reasoning regarding the denial of the Applicant's right to subrogation.

33. According to the Applicant, the lack of adequate reasoning by the Court of Appeals constitutes a serious violation of Article 31 of the Constitution. In this regard, the Applicant refers to the case law of the Constitutional Court, respectively the case KI55/09 [Applicant, *N.T.SH. Meteor*, Judgment of 6 April 2011].

34. The Applicant states that the Court of Appeals has not analyzed his allegations on all issues raised in his appeal, in particular the issue

relating to the refusal to recognize the right to subrogation. In this context, the Applicant specifies that: *"Instead of properly and analytically analyzing the circumstances of the case, the applicable law in Kosovo in the concrete case, and the relevant case law of the Court of Appeals itself and at the same time the case law of the Supreme Court in similar cases, the Court of Appeals arbitrarily denies the right to compensation."*

35. The Applicant considers that in the challenged Judgment of the Court of Appeals was taken into account only the court settlement between its insured person and KIB "[...] *without analyzing at all what is the subject of this Agreement, respectively to what damage caused it refers, if eventually the costs of medical treatment and compensation for the time of recovery were the subject of this Compensation Agreement, respectively whether the insured person had active legitimacy to claim such compensation or if this legitimacy belongs only to the Applicant."*

36. Moreover, according to the Applicant, the Court of Appeals did not provide a reason why the Applicant could not claim compensation of damage for its insured person in accordance with the legal provisions in force, respectively Articles 300 and 939 of the LOR.

37. With respect to the allegation of non-justification of the court decision, the Applicant also referred to the case law of the European Court of Human Rights (hereinafter: the ECHR), respectively to the cases *Suominen v. Finland*, Application no. 37801/97, Judgment of 1 July 2003; *Hadjianastassiou v. Greece*, Application no. 12945/87, Judgment of 16 December 1992; *Tatishvili v. Russia*, Application no. 1509/02, Judgment of 22 February 2007; *Hiro Balani v. Spain*, Application no. 18064/91, Judgment of 19 December 1994; *RuizTorija v. Spain*, Application no. 18390/91, Judgment of 9 December 1994; *Helle v. Finland*, Application no. 20772/92, Judgment of 19 December 1997; and *Gradinar v. Moldova*, Application no. 7170/02, Judgment of 8 April 2008.

38. The Applicant considers that in the present case the case law of the Constitutional Court concerning the right to a reasoned court decision has not been applied. In this regard, the Applicant specifically refers to the case law of the Constitutional Court, respectively the case KI135/14, Applicant *IKK Classic*, Judgment of 9 February 2016, which concerned the issue of the right to subrogation, and where the Court had found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as a result of non-reasoning of the court decision.

In relation to the allegation for violation of the principle of legal certainty as a result of contradictory decisions in the respective case law of the Court of Appeals and the Supreme Court

39. The Applicant also considers that the impugned decision has infringed the principle of legal certainty, as a result of the contradictory decisions in the relevant case law of the Court of Appeals and the Supreme Court. In relation to this allegation, the Applicant states that: *"The requirement for consistency in case law is substantial and contributes to the equal treatment of individuals who bring the same or, in important aspects, similar claims before the Court of Appeals or to the . Supreme Court of the Republic of Kosovo."*

40. The Applicant further specifies that *"[...] the failure of the Court of Appeals to sufficiently elaborate on the Applicant's claims for compensation and the complete change contrary to the existing case law of this Court in respect of subrogation directly violates the principle of legal certainty in conjunction with Article 6 (1) of the European Convention."*

41. The Applicant also considers that: *"[...] if the Court of Appeals, by its decision, deviates from its current case law, it must provide full and appropriate legal justification for this change in its legal position."*

42. The Applicant in its referral, in support of his claim for infringement of legal certainty as a result of divergence in the relevant case law of the Court of Appeals and the Supreme Court, refers to a series of decisions of the Court of Appeals and the Supreme Court, which according to it have dealt with similar matters as is the case in the present referral, respectively: Decision [Rev. No. 14/2015] of the Supreme Court, of 14 May 2015; Judgment [Ae. No. 84/2019] of the Court of Appeals, of 28 January 2019; Judgment [Ae. No. 3/2017] of the Court of Appeals, of 28 December 2018; Judgment [Ae.No. 298/2016] of the Court of Appeals, of 26 February 2018; Judgment [E. Rev. no. 4/2018] of the Supreme Court, of 17 May 2018; and Judgment [E. Rev. no. 27/2018] of the Supreme Court, of 24 January 2018.

43. With regard to the above-mentioned decisions of the Court of Appeals and the Supreme Court, the Applicant alleges that *"On the basis of comparison of these judgments of the Court of Appeals it results that this Court has consistently and constantly applied the same legal position regarding the determination of the legal basis for the right to subrogation." Therefore, according to the Applicant, the challenged decision of the Court of Appeals "[...] in a completely*

opposite way avoids the current case law, without providing an explanation as to why the Court diverges from the current legal interpretation regarding the same court matter, by basing its decision upon a Compensation Agreement and qualifying its legal effect not only "interpartes" but with legal effect also in relation to third parties - which is contrary to the basic principles of the obligational law."

44. The Applicant also refers to case KI87/18, Applicant *IF Skadiforsikring*, Judgment of 27 February 2019, where the Constitutional Court had found that: *"The Supreme Court, as a court of the last instance for deciding in a present case of the Applicant, taking a different position in the challenged judgment in a case that is completely identical or similar to other cases, without providing a clear and sufficient reasoning for this, violated the rights of the Applicant to a reasoned court decision. This led to the violation of the principle of legal certainty, as one of the basic components of the rule of law, which is also an inseparable element of the right to a fair trial under Article 31 of the Constitution and Article 6 paragraph 1 of the ECHR."*

45. The Applicant concludes that the failure of the Court of Appeals to address his claim to recognize the right to subrogation without providing a legal reasoning and divergence from the current case law of the Court of Appeals in similar cases clearly constitutes a violation of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution of Kosovo, in conjunction with Article 6 of the ECHR.

46. Finally, the Applicant requests from the Court to asvertain: (i) violations of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the ECHR; (ii) annul the Judgment [Ae. No. 146/2017] of 26 February 2019 of the Court of Appeals; and (iii) remand the case for retrial.

Relevant legal provisions

The Law of Contracts and Torts, of 30 March 1978:

Statutory Subrogation
Neni 300

If an obligation is fulfilled by a person having some legal interest in the matter, the creditor's claim shall be transferred to him by

the law itself at the moment of fulfilment, together with all accessory rights.

Subrogation in Case of Partial Fulfilment
Article 301

In case of partial fulfillment of the creditor's claim, all accessory rights by which such claim is guaranteed shall be transferred to the fulfiller, unless necessary for the fulfillment of the rest of creditor's claim. However, the creditor and the fulfiller may stipulate that they shall use the guarantees commensurately to their respective claims, while they may also stipulate that the fulfiller shall have the right of priority in effecting collection.

TRANSFER OF INSURED PERSON'S RIGHTS AGAINST THE LIABLE PERSON TO THE INSURER (SUBROGATION)

Article 939

On payment of compensation from insurance, the insurer shall acquire, by law, all rights of the insured person against the person liable for damage on whatever ground, up to the total amount of compensation.

Should such transfer be made entirely or partially impossible through the fault of the insured person, the insurer shall be released correspondingly from his obligation towards the insured person.

The transfer of right from the insured person to the insurer shall not be to the detriment of the insured person, so that should compensation received by the insured person from the insurer be, on whatever ground, lower than the damage sustained by him, the insured person shall be entitled to reimbursement from liable party's means for the remaining part of compensation, prior to the payment of insurer's claim on the ground of rights which have been transferred him.

As an exception to the rules of transfer of an insured person's rights to the insurer, these rights shall not pass to the insurer if damage was caused by a person in direct relationship with the insured person or person under the care and responsibility of the insured person, or a person living with him in the same household, or a person who is an employee of the insured person, unless such persons caused the damage by willful misconduct.

However, should some of the persons specified in the preceding paragraph be insured against liability, the insurer may demand the redress of the amount paid to the insured person from his insurer.

LIABILITY INSURANCE

Liability of the Insurer
Article 940

In case of liability insurance, the insurer shall be liable for damage caused by the insured event only if the third party sustaining damage request compensation.
The insurer shall bear, within the limits of the amount of insurance, the expenses of litigation over the liability of the insured person.

Personal Right of the Person Sustaining Damage and Direct Action
Article 941

In case of liability insurance the person sustaining damage may request the compensation for loss sustained due to an event falling within the sphere of liability of the insured person directly from the insurer, but only up to the amount of the insurer's obligation.
The person sustaining damage shall have, from the day of occurrence of the insured event, his own right to compensation from the insurance, so that any subsequent change in the insured person's rights against the insurer shall have no effect on the right of a person sustaining damage to compensation.

Assessment of the Admissibility of the Referral

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

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

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

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

49. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states: *"Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons, to the extent applicable."*

50. The Court further examines whether the Applicant has met the admissibility requirements as set out in the Law. In this respect, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which provide:

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..."

51. In this respect, the Court first notes that the Applicant is entitled to file a constitutional complaint, by referring to alleged violations of his fundamental rights and freedoms, which are valid for individuals as well as for legal persons (see the case of the Constitutional Court no.

KI41/09, Applicant *AAB-RIINVEST LLC*, Resolution on Inadmissibility, of 3 February 2010, paragraph 14).

52. As to the fulfillment of other admissibility criteria set out in the Constitution and the Law and elaborated above, the Court finds that the Applicant is an authorized party which challenges an act of a public authority, namely the Judgment Ae. no.146/17 of the Court of Appeals, of 26 February 2019. As regards the exhaustion of legal remedies, the Court notes that the last decision, rendered in proceedings before the regular courts, is the challenged judgment of the Court of Appeals, against which due to the value of the dispute the revision was not allowed. Consequently, the Court finds that the Applicant has exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms for which it claims to have been violated, pursuant to the requirements of Article 48 of the Law, and has submitted the Referral in accordance with the deadlines stipulated in Article 49 of the Law.

53. The Court finds that the Applicant's Referral also meets the admissibility criteria provided for by paragraph (1) of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions stipulated in paragraph (3) of Rule 39 of the Rules of Procedure.

54. The Court also states that the Referral cannot be declared inadmissible on any other grounds. It must therefore be declared admissible and its merits must be considered. (See also, in this context, the case of the ECtHR *Alimuçaj v. Albania*, Judgment of 9 July 2012, paragraph 144, see the cases of the Court KI87/18, Applicant *"IF Skadeforsikring"* , Judgment of 27 February 2019, paragraph 35, and KI35/18, Applicant B*ayerischeVersicherungsverbrand*, Judgment of 11 December 2019, paragraph 43).

Merits of the Referral

55. The Court recalls that the Applicant alleges that the challenged Judgment of the Court of Appeals was found to be in breach of its fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR. In relation his allegation for violation of his right to fair and impartial trial, the Applicant specifically alleges (i) a violation of the right to a reasoned court decision and (ii) a violation of the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals and the Supreme Court.

56. As regards the allegation of non-reasoning of the court decision, the Applicant specifically alleges that the Court of Appeals has not analyzed his allegations on all issues raised in his appeal, in particular in the issue concerning the refusal to recognize his right to subrogation. Secondly, the Applicant also considers that the challenged decision violated the principle of legal certainty, as a result of divergence in the relevant case law of the Court of Appeals and the Supreme Court.

57. Therefore, the Court shall subsequently elaborate on the Applicant's allegations concerning the right to a reasoned court decision and the principle of legal certainty as a result of divergence in the relevant case law of the Court of Appeals and the Supreme Court in the light of 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 Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

58. In this regard, the Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which provides:

> *"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."*

59. In addition, the Court refers to Article 6.1 (Right to a fair trial) of the ECHR, which stipulates:

> *"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."*

I. In relation to the right to a reasoned court decision

(i) General principles on the right to a reasoned decision as developed by the case law of the ECtHR and the Court

60. With regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court initially states that it already has a consolidated case law, which has been developed in accordance with the basic principles established in the case law of the ECtHR. (See, inter alia, the cases of Court KI72/12, Applicant *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, Applicant *NaserHusaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic"* , Judgment of 4 December 2017; KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility, of 13 June 2018; KI87/18, Applicant *IF Skadiforsikring*, Judgment of 27 February 2019, and KI24/17, Applicant *Bedri Salihu*, Judgment of 27 May 2019).

61. The case law of the ECtHR and that of the Court initially emphasize that the right to a fair trial includes the right to a reasoned decision and that the courts must "state in a clear manner the reasons on which they have based their decision" (See the ECtHR case Hadjianastassiou v. Greece, Application no. 12945/87, Judgment of 16 December 1992, see also the case of the Court KI87/18, Applicant "*IF Skadeforsikring"*, cited above, paragraph 44).

62. However, even though the ECtHR states that Article 6 (1) of the ECHR obliges the courts to provide reasons for their decisions, this obligation cannot be understood as requiring a detailed answer to each allegation. (See ECtHR cases, *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, paragraph 61; *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, paragraph 26, *Jahne and Lenoble v. France* [DHM], Judgment of 16 December 1992, paragraph 81, and see the case of the Court KI97/16, Applicant *IKK Classic*, paragraph 47) .

63. The extent to which the obligation to provide reasons is applied may vary depending on the nature of the decision and must be determined in the light of the circumstances of the particular case. It is the essential arguments of the claimants that need to be addressed and the reasons provided must be based on applicable law. (See the ECtHR cases *Garcia Ruiz v. Spain*, no. 30544/96, Judgment of 21 January 1999, paragraph 29; *Hiro Balani v. Spain*, Judgment of 9 December 1994, paragraph 27; and *Higgins and others v. France*, paragraph 42, see also the case KI97/16, Applicant IKK Classic, cited above, paragraph 48; and case KI 87/18 "IF Skadeforsikring", cited above, paragraph 48).

64. Consequently, the Court reiterates that the right to render a court decision in accordance with the law includes the obligation for the courts to provide reasons on their decisions, both at the procedural and substantive level. (See, mutatismutandis, case of the Court KI97/16t, Applicant IKK Classic, cited above, paragraph 54).

65. Finally, the Court, referring to its case law, recalls that court decisions will violate the constitutional principle of a ban on arbitrariness in decision-making, if the reasoning does not contain the established facts, the relevant legal provisions and the logical relationship between them. (See, inter alia, the cases of the Court: KI72/12, applicant *Veton Berisha and IlfeteHaziri*, cited above, paragraph 61; KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; KI 96/16 Applicant *IKK Classic*,cited above, paragraph 52; and KI87/18, Applicant *"IF Skadeforsikring"* cited above, paragraph 49).

(ii) Application of the aforementioned principles in the Applicant's case

66. In the present case, the substantial allegation of the Applicant is that the Court of Appeals has considered only the extrajudicial agreement for compensation, concluded between the Applicant's insured person and the KIB, thus failing to fully address the issue of medical expenses and compensation for incapacity to work paid by the Applicant to its insured person M.B.

67. In order to ascertain whether the reasoning given by the Court of Appeals meets the standards of a reasoned court decision, the Court first recalls the reasoning of the Court of Appeals, which states as follows:

> *"The trial panel of the Court of Appeals of Kosovo, having carefully analyzed and reviewied the evidence contained in the case file, concluded that the [Applicant's] appeal is unfounded, for the reason that the Court of First Instance has provided sufficient and convincing reasons that the respondent, the Kosovo Insurance Bureau based in Prishtina, in an extrajudicial procedure has reviewed the appeal of the Applicant's insured person and rendered a decision SK-632/2012 of 13/11 / 2012, by presenting an offer for compensation of damage in the amount of 755.00 euros, with which the injured party [M.B.] did not agree, so on 06/03/2013 he filed a claim for compensation of damages with the Basic Court in Peja, while on 25/02/2015, he concluded a court settlement with the respondent, specifically, in the presence of his lawyer [II], for all forms of damages that derive from the traffic accident dated 19/01/2012. This has been*

confirmed on the basis of the minutes of the Basic Court in Peja C.no.185 / 13 dated 25/02/2015, which court settlement was implemented in full by the defendant, thus fulfilling its financial obligation to the Applicant's insured person and thereby the claimant's insured person has realised his subjective civil right pursuant to the local legislation and has had no legal right to seek compensation from the respondent, respectively on the basis of the cae file it does not result that the claimant has been notified by its insured person [M.B.], that he has exercised his legal right to compensation for damage in the Republic of Kosovo, specifically, through judicial proceedings."

68. Specifically, the Court of Appeals, referring to the provisions of the LCP, found that the court settlement has the characteristics of a final judgment and as such produces the same legal effects as the judgment, consequently in relation to the legal issue, for which the parties have reached a court agreement, no dispute can be conducted. In this regard, the Court of Appeals pointed out that *"[...] in th present case the legal conditions for reimbursement of damages under Article 941 of the LOR have not been met, as the claimant's insured person has realised his legal right at the judicial bodies of the Republic of Kosovo and the same cannot transfer a non-existent legal claim to the claimant, while on the other hand the eventual approval of the statement of claim of [the Applicant] would directly violate the legal certainty of the Republic of Kosovo by stripping the country's judicial decisions of legal effect."*

69. Based on the above reasoning of the Court of Appeals, the Court notes that the Court of Appeals did not adequately address the issue of compensation of the Applicant, which was a substantial claim raised in the statement of claim before the Basic Court. In its claim filed with the Basic Court, as well as in its appeal filed in the Court of Appeals, the Applicant had reasoned his claim for compensation under the right to subrogation by referring to the relevant provisions of the LOR, respectively Articles 300 and 939. However, the Court of Appeals bases its reasoning on the refusal of Applicant's claim compensation on the basis of the right to subrogation solely on the extrajudicial agreement, without providing relevant justification and interpretation also in respect of the Applicant's right to subrogation , as specified in his statement of claim and appeal filed with the Court of Appeals.

70. The Court also notes that in the above-mentioned position of the Court of Appeals it is established that the extrajudicial agreement annuls the issue of compensation of the Applicant, without specifying: (i) how the compensation paid by KIB to the insured person released the latter

from the payment of compensation to the Applicant, based on the fact that this extrajudicial agreement was certified by the Basic Court in Peja, upon the request of the Applicant's insured person for compensation of medical treatment and incapacity to work, realised in 2013; as well as (ii) how the extrajudicial agreement between the Applicant's insured person and the KIB has affected the Applicant's rights, when it is clear that the latter was not a party to this agreement.

71. The Court recalls that it had found violations of the right to a reasoned court decision, in a similar case, namely the case KI135/14, Applicant IKK Classic, cited above, and through which it assessed the constitutionality of the Judgment [E. Rev. no. 21/2014] of the Supreme Court, of 8 April 2014 (hereinafter: the case KI134/15). In this case, the Supreme Court had accepted the revision of the respondent, SIGMA Insurance Company, whose insured person had caused the traffic accident in the Republic of Kosovo in which the claimant's insured person, respectively of the Insurance Company in the Federal Republic of Germany (IKK Classic) had suffered bodily injuries. Through the same judgment, the Supreme Court had annulled the judgments of the Court of Appeals and the former District Court of Economics in Pristina, with the reasoning that the lower instance courts "have erroneously approved as founded the statement of claim" of the claimant IKK Classic, filed in on the basis of the right to subrogation because, according to the Supreme Court, its insured person through the extrajudicial of 3 February 2009 concluded between him and SIGMA had received indemnity in the amount of 2,729 Euros. The Court found that *"the failure of the Supreme Court to provide clear and complete answers to the main question concerning the right of the Applicant [IKK Classic] to compensation, established by the courts of lower instance, is a violation of the Applicant's right to be heard and the right to a reasoned decision, as an integral part of the right to a fair and impartial trial."*

72. On 16 March 2016, following the Judgment of the Constitutional Court in the case KI135/14, the Supreme Court issued a new, respectively second judgment in the case, Judgment E. Rev. no. 15/2016 whereby it repeated the findings of the first Judgment [E. Rev. no. 21/2014] of 8 April 2014, deciding that the request for revision of SIGMA is grounded. Following this Judgment, *IKK Classic* again submitted a referral to the Constitutional Court, in which case the Constitutional Court by Judgment KI97 / 16, of 14 December 2017 (hereinafter: the case KI97/ 16) found that the Supreme Court *"[...] by not taking into account and not justifying the alleged right of the Applicant to compensation, moreover by failing to address the findings of the Judgment of the Court in case no. KI135/14, the second judgment of*

the Supreme Court [E. Rev. no. 15/2016] of 16 March 2016, violated the Applicant's right to a fair and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6, paragraph 1 of the ECHR. As a result of this violation, the Applicant was deprived of his right to a reasoned decision."

73. Therefore, in the light of the above reasoning and on the basis of its case law in similar cases, the Court considers that the challenged Judgment of the Court of Appeals has not fully and clearly addressed the issues of compensation for medical expenses paid by the Applicant, which he had specified in his statement of claim (See *mutatis mutandis*, case KI135/14, paragraph 52).

74. Furthermore, the Applicant's substantive claim, which was submitted on the basis of the right to subrogation, was not reasoned by the Basic Court either.

75. In this regard, the Basic Court had found that after the conclusion of the extrajudicial agreement, the Applicant's insured person had consumed his right to claim compensation of damages, concluding that no one could transfer to another person/entity a right which he had previously realised, and consequently this right accordgint to the Basic Court had ceased to exist. The Court of Appeals in its judgment had only confirmed the finding of the Basic Court, adding that pursuant to Article 391, item e) of the LCP, court settlement has the characteristics of a final and final judgment and as such it produces the same legal effects as a judgment, and consequently in relation to the legal issue, for which the parties have reached a court agreement, no dispute can be conducted.

76. Consequently, the Court considers that the challenged Judgment of the Court of Appeal, Ae. no. 146/17, of 26 February 2019, does not meet the standards required for a reasoned decision, and thus violates the right of the Applicant, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

77. Following the finding that the challenged Judgment of the Court of Appeals was found to be contrary to Article 31 of the Constitution, in conjunction with Article 6 of the ECHR due to the lack of a reasoned court decision, in the following the Court will examine the Applicant's allegations relating to the violation of the principle of legal certainty due to the lack of consistency in the case law of the Court of Appeals and the Supreme Court.

II. In relation to the allegations which concern the principle of legal certainty, as a result of contradictory decisions

(i) General principles as developed by the case law of the ECtHR and the Court

78. With regard to the principle of legal certainty as a result of the lack of consistency in the case law, the ECtHR in its case law has developed fundamental principles and set the criteria whether an alleged divergence of court decisions constitutes a violation of Article 6 of the ECHR. During the review of Applicants' allegations for the violation of the principle of legal certainty, as a result of contradictory decisions, the Court has applied in its case law also the criteria set by the ECtHR. (See, inter alia, the aforementioned cases of the Court KI35/18 and KI87/18, where the Court found a violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR as a result of divergence in the case law of the ECtHR).

79. Regarding the first principle, the ECtHR has consistently stated that one of the essential components of the rule of law is legal certainty, which, among other things, guarantees an unquestionable certainty in legal situations and contributes to public confidence in the courts. (See, *mutatis mutandis*, Stefănică and others v. Romania, Application no. 38155/02, Judgment of 2 November 2010, paragraph 38, *Nejdet Şahin and Perihan Şahin v. Turkey*, Judgment of 20 October 2011, paragraph 56).

80. Regarding the second principle, the ECtHR, however, has specified that there is no right acquired for the consistency of case law. (See the case *Unédic v. France*, Application no. 20153/04, paragraph 74, 18 December 2008, see the above cited case *Nejdet Şahin and Perihan Şahin v. Turkey*, paragraph 56; see also the abovementioned case of the Court KI35/18, Applicant BayerischeVersicherungsverbrand, paragraph 65, as well as case KI42/17, Applicant Kushtrim Ibraj, Resolution on Inadmissibility of 25 January 2018, paragraph 33).

81. With regard to the third principle, the ECtHR has emphasized that the possibility of conflicting decisions is an inherent trait of any judicial system based on a network of basic and appellate courts, with authority over the area of their territorial jurisdiction, and a divergence may arise even within the same court. That in itselfs cannot be considered to be contradictory to the Convention. (see the case *Santos Pinto v. Portugal*, Application no. 390005/04, paragraph 41, Judgment of 20 May 2008, see also the case of the Court KI87/17, Applicant "*IF Skadeforsikring"*, cited above, paragraph 66 and case

KI35/18 Applicant *BayerischeVersicherungsverbrand*, paragraph 67).

82. However, in view of the above principles, the ECtHR has established three basic criteria to determine whether an alleged divergence of judicial decisions constitutes a violation of Article 6 of the ECHR, as follows: (i) whether "*profound and long-standing differences"* exist in the case law; (ii) whether the domestic law provides for a mechanism capable to overcome such divergences; and (iii) whether that mechanism has been applied and, if so, to what effect (in this context, see ECtHR cases, *Beian v. Romania* (no. 1), Judgment of 6 December 2007, paragraphs 37-39; *Greek Catholic Parish of Lupeni and others v. Romania*, Judgment of 29 November 2016, paragraphs 116 - 135; *Iordan Iordanov and others v. Bulgaria*, Judgment of 2 July 2009, paragraphs 49-50; *Nejdet Şahin and Perihan Şahink v. Turkey*, cited above, paragraph 53; and see the caseof the Court, Kl29/17, Applicant *Adem Zhegrova*, Resolution on Inadmissibility, of 5 September 2017, paragraph 51 and also see the cases of the Court cited above, KI42/17, Applicant *Kushtrim Ibraj*, paragraph 39, KI87/17 Applicant IF Skadiforsikring, paragraph 67, KI35/18, Applicant BayerischeVersicherungsververbrand, paragraph 70).

(i) Application of these principles in the circumstances of the present case

83. In the following, the Court will apply the principles elaborated above in the circumstances of the present case, by applying the criteria on the basis of which the ECtHR addresses divergence issues concerning the case law, starting with the assessment whether in the circumstances of the case, (i) the alleged divergences in the case law are *"profound and long-standing"*; and if this is the case, (ii) the existence of mechanisms capable of resolving the respective divergence; and (iii) assessing whether these mechanisms have been applied in the circumstances of the concrete case and to what effect.

84. Initially, the Court should also reiterate that, on the basis of the ECtHR case law and the case law of the Court, it is not its role to compare different decisions of the regular courts, even if they are rendered in significantly similar proceedings, as their independence must be respected. Moreover, in such cases, despite allegations for constitutional violations of fundamental rights and freedoms as a result of divergences in the case law, the applicants must present to the Court the relevant arguments regarding the factual and legal similarity of the cases which as alleged by them have been resolved differently by the regular courts, resulting in conflicting decisions in the case law and which may have resulted in a violation of their

constitutional rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.(see the case cited above KI35/18, Applicant *BayerischeVersicherungsverbrand*, paragraph 76).

85. In the circumstances of the present case, the Court recalls that the Applicant alleges that in his case, the Court of Appeals has decided differently as regards the right to subrogation, thus acting contrary to its case law and the case law of the Supreme Court. In support of his allegation, he refers to six (6) other cases of the Court of Appeals and the Supreme Court as follows: Decision of the Supreme Court, Rev. No. 14/2015,of 14 May 2015; Judgment of the Court of Appeals, Ae. No. 84/2019, of 28 January 2019; Judgment of the Court of Appeals, Ae. No. 3/2017, of 28 December 2018; Judgment of the Court of Appeals, Ae. No. 298/2016 of 26 February 2018; Judgment of the Supreme Court, E. Rev. no. 4/2018, of 17 May 2018 and the Judgment of the Supreme Court, E. Rev. no. 27/2018, of 24 January 2018.

86. With regard the above-mentioned decisions of the Court of Appeals [Ae. No. 84/2019] of 28 January 2019 and [Ae. No. 3/2017] of 28 December 2018] and that of the Supreme Court [E. Rev. no. 27/2018] of 24 January 2018, the Court notes that these decisions specifically refer to the issue of the application of provisions governing the amount of late payments(interest) in the context of compulsory motor liability insurance. Subsequently, the Court notes that in these three decisions, the Court of Appeals and the Supreme Court had applied also the provisions of the LOR, respectively Article 939, which refers to the right to subrogation. However, the Court considers that these three (3) decisions, submitted by the Applicant, which in their essence address the issue of determination of the late payment and do not contain factual and procedural similarities, with the Applicant's case.

87. While the following three decisions, which the Court will summarize briefly, respectively the Decisions of the Supreme Court [Rev. No. 14/2015] of 14 May 2015 and [E. Rev. no. 4/2018] of 17 May 2018 and the Judgment of the Court of Appeals [Ae. No. 298/2016] of 26 February 2018 refer to the issue of the assessment of the Supreme Court and the Court of Appeals concerning the effects of extrajudicial agreements for third parties, respectively the insurance companies that have reimbursed their insured persons for the damage caused by accidents and consequently they have not even been a part of these extrajudicial agreements.

a) *Decision of the Supreme Court, Rev. No. 14/2015, of 14 May 2015*

88. The Supreme Court by this Judgment apprved the revision of the claimant [Suva Wetzikon] and remanded the case for retrial. The claimant's insured person, in the capacity of the victim, had concluded an extrajudicial settlement with the Guarantee Fund, which represented the person who had caused the accident with the vehicle. The Basic Court and the Court of Appeals had rejected the claimant's statement of claim for compensation of a certain amount, in the name of medical treatment and payment due to incapacity for work as a result of the accident.

89. The Supreme Court, in its Judgment, had reasoned as follows*: "Does the* extrajudicial *agreement concluded between the injured party in this traffic accident with the Guarantee Fund have any effect on the relations between the claimant and the respondent and can it be considered that by the payment of the amount of [...] by the Guarantee Fund to the injured party [M.G.], the respondent has fulfilled its obligation to the claimant. Did the injured party know about the fact that the claimant has paid compensation for the damage suffered but despite this he concluded ant agreement with the Guarantee Fund? Therefore, the court of first instance must assess whether the extrajudicial settlement concluded between the Guarantee Fund and the injured party [M.G.] has a legal effect on the claimant and whether the injured party has had the capacity of a third person in the vehicle which was insured at the respondent's company and is there a legal basis for the claimant's claim against the respondent for reimbursement of the damage that the claimant has paid [MG]. "*

b) *Judgment of the Court of Appeals, Ae. No. 298/2016, of 26 February 2018*

90. The Court of Appeals rejected the appeal of the respondent [Kosovo Insurance Bureau], by reasoning as follows:

> *"The Court of Appeals reviewed the claimant's [Kosovo Insurance Bureau] appeal claims regarding the compensation for damages to the injured party [R.M.], by the respondent, which has derived from the Extrajudicial Agreement, and therefore he has no right to seek reimbursement , but found that they are unfounded because based on Article 190 of the LCT, which stipulates that "While also taking into account the circumstances after the occurrence of damage, the court shall determine damages in the amount necessary to restore the material state of the person sustaining damage ibnto the state it would have been without the damaging act or omission". In this case, the amount covered by*

the Extrajudicial Agreement of (...) is not the total amount of damage, therefore there is also the obligation of the respondent to compensate the remaining part, respectively of the amount of (...) €."

c) *Decision of the Supreme Court, E. Rev. no. 4/2018 of 17 May 2018 [case IKK Classic]*

91. D.H., the Applicant's insure person in cases KI134 / 15 and KI97 / 16, who had suffered grave injuries in a traffic accident caused by B.L., insurance user in the insurance company "SIGMA" in Prishtina (in further text: SIGMA). D.H., had received medical treatment in the Federal Republic of Germany in the amount of 18,985.36 Euros, which had been paid by the claimant [IKK Classic]. (See below the brief summary of cases KI134/15 and KI97/16 in paragraph 71 of this Judgment).

92. As a result of the Judgment of the Constitutional Court (case KI97/16), the Supreme Court by Judgment [E. Rev. no. 4/2018] of 17 May 2018, again approved the revision submitted by the respondent [SIGMA], but remanded the case to the first instance for retrial. The Supreme Court on the basis of the Judgment of the Constitutional Court KI97 / 16 found that *"[...] in this legal dispute matter, the facts for what were the necessary expenses for the recovery of the claimant's insured person D.H. have not been clarified, as well as other expenses for the duration of his recovery and which the claimant has the right to have reimbursed by the defendant. After reaching the extrajudicial agreement between the respondent KS Sigma and the claimant's insured person D.H., did the health condition of the latter deteriorate as a result of the accident caused by the respondent's insured person and did the further recovery of the insured person result as a consequence of the accident caused, namely is it in causal link with the accident caused and what expenses have been necessary for his recovery, expenses which can be accepted and which the respondent will be obliged to reimburse. [...]."*

93. In the light of the above decisions of the Court of Appeals and the Supreme Court, presented by the Applicant in his Referral, the Court notes that there is no uniform case law of the Court of Appeals and the Supreme Court relating to the right to subrogation, in particular in cases when the parties have entered into extrajudicial agreement without the involvement of the insurance company, which has paid for medical treatment and provided compensation for incapacity to work to their insured persons, as a result of accidents caused in the Republic of Kosovo.

94. Therefore, based on the above, and in the context of the obligation determined by the case law of the ECtHR and of Court that the applicants must present to the Court the relevant arguments regarding the factual and legal similarity of the cases which they claim have been resolved differently by the regular courts, resulting in conflicting decisions in the case law, the Court considers that in the circumstances of the present case, the Applicant has not fulfilled this obligation. In this respect, the Court found that three (3) of the six (6) decisions, submitted by the Applicant, which essentially elaborated on the issue of determination fo the late payment (interest) do not contain factual and procedural similarities with those in the case of the Applicant.

95. Subsequently, and with regard to the other three (3) decisions of the Court of Appeals and the Supreme Court, submitted by the Applicant, and which refer to similar factual and legal circumstances with the Applicant's case, the Court has clarified that the main criterion for assessing if the conflicting decisions are "manifestly arbitrary", is the existence of "*profound and long-standing differences"* in the relevant case law. Therefore, the Court considers that in the present case there are no "*profound and long-standing differences"* in the case law of the Supreme Court and the Court of Appeals, respectively there is no court and uniform case law that refers to the recognition of the right to subrogation of insurance companies in cases when the latter have not been parties to the extrajudicial agreements.

96. Consequently, the Court considers that neither the number of the alleged contradictory judgments nor the time period within which these judgments were rendered provide a sufficient basis to justify the allegation for a violation of the principle of certainty as a result of the conflicting judgments.

Conclusion

97. The Court, when examining and considering the Applicant's allegations, by applying on this basis the assessment of the case law of the Court and the ECtHR regarding the lack of a reasoned court decision and the principle of legal certainty in terms of consistency of the case law comes to the conclusion as follows:

98. As regards the first allegation of the Applicant concerning the lack of a reasoned court decision, the Court found that in issuing the judgment Ae. no. 146/17 of the Court of Appeals, of 26 February 2019, the Court of Appeals failed to justify the substantive allegations of the Applicant, and consequently his right guaranteed by Article 31 of the

Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, has been violated.

99. As regards the second allegation of the Applicant concerning the principle of legal certainty as a result of the conflicting decisions of the case law of the Court of Appeals and the Supreme Court, the Court having elaborated on the basic principles and criteria set by the Court and the ECtHR in this respect , and applied the same in the circumstances of the present case, found that neither the number of the alleged contradictory judgments nor the time period within which these judgments were rendered provide a sufficient basis to justify the allegation for a violation of the principle of certainty as a result of the conflicting judgments.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, on 13 May 2020, by majority of votes

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO FIND that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 (Right to a fair trial) of the European Convention on Human Rights.;

III. TO DECLARE invalid the Judgment Ae. No. 146/17 of the Court of Appeals, of 26 February 2019;

IV. TO REMAND the Judgment Ae. No. 146/17, of the Court of Appeals, of 26 February 2019 for reconsideration in accordance with this Judgment of the Constitutional Court;

V. TO ORDER the Court of Appeals to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court;

VI. TO REMAIN strongly engaged in this case pending the compliance with this order;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20. 4 of the Law, and publish it in the Official Gazette;

IX. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

Case No. K38 / 19, Applicant: *Avdi Mujaj*, Constitutional review of the Judgment , Rev. no. 285/2018 of the Supreme Court of the Republic of Kosovo, of 1 October 2018

Keywords*: individual referral, property dispute, composition of the trial panel, right to a fair trial, impartiality of the court*

The Applicant, in the capacity of the buyer, had entered into a Contract on sale with H. D., the subject of the Contract on the sale being the purchase of immovable property consisting of a house and some other adjacent facilities constructed on the cadastral parcel [no. 5393/18], with an area of 480 m².

The Applicant's statement of claim was initially fully upheld by the Judgment [C. no. 56/2008] of the Municipal Court in Peja, of 12 January 2010, whereby it was decided that he is the owner of the disputed cadastral parcel with a total area of 480 m² and that all the heirs of the first line of H. D., in total eight of them, must recognize the Applicant's right of ownership and allow the property in question to be registered with the Municipal Cadastral Office in Peja.

Subsequently, the District Court by Judgment [Ac. no. 101/10] of 16 March 2011: (i) partially upheld the Applicant's statement of claim, by confirming that the Applicant was the owner of the cadastral parcel on the basis of the adverse possession [no. 5393/18], in an area of 455 m2 [not 480 m²]; and (ii) obliged the respondents to acceot the Applicants' ownership and allow the property to be registered with the Municipal Cadastral Office in Peja. In the composition of the 3 member trial panel of the District Court, was also the Judge I. K.

Against the Judgment [Ac. no. 101/10] of the District Court, the State Prosecutor submited a request for protection of legality while a request for revision was filed by the Applicant.

The Supreme Court by Decision [Rev-Mlc. no. 253/2011] of 27 August 2013, decided to uphold as founded both the request for protection of the legality of the State Prosecutor and the request for revision of the Applicant, by ordering the quashing of the Judgment [Ac. no. 101/10], of the District Court, of 16 March 2011, and remanding of the case for reconsideration to the District Court [which, later, upon legal amendments would fall under the jurisdiction of the Court of Appeals].

In the process of the case retrial, the Court of Appeals by Judgment [Ac. no. 2749/13] of 10 April 2017, again partially approved the appeal of B. D. by

confirming that the Applicant is the owner of the part of the cadastral parcel of 455 m2 and not 480 m2 as originally decided by the Municipal Court.

On 1 October 2018, the Supreme Court through Judgment [Rev. no. 285/2018] rejected the Applicant's request for revision as *"unfounded"*. In this case, as well, Judge I. K. was a part of the trial panel, in the capacity of the presiding judge.

As regards the Referral KI38/19, the Court notes that the essence of the Applicant's allegations refers to the participation of the same judge [I. K.] in two judicial instances on which occasion the right to fair trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated. The Court found that this rerferral meets the admissibility criteria and examined its merits.

In examining the merits, the Court, *inter alia*, elaborated (i) the general principles of the European Court of Human Rights in relation to the criteria for assessing the impartiality of a court; (ii) the concept of subjective and objective impartiality of the court; (iii) the case law of the European Court of Human Rights in terms of assessing the impartiality of the court, namely the concept of *"legitimate doubts"* and the fact that they must be *"objectively justifiable"* in order to ascertain the impartiality of a court ; (iv) the respective case law regarding the participation of a judge in different stages of the same case; and finally, found that (v) the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018 was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it was rendered by a composition of the trial panel, in which contrary to the relevant provisions of the LCP and the case law of the ECtHR and the Court has taken part also the judge who, in earlier stages of the same case, had participated as a member of the panel in the District Court in Peja when it was decided on the Applicant's statement of claim and thereupon also as the presiding judge of the trial panel of the Supreme Court when it was decided on the Applicant's request for revision. In such circumstances, the Court found that the *"legitimate doubts"* about the impartiality of the court, in the circumstances of the present case, were *"objectively justifiable"*.

The Constitutional Court, in the circumstances of the present case, has treated exclusively and only the allegation for the impartiality of the court due to the participation of Judge I. K. in the same court proceeding in two court instances. This Judgment of the Court is without any prejudice to the final merits for decision-making in this case, once the case is remanded to the Supreme Court for retrial.

JUDGMENT

in

Case No. KI38/19

Applicant

Avdi Mujaj

Constitutional review of the Judgment Rev.no.285/2018 of the Supreme Court of the Republic of Kosovo, of 1 October 2018

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 AvdiMujaj, residing in Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [Rev. no. 285/2018], of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 1 October 2018, which was served on him on 29 October 2018

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, which as alleged by the Applicant has violated his rights guaranteed by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] and paragraph 2 of Article 22 [Direct Applicability

of International Agreements and Instruments] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 25 February 25, 2019, the Applicant submitted the Referral by mail to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 12 March 2019, the President of the Court appointed Judge Safet Hoxha, as Judge Rapporteur and the Review Panel, composed of Judges: Bekim Sejdiu (presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.

7. On 25 March 2019 the Court notified the Applicant about the registration of the Referral, by requesting from him to: (i) submit the acknowledgment of receipt proving the date when the challenged judgment of the Supreme Court was received by him; (ii) submit the power of attorney of the representative in case he has decided to be represented in the proceedings before the Court.

8. On 20 April 2019 the Applicant submitted: (i) the acknowledgment of receipt proving that he had received the challenged Judgment on 29 October 2018; and (ii) the completed referral form where he stated that in this case he has not engaged a representative and that in the proceedings before the Court he will represent himself.

9. On 23 May 2019, the Court notified the Supreme Court about the registration of the Referral and sent a copy thereof to it.

10. On 15 January 2020 the Court notified the interested party B.D. about the registration of the Referral and enabled him to submit his

comments in relation to the Referral, if any, within 15 (fifteen) days from the receipt of the notification of the Court.

11. On 3 February 2020, the interested party B.D. submitted several comments to the Court.

12. On 1 July 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously made a recommendation to the Court on the admissibility of the Referral.

13. On the same day, on 1 July 2020, the Court unanimously decided that (i) the Referral is admissible, and (ii) the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

14. On 30 April 1985, the Applicant, in the capacity of buyer, entered into a contract on sale with H.D., in the capacity of seller (hereinafter: the contract on sale). The subject of the Contract on Sale was an immovable property consisting of a house and some other adjacent facilities constructed on the cadastral parcel [no.5393 / 18], with an area of 480m².

15. On an unspecified date, H.D., who had signed the Contract on Sale as a Seller with the Applicant, passed away. Based on the case file it results that the Applicant, despite having entered into this Contract on Sale, he had not registered the property in question in his name with the relevant public authorities for registration of property rights.

16. The Applicant had requested from the heir of H,D., respectively B.D., to enable him to register the property in question at the Directorate for Cadastre, Geodesy and Property in the Municipality of Peja - but according to the statement of claim, the respondent, respectively the interested party B.D. rejected it.

17. Consequently, on 31 January 2008 the Applicant filed a claim for "confirmation of ownership" with the Municipal Court in Peja against B.D. The Applicant requested to be confirmed that he is the owner of the disputable property according to the aforementioned Contract on Sale concluded in 1985 between him and the father of B.D. He demanded to oblige B.D. to enable him to be identified as the owner of the immovable property and, in order to avoid the risk and causing of

irreparable damage, the Applicant requested the imposition of an interim measure whereby the establishment of the mortgage on the property in question would be prohibited.

Decision-making in the first instance, at the Municipal Court in Peja [without the presence of Judge I.K.]

18. On 12 January 2010, the Municipal Court in Peja, through the Judgment [C.no.56/2008], upheld the Applicant's statement of claim in its entirety. On that occasion, it decided that the Applicant was the owner of the disputable cadastral parcel with a total area of 480m² and that all heirs of the first line of H.D., in total eight of them, must recognize the Applicant's right of ownership as well as allow the property in question to be registered at the Municipal Cadastral Office in Peja.

19. On 1 February 2010, B.D. filed an appeal with the District Court in Peja against the aforementioned Judgment due to violations of the provisions of the Law on Contested Procedure (hereinafter: LCP), incomplete and erroneous determination of the factual situation and erroneous application of the substantive law.

20. On 9 February 2010, the Applicant filed a response to the appeal with the District Court in Peja, stating that the respondents' allegations were unfounded and unsustainable, proposing that the appeal be rejected as unfounded and that the challenged judgment be confirmed.

Decision-making in the second instance, at the District Court in Peja [in the presence of Judge I.K., as a member of the trial panel consisting of 3 members]

21. On 16 March 2011, the District Court in Peja, by Judgment [Ac.no.101/10] decided on the partial approval of the appeal of B.D.

22. By this approval, the District Court in Peja (hereinafter: the District Court) amended the Judgment [C.no.56 / 2008] of the Municipal Court in Peja, of 12 January 2010, in a way that it recognized the already recognized ownership right of the Applicant's but not over the total area of cadastral parcel consisting of 480m² but over a total area of 455m², respectively 25m² less than the area initially recognized by the court of first instance.

23. Thus, the District Court: (i) partially approved the Applicant's claim, confirming that the Applicant was the owner of the cadastral parcel

[no. 5393/18], with an area of 455m2 [and not 480m²]; and (ii) obliged the respondents to recognize the Applicant's right of ownership and to allow the registration of the property at the Municipal Cadastral Office in Peja. Also the Judge I.K. was a member of the Review Panel of the District Court consisting of 3 judges.

24. On 21 April 2011 the Applicant filed a request for revision with the Supreme Court against the above-mentioned Judgment of the District Court in Peja, due to the violation of the provisions of the contested procedure and erroneous application of substantive law.

25. On 2 May 2011, in addition to the request for revision, the Applicant also submitted a request to the State Prosecutor's Office, seeking from it to file a request for protection of legality against the above-mentioned Judgment of the District Court, based on its authorizations.

26. On 3 June 2011 the State Prosecutor filed a request for protection of legality [KMLC.no.35/2011] against the Judgment [Ac.nr.101/10] of the District Court in Peja, of 16 March 2011, due to the erroneous application of the substantive law.

Decision-making in the third instance, at the Supreme Court [without the presence of Judge I.K.]

27. On 27 August 2013, the Supreme Court, by its Decision [Rev-Mlc.no.253 / 2011], decided to uphold as founded both, the request of the State Prosecutor for protection of legality and the Applicant's request for revision.

28. On this occasion, the Supreme Court ordered the quashing of the Judgment [Ac.no.101/10] of 16 March 2011 of the District Court and remanding of the case for reconsideration to the District Court [which, later, upon legal amendments would fall within the subject matter jurisdiction of the Court of Appeals].

29. According to the Supreme Court, the aforementioned Judgment of the District Court "*was rendered by substantial violation of the provisions of the contested procedure from Article 182.2 (n) in conjunction with Article 201 (c) of the LCP*". The abovementioned violation existed because the enacting clause of the Judgment of the District Court "*is incomprehensible and contradictory to the reasons of the judgment and the decisive facts have not been presented at all*". Further, the Supreme Court reasoned that the request for

protection of legality submitted by the State Prosecutor and the statements in the revision are founded, hence for such reasons the Judgment of the District Court "*had to be quashed and the case to be remanded to the same court for reconsideration.*"

Second decision-making in the second instance, at the Court of Appeals [without the presence of Judge I.K.]

30. On 10 April 2017, the Court of Appeals, during reconsideration according to the order of the Supreme Court, again reviewed the appeal of B.D. of 1 February 2010 filed against the Judgment [C.no.56/2008] of the Municipal Court, of 12 January 2010.

31. Through the second decision-making, the Court of Appeals issued the Judgment [Ac.no.2749/13] whereby it again partially approved the appeal of B.D. On that occasion, the Court of Appeals: (i) confirmed that the Applicant is the owner of the cadastral parcel consisting of 0.04.55 ha (455m2 but not 480m2 as originally decided by the Municipal Court); (ii) obliged B.D. and other heirs of H.D. to recognize the Applicant's right of ownership and to allow him to register the property in question at the Municipal Cadastral Office in Peja; (iii) rejected the part of the Applicant's statement of claim, whereby he requested to be proved that according to the contract on sale he is also the owner of the part of the cadastral parcel [no.5393/18], in an area of 0.00,25 ha (25 m2). [Clarification: the Court of Appeals decided the same as the District Court, by not recognizing the full ownership over 480m2 according to statement of claim, but only over 455m2 - namely 25 m2 less].

32. On 17 May 2018, the Applicant filed a request for revision with the Supreme Court against the above-mentioned Judgment of the Court of Appeals due to the violation of the provisions of the contested procedure and erroneous application of the substantive law.

Second decision-making in the third instance, at the Supreme Court [in the presence of Judge I.K., as the presiding judge of the trial panel]

33. On 1 October 2018, the Supreme Court, by the Judgment [Rev. no. 285/2018], rejected the Applicant's request for revision as *"unfounded"*. Part of the trial panel in this case, in the capacity of presiding judge, was also the Judge I.K.

34. The Supreme Court reasoned that the Court of Appeals "*in the factual situation determined in a correct and complete manner by the court of first instance[Municipal Court] has applied the provisions of the*

contested procedure and the substantive law in a correct and complete manner when deciding as in the enacting clause of the challenged Judgment. The judgment of the court of second instance contains sufficient reasons on the relevant facts for a fair adjudication of this legal matter that are admissible for this Court as well."

Applicant's allegations

35. The Applicant alleges that the Judgment of the Supreme Court [Rev. no. 285/2018] of 1 October 2018, whereby his request for revision was rejected, has violated his rights provided by Article 31, Article 22 of the Constitution and Article 6 of the ECHR.

36. The Applicant also considers that Article 67, item (d) (exclusion of the judge from the case) of the LCP has been violated due to the fact that the same judge (Judge I.K.) who participated in the settlement of this litigation matter at the District Court in Peja [see the Judgment Ac.no.101/10], when it was decided regarding the appeal of the respondent exercised against the Judgment of the first instance, was the presiding judge of the trial panel of the Supreme Court, which has decided on the respondent's revision [see the Judgment Rev.no.285 /2018]. Consequently, according to the Applicant, disregard of this prohibition constitutes a flagrant violation of paragraphs 1 and 2 of Article 31 of the Constitution and Article 6 of the ECHR, which according to paragraph 2 of Article 22 of the Constitution applies directly in the Republic of Kosovo.

37. The Applicant states that the District Court, where also I.K. was a part of the panel of judges had recognised his "*right of ownership over the same cadastral parcel but not in an area of 480m2, but in an area of 455m2, which is 25m2 less than the area purchased by the Applicant and according to this Judgment of this court the contract on sale – as a legal act which represents the legal basis for acquiring the right of ownership, is not the basis for the acquisition of the right of ownership [...] but it is the adverse possession that is the legal basis for acquiring the right of ownership and consequently, the purchased area is reduced by 25 m2."* He further stated that *"on the occasion of deciding on this case also the Judge I.K., at that time a judge of the District Court in Peja, has been a member of the trial panel."*

38. Subsequently, the Applicant clarifies that following the annulment of the Judgment [Ac.no.101/10] of the District Court, the case is now remanded to the Court of Appeals for reconsideration, as a competent

court, after the reorganization of the judicial system according to the Law on Courts. The Court of Appeals, states the Applicant, "*by deciding on the appeal, as a court of second instance, decided on this contested matter identically with the District Court in Peja, by recognizing the Applicant's right of ownership over the disputed immovable only in an area of 455m2, acquired on the basis of the adverse possession, and not over the entire purchased area of 480m2, according to the Contract on sale drafted in writing, as requested by the respondent*".

39. Further, the Applicant states that being dissatisfied with the decision-making of the Court of Appeals which was identical with that of the District Court, he submitted a request for revision to the Supreme Court where he stated that "*the remarks of the Supreme Court of Kosovo, which had annulled the Judgment of the District Court in Peja, according to the request for protection of the legality of the State Prosecutor and the revision of the Applicant, have been disregarded.*"

40. In this respect the Applicant states that, in the present case, there is a violation of his right to fair and impartial trial "*due to the fact that the same judge (I.K.) who has taken part in the settlement of this disputable matter at the Court of the District of Peja, when it was decided in relation the appeal of the respondent exercised against the judgment of the first instance, is also member of the trial panel of the Supreme Court of Kosovo, which has decided on the revision of the respondent*".

41. In this respect, the Applicant states that since we are dealing "with a violation of the Applicant's right to a fair and impartial trial, which implies exclusion of the possibility for the same judge to take part in a trial in two instances, and even though this is expressly prohibited by the provision of Article 67 item (d) of the Law on Contested Procedure which regulates the exclusion of the judge from the trial where it is stated that the judge cannot proceed with the legal issue if: "... if in the same case he or she has taken part in rendering a decision of a lower court, or another body, or in mediation procedure. Failure to comply with this prohibition, the Applicant states, "constitutes a flagrant violation" of paragraphs 1 and 2 of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and paragraph 2 of Article 22 of the Constitution.

42. In the end, the Applicant requests from the Court to issue a Judgment whereby: (i) the referral of the Applicant is upheld as founded; and

(ii) the challenged judgment of the Supreme Court is annulled and the case is remanded for reconsideration.

Comments of the interested party B.D.

43. In his comments on the case, the interested party B.D. pointed out that *"as a respondent, I have not contributed in any way, because I have not selected which of the judges will render a meritorious decision on the statement of claim in any instance that this case gone through, nor have I been aware about their career advancements as an opportunity for the eventual issue of their impartiality when deciding on the cases within their competence."*

44. Further, the interested party B.D. emphasized as follows: "*I would like to inform you that the Judgment of the District Court in Peja, AC no. 101/2010, of 23.03.2011 for which Judge I.K. has decided in this case as a member of the trial panel, has been annulled by the Judgment Rev. MLC. No. 253/2011 of the Supreme Court of Kosovo on 27.08.2013, hence as such it is null and void, the Judgment of the District Court Ac. no. 101/2010 since that moment has not produced any effect in the future nor has it been taken into account in the decisions that they have rendered, so as such it is legally non-existent for review by anyone."* In this respect, the interested party B.D. states that the Judgment AC. No. 2749/2013 of the Court of Appeals, of 10.04.2018 in which Judge I.K. *"did not take part as a member of the trial panel, was decided by other judges in the same way."*

45. The interested party B.D. requests from the Court to assess the constitutionality of this case "on the basis of the principle of opportunity and the cost saving principle of proceedings" thus rejecting the Applicant's referral *"as a futile attempt to impede the justice already attained."* This due to the fact that, *"as a result of the circumstances that have been on-going in judicial institutions, the promotion of I.K. [Judge whose impartiality is challenged] to a higher instance [from the Court of Appeals to the Supreme Court] and his negligence, due to the workload of many cases and the retirement age reached, we believe that this omission was accidental, and moreover it has no bearing at all on the merits of the case."*

46. Also, the interested party B.D. considers that the concrete case raised by the Applicant "*does not pertain the purpose of the lawmaker, determined by the provision of Article 67 item d of the Law on Contested Procedure, and with the automatic application of this*

provision you will legitimize a total uncertainty of recognition and the realization of the fundamental property rights of a citizen by judicial institutions." Also, the interested party BD emphasized that the decision making in the case in question has lasted *"12 full years with personal and family psychological maltreatment and financial loss in order to protect the legitimate right that has finally been achieved after having gone through all court instances, for which I have now achieved at least a moral satisfaction."*

47. At the end of the comments, the interested party B.D. requested from the Court as follows: *"I would like to express with politeness my respect and trust in the Constitutional Court for resolving this case, I am convinced that you have in mind that you can guarantee to me that the negligence such as the one of Judge I.K. will not happen again in the future by any other judge, but by rejecting this referral I am convinced that you can eliminate this very real and undesirable possibility for you, as well, to have the same repeated."*

Assessment of the admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

50. In addition, the Court also examines whether the Applicant has fulfilled the admissibility requirements as provided by Law. In this respect, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which determine:

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... "

51. As to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who is challenging an act of a public authority, namely the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 September 2018, after eaxhausting all legal remedies provided by law. The Applicant has also specified the rights and freedoms which he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

52. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The same cannot be declared inadmissible on the basis of the conditions set out in paragraph 3 of Rule 39 of the Rules of Procedure.

53. The Court also emphasizes that the Referral cannot be declared inadmissible on any other basis. Therefore, it must be declared admissible and its merits must be assessed. (See the case of the Court: KI24/17, Applicant *Bedri Salihu*, Judgment of 19 July 2019,

paragraph 33; see also the case of the ECtHR: *Alimuçaj v. Albania*, Application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

54. The Court first recalls that the Applicant alleges that his rights protected by paragraphs 1 and 2 of Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 [Right to a fair trial] of the ECHR, and paragraph 2 of Article 22[Direct Applicability of International Agreements and Instruments] of the Constitution, have been violated.

55. The Court notes, first of all, that the substance of the Applicant's allegations refers to the participation of the same judge [I.K.] in two court instances, on which occasion his right to fair trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, has been violated.

56. The Court recalls that in the circumstances of the present case, Judge I.K. had been a judge of the trial panel consisting of 3 members formed in the District Court in Peja, responsible for deciding on the appeal of the respondent, respectively of the interested party, which was decided by Judgment [Ac.no.101/ 10] of 16 March 2011. Further, the same judge, had thereupon participated as presiding judge in the 3 member trial panel of the Supreme Court, when by Judgment [Rev. no. 285/2018] of 1 October 2018, it was decided on the Applicant's request for revision filed against the Judgment [Ac.no.2749 / 13] of the Court of Appeals, of 10 April 2017. So, in the case before the Court, the essential question is the answer to the question of whether the impartiality of the Court has been violated or not with the participation of Judge I.K. in two different court instances where it was decided on the basis of the Applicant's statement of claim.

57. In treating the allegation of the Applicant relating to the right to fair and impartial trial, the Court shall apply the case law of the ECtHR, on the basis of which pursuant to Article 53 [Interpretation of the Human Rights Provisions] of the Constitution, it is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, as regards the interpretation of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the case law of the ECHR.

General principles for impartiality of the Court, according to the case law of the ECtHR and the Constitutional Court

58. The impartiality of a court according to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, based on the consolidated case law of the ECHR, should be determined according to (i) *a subjective test*, that is on the basis of personal conviction and conduct of a judge, implying that a judge may have had personal prejudices or bias in a particular case; and (ii) *an objective test*, that is ascertaining whether the court itself, inter alia, its composition, has provided sufficient guarantees to exclude any legitimate doubt in this respect. (See, inter alia, ECtHR cases, *Miracle Europe KFT v. Hungary*, Judgment of 12 April 2015, paragraphs 54 and 55; *Gautrin and Others v. France*, Judgment of 20 May 1998, paragraph 58; *San Leonard Band Club v. Malta*, Judgment of 29 July 2004, paragraph 58; *Thomann v. Switzerland*, Judgment of 10 June 1996, paragraph 30; *Wettstein v. Switzerland*, Judgment of 21 December 2000, paragraph 42; , and Court cases: KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, Judgment of 26 August 2019, paragraph 50; KI24/17, Applicant *Bedri Salihu*, Judgment of 19 July 2019, paragraph 44; KI06/12, Applicant *Bajrush Gashi*, Judgment of 9 May 2012, paragraph 45).

59. More specifically, as regards the subjective test, based on the ECtHR case law, personal impartiality of a judge must be presumed until there is proof to the contrary. (See, inter alia, ECtHR cases, *Meznaric v. Croatia*, Judgment of 30 November 2005, paragraph 30; *Padovani v. Italy*, Judgment of 26 February 1993, para.26; *Morel v. France*, paragraph 41; *San Leonard Band Club v. Malta*, cited above, paragraph 59; *Hauschildt v. Denmark*, Judgment of 24 May 1989, paragraph 47; *Driza v. Albania*, Judgment of 13 November 2007, paragraph 75; and *Korzeniak v. Poland*, Application *No.56134/08, Judgment of 10 January 2017, paragraph 47*).

60. As regards the type of proof required to prove the personal impartiality of a judge , the ECtHR, has strived to ascertain whether a judge has displayed hostility or ill will for personal reasons. The principle that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the ECtHR. (See, ECtHR cases, *Kyprianou v. Cyprus*, cited above, paragraph 119; *Micallef v. Malta*, Judgment of 15 October 2009, paragraphs 93-94; and *Tozicka v. Poland*, Judgment of 24 July 2012, paragraph 33).

61. According to the case law of the ECHR, while in some cases it may be difficult to procure evidence with which to rebut the presumption of

the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee for an impartial trial. (See, the case of ECtHR *Micallef v. Malta*, cited above, paragraphs 95 and 101). It must be noted, that in the vast majority of cases raising impartiality issues the ECtHR has focused and found violations in the aspect of the objective test. (see also the case of ECtHR, *Ramos Nunes de Carvalho and Sa v. Portugal*, Judgment of 6 November 2018, paragraph 146; and *Korzeniak v. Poland*, cited above, paragraph 48).

62. Asto the objective test, the Court notes that on the basis of the ECtHR case law, when such a test is applied on a trial panel, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to impartiality of the court. In this respect even the appearance/perception may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done”. (In this context, see, inter alia, ECtHR cases, *De Cubber v. Belgium*, Judgment of 26 October 1984, paragraph 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Therefore, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. (See, the ECtHR case, *Micallef v. Malta*, cited above, paragraph 98).

63. Moreover, based on the case law of the ECtHR, the situations within which issues may arise regarding the lack of impartiality may be of (i) functional and (ii) personal nature.

64. The first one relates to the exercise of various functions within a judicial proceeding by the same person or hierarchical or other nature between the judge and other actors in the particular judicial process. With regard to the latter, the level and nature of this connection should be examined. These situations of a functional nature may include examples of cases in which were carried out (i) advisory and judicial functions (in this context, see, inter alia, cases of ECtHR *Procola v. Luxembourg*, Judgment of 8 September 1995 , paragraph 45, *Kleyn and Others v. the Netherlands*, Judgment of 6 May 2003, paragraph 200; *Sacilor Lormines v. France*, Judgment of 9 November 2006, paragraph 74); (ii) judicial and extra-judicial (in this context, see, inter alia, the ECtHR case, *McGonnell v. the United Kingdom*, Judgment of 8 February 2000, paras. 52-57); and (iii) various court cases(see, inter alia, the EctHR case *Pasuqini v. San Marino*, Judgment of 2 May 2009, paragraph 148.) In this context, the ECtHR emphasizes that the assessment of whether the participation of the same judge at different stages of the trial may have resulted in a violation of the requirements

related to the impartiality of the court, should be assessed case by case and depending on the circumstances of each case.

65. The second issue to be dealt with in respect of the absence of impartiality, respectively issues of a personal nature, is mainly related to the conduct of a judge in a case or the existence of connections with one of his/her parties or his/her representatives in a case. (See further in this context the ECHR Guide of 31 August 2019, on Article 6 of the ECHR, Right to a fair trial (civil limb), Part III. Institutional requirements, C. Independence and Impartiality, 3. An impartial tribunal, b. Situations in which the question of a lack of judicial impartiality may arise, ii. Situations of a personal nature).

66. The Court also notes, that based on the ECtHR case law, the assessment of court's impartiality under a subjective and objective test implies that, it must be determined whether in a given case there is a legitimate reason to fear that a particular trial panel lacks impartiality. However, to decide whether in a concrete case there are sufficient grounds to determine that a certain judge is not impartial, the standpoint of the Applicant is important, but not decisive. What matters is the court's assessment whether such a fear can be held to be objectively justified. (See, *inter alia*, the ECtHR cases *Mežnarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangel v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; *San Leonard Band Club v. Malta, cited above*, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49, and *Tozicka v. Poland*, cited above, paragraph 33).

Application of the general principles of impartiality of the Court in the circumstances of the concrete case

67. In applying these general principles in the circumstances of the present case, the Court first recalls that the Applicant alleges precisely the exercise of the different functions of a judge within the same judicial process, namely the fact that Judge I.K. had participated as a member of the trial panel in: (i) the issuance of the Judgment [Ac.no.101/10] of the District Court in Peja, of 16 March 2011; as well as in: (ii) the issuance of Judgment [Rev.nr.285 /2018], of the Supreme Court, of 1 October 2018 in the capacity of Presiding Judge. According to the Applicant, the participation of Judge I.K. in these two court instances where his claim for confirmation of ownership was dealt with has resulted in a violation of his right to a fair and impartial trial.

68. Based on the aforementioned case law of the ECtHR, the Court will first examine the Applicant's allegations regarding the impartiality of the court under the criteria of the subjective test.

69. The Court reiterates that as to the subjective test, the personal impartiality of Judge I.K. should be presumed until proven otherwise. The Applicant has not submitted any evidence which could call into question the impartiality of Judge I.K. Consequently, the Court finds that in the issuance of Judgment [Rev.no.285/2018] of the Supreme Court, of 1 October 2018 no facts can substantiate the finding that the Supreme Court was not impartial in terms of the subjective test.

70. In the following, in accordance with the principles of the above-mentioned case law of the ECHR, the Court will proceed with the examination of the Applicant's allegations under the criteria of the objective test. Initially, the Court will consider (i) whether the circumstances of the present case may raise legitimate doubts on the part of the Applicant regarding the impartiality of the Supreme Court, and whether this is the case (ii) whether these doubts are objectively justifiable.

71. The determination of these issues and the decision in their respect is made in each case individually at the level of the ECtHR, and also at the level of this Court. (See, in this context, the ECtHR cases, *Meznarić v. Croatia*, cited above, paragraph 31; *Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, paragraph 58; *Wettstein v. Switzerland*, cited above, paragraph 44; and *San Leonard Band Club v. Malta*, cited above, paragraph 60; *Korzeniak v. Poland*, cited above, paragraph 49; and *Tozicka v. Poland*, cited above, paragraph 33).

72. In this respect, as noted above, the exercise of different functions within the same judicial process by the same judge and which relates to the circumstances of the present case, represents a category of issues of a functional nature and which are relevant in the assessment of impartiality of a court. In such cases, the ECtHR has in principle held that there are legitimate doubts about the impartiality of the court. (See, *inter alia*, the ECtHR case, *Korzeniak v. Poland*, cited above, paragraphs 51 and 52).Also this Court takes the same position on such circumstances of the cases. This is due to the fact that the exercise of different functions of Judge I.K., before and after his promotion to the Supreme Court, took place within the same judicial process when deciding on the Applicant's claim. Initially, Judge I.K. decided on the Applicant's appeal when he was a judge in the District Court in Peja and later on, when Judge I.K. has been transferred to the

Supreme Court, he has decided on the Applicant's request for revision **concerning the same court case** of the Applicant.

73. Consequently, on the basis of the ECtHR case law, the Court will, in the following, assess whether such doubts in the circumstances of the concrete case, which have already been ascertained, can be objectively justifiable.

74. In terms of assessing *legitimate doubts* in the context of circumstances in which a judge has exercised more than one function in the same court case, two categories of cases are important.

75. Firstly, special attention should be paid to the characteristics of the law and the rules that are applicable in a particular case. (See, *inter alia*, the ECtHR cases *Warsicka v. Poland*, Judgment of 16 January 2007, paragraph 40; *Toziczka v. Poland*, Judgment of 24 July 2012, paragraph 36; and *Korzeniak v. Poland*, cited above, paragraph 50).). In this context, the ECtHR has emphasized that organizational issues are also important. (See, inter alia, the case of the ECHR, *Piersack v. Belgium*, Judgment of 1 October 1982, paragraph 30). For example, the existence of procedures that ensure impartiality, namely the rules and procedures that govern also the withdrawal/exclusion of a judge, is a relevant factor. (See ECtHR cases, *Pfeifer and Plankl v. Austria*, Judgment of 25 February 1992, paragraph 6; *Oberschlick v. Austria (no. 1),* Judgment of 23 May 1991, paragraph 50; and *Pescador Valero v. Spain*, Judgment of 24 September 2003 , paragraphs 24-29).

76. Secondly, it is necessary to assess whether the link between the substantive issues considered by the same judge at different stages of the proceedings is so close/obvious that it casts doubt on the impartiality of the judge who took part in the decision-making throughout these stages. This assessment is also to be made from case to case; regard being had to the characteristics and circumstances of the individual case. (See, *inter alia*, the ECtHR cases *Warsicka v. Poland*, cited above, paragraph 40; *Toziczka v. Poland*, cited above, paragraph 36; and *Korzeniak v. Poland*, cited above, paragraph 50).

77. In this respect, the Court, based on the ECtHR case law elaborated above, should first elaborate on legal and regulatory issues. The Court recalls that the procedures governing the withdrawal of a judge from decision-making are of special importance.

78. In this context, the Court notes that in the Applicant's case in the proceedings relating to the request for revision, the Supreme Court has applied the provisions of the LCP. The latter, in Article 67 paragraph

(d) (Exclusion of the Judge from the Trial), specifically regulates the case and the circumstances in which judges are excluded from the respective decision-making. The Court notes that paragraph (d) of Article 67 of the LCP, the violation of which is alleged by the Applicant, stipulates that:

> *"*A judge may be excluded from the legal matter*:*
>
> *[...]*
>
> *d) if in the same case he or she has taken part in rendering a decision of a lower court or any other body or has taken part in mediation procedure; [...]"*

79. The Court should also note that in the circumstances of the present case, between the participation of Judge I.K. in the trial panel of the District Court in Peja, respectively the issuance of the Judgment [Ac.nr.101/10] of 16 March 2011 and his participation in the Panel of the Supreme Court in the capacity of the presiding judge, respectively, the issuance of the Judgment [Rev. no. 285/2018] of 1 October 2018, by Decision [Rev-Mlc.no.253/2011] of the Supreme Court, of 27 August 2013 , the Applicant's case was remanded for retrial. In the new trial, Judge I.K. had participated in the capacity of the presiding judge of the Supreme Court trial panel that has reviewed the request for revision filed against the Judgment [Ac.no.2749/13] of the Court of Appeals, of 10 April 2017. However, the Court notes that the content of paragraph (d) of Article 67 of the LCP, respectively "*if in the same case he or she has taken part in rendering a decision of a lower court* [...]", and applicable in the circumstances of the present case because this norm is comprehensive and has obliged the Judge I.K. to be excluded from decision-making in the respective trial panel of the Supreme Court.

80. The Court also emphasizes that in such circumstances the exclusion of a judge is not necessarily dependent on the request of the parties to the proceedings. On the basis of the provisions of the LCP, a judge cannot proceed with a legal matter *"if in the same case he or she has taken part in rendering a decision of a lower court"*. This is stipulated in Article 67 of the LCP and is also supported by the ECtHR case law, which, emphasizing the importance of the perception and confidence that courts should reflect in public in a democratic society, has consistently stated that any judge who believes that his or her participation in a court case may raise doubts about the impartiality of the trial should be excluded from the decision-making.

81. Moreover, the Court also recalls that in the proceedings relating to the request for revision, it is decided only on the basis of the documents contained in the case file. Therefore, due to the written nature of the proceedings, neither the Applicant nor his defence counsel could have been aware, prior to having received the decision of the Supreme Court, that the same judge who was a part of the trial panel in the District Court has taken part also in the trial panel of the Supreme Court that decided on his request for revision. Therefore, the responsibility for the exclusion of the respective judge cannot be attributed to the Applicant and it can be concluded that he has waived the right for his case to be decided by an impartial court. (See, in this context also the cases of the Court: KI187/18 and KI11/19, Applicant: *Muhamet Idrizi*, Judgment of 26 August 2019, paragraph 67; KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 36; see also the ECtHT case, *Oberschlick v. Austria*, cited above, paragraph 51).

82. The Court recalls that the question of whether or not there is a sufficient number of judges to decide on the requests for revision is a matter entirely within the jurisdiction of and for discussion, if necessary, between the judiciary and other responsible authorities. The primary responsibility for proper administration of justice pertains to the relevant institutions and organizational matters cannot be used as an excuse for not adhering to the Constitution and the ECHR. (In this context, see the cases of the Court: KI187/18 and KI11/19, Applicant *Muhamet Idrizi*, cited above, paragraph 68; KI06/12, Applicant: *Bajrush Gashi*, cited above, paragraph 51; and the case KO4/11 Applicant: The Supreme Court of Kosovo, Constitutional review of articles 35, 36, 37 and 38 of the Law on Expropriation of Immovable Property, No.03/L-139, Judgment of 1 March 2012).

83. Consequently and in such circumstances, the Court finds that the "*legitimate doubts*" about the impartiality of the court arising as a result of the exercise of the different functions by Judge I.K. within the same court proceeding are objectively justifiable. In this respect, the Court finds that in issuing the Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, the court, which in the present case is the Supreme Court, was not impartial in terms of the objective test and that consequently, the Applicant's right to fair and impartial trial by an impartial tribunal, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

84. The Court, as stated above, recalls that in the context of assessment of the impartiality of the Court, beyond legal and regulatory matters, the interrelationship between substantive matters examined by the same

judge at different stages of the proceedings is also relevant. However, given that the Court has already found that in the circumstances of the present case, the legitimate doubts of bias are objectively justifiable; it is considered not necessary to examine other aspects relating to the impartiality of the court in terms of objective test.

85. The Court notes that this conclusion concerns exclusively the challenged Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, from the standpoint of the impartiality of the court in terms of the objective test and in no way interrelates or in any way prejudices the outcome of the merits of the case regarding the issue of ownership that has been the subject of review by the regular courts.

Conclusions

86. In the circumstances of the present case, the Court found that Judgment [Rev. no. 285/2018] of the Supreme Court, of 1 October 2018, was issued in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it was rendered by the composition of a Panel, in which contrary to the relevant provisions of the LCP and the case law of the ECHR and the Court, has taken part the Judge I.K., who has been also part of the decision-making in the earlier stages of the same case, respectively has participated as a member of the trial panel in the District Court in Peja when it was decided on the Applicant's claim and also as the presiding judge of the of the Supreme Court when it was decided on the Applicant's request for revision. In such circumstances, the Court found that the legitimate doubts about the court's lack of impartiality are objectively justifiable.

87. In the circumstances of the present case, the Constitutional Court has dealt exclusively and solely with the allegation for impartiality of the court due to the participation of Judge I.K. in the same trial in two court instances. Consequently, this Judgment of the Court is without any prejudice to the final merits for decision-making in this case, once the case is remanded to the Supreme Court for retrial.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Articles 20 and 47 of the Law on the Constitutional Court and Rule 59 (a) of the Rules of Procedure, on 1 July 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE INVALID the Judgment Rev.no.285/2018 of the Supreme Court of Kosovo, of 1 October 2018;

IV. TO REMAND the case for reconsideration to the Supreme Court in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court, to notify the Court, in accordance with Rule 66 (4) of the Rules of Procedure, about the measures taken for the implementation of the Judgment of this Court, no later than 30 November 2020;

VI. TO REMAIN seized of the matter pending the compliance with this order;

VII. TO ORDER that this Judgment be notified to the Parties, and in accordance with Article 20.4 of the Law to be published in the Official Gazette;

VIII. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI56/18, Applicant: Ahmet Frangu, Constitutional review of Judgment ARJ. UZVP. No. 67/2017 of the Supreme Court, of 22 December 2017

KI 56/18, Judgment adopted on 22 July 2020, published on 10 August 2020

Keywords: *individual referral, admissible referral, right to respect for private and family life, right to an effective remedy, judicial protection of rights, principal death register, formal access of public authorities, public hearing, victim status, violation of the right to private and family life, violation of the right to an effective remedy*

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

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

the documents issued by the Swedish health institutions do not coincide with those issued in the Republic of Kosovo.

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

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

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

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

protects the rights of individuals or by determining the application of special measures appropriate to the circumstances of a case; and (v) that in such cases, the public authorities are obliged to consider the balance between the interests of the individual, including the nature of the allegations and whether they relate to "*essential aspects*" of private life and the obligations of the State, including whether they relate to "*narrow and precise*" or "*broad and indefinite*" obligations and the potential burden they impose on the state.

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

In applying these principles in the circumstances of the present case, with regard to Article 36 of the Constitution in conjunction with Article 8 of the ECHR, the Court emphasized that public authorities, including the regular courts, beyond the finding that with regard to the death of the Applicant's son the medical report confirming his death is missing, a finding that has resulted in the refusal of registration of the Applicant's son in the PDR, with the serious consequence of leaving the civil status of his wife and deceased minor son unresolved, have not taken into account the fact that (i) it is not disputed that the Applicant's son died; and (ii) such a fact was confirmed by the public authorities of the Republic of Kosovo, namely the Embassy of Kosovo in Sweden, where the death occurred. Furthermore, the public authorities, by rejecting the Applicant's request for registration of his son's death in the PDR, despite the fact that the same death was not contested, (i) not only had they formally applied the applicable law, thus not considering either the possibility of international legal cooperation with the Swedish state nor the possibilities provided through the provisions of the out-contentious procedure, but (ii) contrary to the constitutional requirements and those of the ECHR, did not consider the balance between the competing interests, namely the essence and features of the Applicant's allegations and the obligations of the state to protect the right to private life.

The Court clarified that the examination of such a balance, would result in the finding that the Applicant's allegations and claim are "*narrow and clear*"

and do not result in disproportionate obligations to the State. Moreover, through such a refusal in the absence of a medical report, without taking into account any of the circumstances and specifics of the present case, the decisions of public authorities resulted in only "*theoretical and illusory*" constitutional rights for the Applicant, and not "*practical and effective*" constitutional rights, as required by the Constitution and the ECHR. Consequently, the Court found that the proceedings followed by the administrative and judicial system, contrary to the positive obligations of the state, did not result in the exercise of the Applicant's right to respect for his private life, contrary to paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

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

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

JUDGMENT

in

Case No. KI56/18

Applicant

Ahmet Frangu

Constitutional review of Judgment ARJ. UZVP. No. 67/2017 of the Supreme Court of Kosovo of 22 December 2017

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicant

1. The Referral is submitted by Ahmet Frangu from Prishtina (hereinafter: the Applicant).

Challenged law

2. The Applicant challenges the constitutionality of Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [AA. No. 333/2017] of 20 October 2017 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [A. No. 1185/2014] of 5 June 2017 of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates the

Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

5. On 31 May 2018, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) adopted in the administrative session the amendments and supplementation to the Rules of Procedure, which was published in the Official Gazette of the Republic of Kosovo on 21 June 2018 and entered into force 15 (fifteen) days after its publication. Accordingly, in reviewing the Referral, the Court refers to the legal provisions of the new Rules of Procedure in force.

Proceedings before the Constitutional Court

6. On 12 April 2018, the Applicant submitted the Referral to the Court.

7. On 18 April 2018, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Snezhana Botusharova and Arta Rama-Hajrizi.

8. On 7 May 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.

9. On 14 May 2018, the Court requested the Basic Court to submit all the case files.

10. On 15 May 2018, the Basic Court submitted all case files to the Court.

11. On 16 June 2018, the term of office of the Judges: Snezhana Botusharova and Almiro Rodrigues ended. On 26 June 2018, the term of office of the judges: Altay Suroy and Ivan Čukalović ended.

12. On 9 August 2018, the President of the Republic of Kosovo appointed new judges: Bajram Ljatifi, Safet Hoxha, Radomir Laban, Remzije Istrefi-Peci and Nexhmi Rexhepi.

13. On 20 November 2018, as the mandate of the four judges mentioned above as judges of the Court ended, the President of the Court, pursuant to the Law and the Rules of Procedure, rendered Decision KSH. 56/18, on the appointment of the new Review Panel, composed of Judges: Arta Rama-Hajrizi (Presiding), Safet Hoxha and Remzije Istrefi-Peci.

14. On 21 January 2020, having regard to the paragraph 2 of Rule 42 (Right to Hearing and Waiver) of the Rules of Procedure, the Court decided to hold a hearing taking into account that in the circumstances of the present case it considered necessary the clarification of issues related to evidence and applicable law, it sent the invitations to participate in the public hearing to the Applicant, the Civil Registration Agency of the Ministry of Internal Affairs (hereinafter: the Civil Registration Agency), Directorate of Administration of the Civil Status Sector of the Municipality of Prishtina (hereinafter: the Municipality of Prishtina) and the Ministry of Foreign Affairs of the Republic of Kosovo (hereinafter: the Ministry of Foreign Affairs).

15. On 29 January 2020 and 3 and 7 February 2020, the Applicant, the Civil Registration Agency, the Municipality of Prishtina and the Ministry of Foreign Affairs, represented by the State Advocacy, confirmed their participation in the above-mentioned public hearing.

16. On 10 February 2020, a public hearing was held. The Applicant and representatives of the Civil Registration Agency, the Municipality of Prishtina and the State Advocacy were present at the hearing.

17. On 14 February 2020, the Court requested the Municipality of Prishtina and the State Advocacy to submit additional documentation to clarify some factual aspects related to case No. KI56/18.

18. On 19 and 21 February 2020, the Municipality of Prishtina and the State Advocacy, submitted the requested clarifications to the Court.

19. On 22 April 2020, after having considered the Report of the Judge Rapporteur, the Review Panel, by a majority, recommended to the Court the admissibility of the Referral, while it was decided that the decision on the merits of the case would be taken at one of the next sessions.

20. On 22 July 2020, the Court voted by a majority of votes that the Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court in conjunction with the Judgment [AA. No. 333/2017] of 20 October 2017 of the Court of Appeals, the Judgment [A. No. 1185/2014] of 5 June 2017 of the Basic Court; Decision [No. 30/2014] of 24 June 2014 of the Civil Registration Agency; the Decision [No. 86/013] of 18 November 2013 of the Civil Registration Agency and Decision [No. 01-203-194645] of 16 October 2013 of the Municipality of Prishtina, are not in compliance with (i) Article 36 [Right of Privacy] of the Constitution in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (hereinafter: the ECHR); and (ii) Article 54 [Judicial Protection of Rights] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR.

Summary of facts

21. On 30 April 2013, the Applicant's son, namely the deceased I.F. traveled to Sweden for the purpose of recovery from a serious illness. Based on the explanations given by the Applicant at the public hearing, the deceased I.F. traveled to Sweden with his passport. Based on the case file, his Schengen visa was valid from 17 December 2012 until 17 June 2013.

22. On an unspecified date, and during his stay in Sweden, the deceased had applied for asylum, but using another name, namely the name A.H. To the deceased, the Swedish authorities issued the document proving that he is an asylum seeker, namely the LMA-card under the name with which he had applied, namely A.H. The reasons, on the basis of which the deceased did not apply for asylum in Sweden in his personal name, but in that of A.H., remain unclear even after the public hearing. In the latter, the Applicant alleges that his son "*has imagined a name A.H. But in reality A.H is I.F.*"

23. On 7 June 2013, I.F. died at a health institution in Sweden. The medical report regarding his death was issued under the name of A.H.

24. On 8 June 2013, the Embassy of the Republic of Kosovo in Sweden issued a submission [no. 09/13] in which it (i) clarified that the relevant authorities of the Republic of Kosovo were informed about his death; (ii) confirmed that there is no obstacle to the repatriation of the deceased I.F. in the Republic of Kosovo; and (iii) requests the company responsible for funeral services at Linkoping to enable transportation to Kosovo for the deceased I.F.

25. On 16 June 2013, the body of the deceased arrived at Prishtina International Airport and was transported to Prishtina via N.SH.T "Dardania". The funeral ceremony was held on the same day.

26. On 10 October 2013, the Applicant addressed the Municipality of Prishtina, requesting that his deceased son, namely I.F., be registered in the Principal Death Register (hereinafter: PDR) based on Law no. 04/L-003 on Civil Status (hereinafter: the Law on Civil Status).

27. On 16 October 2013, the Municipality of Prishtina by Decision [No. 01-203-194645] rejected the Applicant's request reasoning, *inter alia*, that (i) the request is not complete in accordance with the legal provisions for subsequent death registration in the principal register; and (ii) the case file, namely, the personal data of I.F., the birth certificate, the identity card and the marriage certificate of the Republic of Kosovo do not match the data issued by the authorities of the place where the death happened, namely in Sweden. This Decision, in its reasoning, specifically stated that in the death documentation issued by the health institution in Sweden appears the name of the deceased A.H., born on 19 September 1979, while in the documents issued by the Republic of Kosovo, appears the name I.F. born on 2 September 1978.

28. On an unspecified date, against the aforementioned Decision of the Municipality of Prishtina, the Applicant filed a complaint with the Civil Registration Agency.

29. On 18 November 2013, the Civil Registration Agency by Decision [No. 86/013] rejected the Applicant's appeal against the Decision of the Municipality of Prishtina. The Civil Registration Agency, among others, reasoned that (i) the documents issued by the Swedish health institutions do not correspond to those issued in the Republic of Kosovo, because the former coincide with the person A.H., while the latter with the person I.F .; and (ii) the party, namely the Applicant, did not substantiate his claim that A.H. is in fact I.F.

30. On 12 February 2014, the Applicant filed a lawsuit against the aforementioned Decision of the Civil Registration Agency in the Department of Administrative Matters of the Basic Court. The Applicant requested to allow the registration of I.F. to PDR and to annul the challenged Decision of the Civil Registration Agency. The Applicant stated that as a consequence of the non-registration of his son, I.F. at the PDR, the civil status of the latter's wife and son had remained unresolved. The Civil Registration Agency, in its capacity of

respondent, on 21 March 2014, filed a response to the lawsuit, proposing that it be rejected as ungrounded.

31. On 16 May 2014, the Basic Court, by Judgment [No. 1652/13] approved the Applicant's statement of claim and annulled the Decision of 18 November 2013 of the Civil Registration Agency, remanding the case for retrial. The Basic Court, *inter alia,* stated that the challenged Decision was rendered with essential violation of the provisions of Law No. 02/L-28 on Administrative Procedure (hereinafter: LAP) and specifically Articles 84 and 85 thereof. The Basic Court, moreover, stated that the Civil Registration Agency failed to substantiate all the evidence, including the submission [no. 09/13] of 8 June 2013 issued by the Embassy of the Republic of Kosovo in Sweden. In the context of this submission, the Basic Court specifically stated the following:

> *"The Court notes that the issue has not been fully and fairly assessed in the first instance body, the same thing has been done by the second instance body, which left on force the first instance decision with the decision challenged by the claim, for the fact that it was not taken into consideration at all the submission no. 09/13 of 08.06.2013, issued by the Embassy in Stockholm – consular office Section, which confirms that the Embassy of the Republic of Kosovo in the Kingdom of Sweden, certifies that the deceased I.F. born on 02.09.1978 in Prishtina, Kosovo, with personal number 1001193615, passport number K00488071 was a citizen of the Republic of Kosovo, and by this submission he asked the company responsible for funeral services in Linkoping, to enable the transportation of IF corpse to Kosovo. So, with the same submission are stating that the authorities of the Republic of Kosovo have been informed about the death of IF too and the Embassy of Kosovo confirms that there is no obstacle to his repatriation in the Republic of Kosovo (emphasis added)."*

32. On 24 June 2014, the Complaints Review Commission in the Department for Registrations and Civil Status of the Civil Registration Agency, by Decision [No. 30/2014], rejected again the Applicant's application for registration of I.F. in the PDR, upholding the Decision [No. 01-203-194645] of 16 October 2013 of the Municipality of Prishtina. By its Decision, the Civil Registration Agency, among others, reasoned that the registration of I.F. in the PDR would be in violation of Article 15 (Criteria for late registrations of deaths in the register of the dead) of Administrative Instruction no. 02/2012 on the Late Registrations in the Civil Status Records (hereinafter: the Administrative Instruction), because the documents issued by the Swedish health institutions do not match the documents issued in the

Republic of Kosovo. The Civil Registration Agency also added that "*the documentation from the Swedish state is in the name of A.H., while the documentation from Kosovo is for I.F.*" and that the party, namely the Applicant, did not "*bring evidence to substantiate his claim that his son I.F. is the same as A.H.*", Furthermore, the Commission, referring to the Administrative Instruction 05/2012 for the Complaints Review Commission (hereinafter: the Administrative Instruction for the Complaints Commission), stated that the same "*has the power to make decisions based on the facts (evidence) and evidence which the complainant presents to the Commission*".

33. On 15 July 2014, the Applicant again filed a lawsuit for administrative conflict against the above-mentioned Decision of the Civil Registration Agency with the Basic Court, alleging essential violation of the provisions of the procedure, erroneous and incomplete determination of the factual situation and violation of the substantive law. The Applicant requested that the relevant Decision be annulled and that I.F. be registered in the death register, namely in the PDR. The Applicant specifically stated that the challenged Decision was issued in violation of (i) Articles 46 (Death Certification), 47 (Declaration of death), 48 (Certification of legal fact of death), 49 (Death confirmation) and 50 (Burial permit) of the Law on Civil Status; (ii) by Judgment [A. No. 1652/13] of 16 May 2014 of the Basic Court; and (iii) item 7 of Article 7 [Procedures of the commission] of the Administrative Instruction for the Complaints Commission, because the relevant evidence has not been reviewed. The Applicant stated that any ambiguities regarding the person A.H., have been clarified through the submission [no. 09/2013] of the Embassy of the Republic of Kosovo in Sweden.

34. On 10 September 2014, 7 September 2015, 29 February 2016, and 26 October 2016, respectively, through his representative, the Applicant addressed the Basic Court with a request for resolution of his case with priority, stating that (i) the Basic Court by Judgment [No. 1652/13] of 16 May 2014 approved his statement of claim, but did not oblige the Civil Registration Agency to register the deceased I.F. in the PDR; and (ii) the resolution of his case directly affects the regulation of the status issues of the family of the deceased I.F., namely his wife and son.

35. On an unspecified date, the Ministry of Justice, through the State Advocacy, filed a response to the lawsuit, stating that the late registration of death could not be made at the PDR because in the circumstances of the case, the documentation issued by the Swedish state no longer matched documentation of the Republic of Kosovo, and there is no evidence that the person A.H. is in fact I.F.

36. On 5 June 2017, the Basic Court, by Judgment [A. No. 1185/2014] rejected as ungrounded the statement of claim of the Applicant for annulment of the above mentioned Decision of the Civil Registration Agency. In assessing the claim of the claimant, the Basic Court based on Article 15 of the Administrative Instruction on the criteria for late registration of deaths in the PDR. The Court noted, *inter alia*, that the registration of the person I.F. in the PDR is in contradiction with this Administrative Instruction because the documentation issued by the Swedish health institutions does not correspond to those issued in the Republic of Kosovo. With regard to the Applicant's allegations that in fact the person A.H. is I.F. and consequently it is about the same person, the Court noted as follows:

> "*The court from the evidence which was administered in the main hearing, finds that the reasoning of the respondent as in the challenged act that after the evidence was administered by the respondent it was concluded that the complainant's complaint is ungrounded due to the fact that the documentation attached to the request for death registration for I.F. in the PDR do not match the documentation issued by the Republic of Kosovo. All this due to the fact that the documents on the basis of which the death is required to be registered and which were issued by the Swedish authorities after the administration of the evidence as above are found to be all in the name of A.H. while death registration is required to be done for I.F. This court has also assessed the claims of the claimant that it is about the same person and after the deceased I.F. lived in Sweden and the death occurred there but as such he could not approve these allegations as grounded for the registration of death in the PDR as it found that as such they are contrary to Article 15 of AI 02/2012 of the MIA which clearly sets out the criteria to be met by the Applicant*".

37. On 10 July 2017, the Applicant filed an appeal with the Court of Appeals alleging essential violation of the procedural provisions, erroneous and incomplete determination of factual situation and erroneous application of substantive law, proposing that his statement of claim be approved, or that the aforementioned Judgment of the Basic Court be annulled and the case be remanded for retrial. The Applicant in this appeal also highlighted the importance of resolving his case and the effect that the latter has on the civil status of the wife and son of the deceased I.F.

38. On 20 October 2017, the Court of Appeals, by Judgment [AA. No. 333/2017], rejected the Applicant's appeal as ungrounded and upheld

the Judgment of the Basic Court. The Court of Appeals, *inter alia*, reasoned that (i) the subsequent registration of the death in the PDR of person I.F. does not meet the criteria of Article 15 of the Administrative Instruction; (ii) the documentation issued by health institutions in Sweden does not match the documentation issued by the Republic of Kosovo; and (iii) the claimant, namely the Applicant, "*has not brought convincing evidence to substantiate his claims that his son I.F. is of the same name as that of A.H*".

39. On 20 November 2017, the Applicant filed (i) a revision; and (ii) a request for extraordinary review of the judicial decision with the Supreme Court, alleging essential violation of the procedural provisions, erroneous and incomplete determination of factual situation and erroneous application of substantive law, with the proposal to approve the statement of claim and annul the decisions of the lower instance courts, remanding the case for retrial.

40. On 22 December 2017, the Supreme Court by Judgment [ARJ. UZVP. No. 67/2017] rejected as ungrounded the request for extraordinary review of the court decision and consequently upheld the Judgment [AA. No. 333/2017] of 20 October 2017 of the Court of Appeals in conjunction with the Judgment [A. No. 1185/2014] of 5 June 2017 of the Basic Court.

41. The Supreme Court also found that the registration of the death of person I.F. with the PDR is contrary to Article 15 of the Administrative Instruction because the documentation issued by the Swedish health institutions does not match the documentation issued by the Republic of Kosovo. The former are on behalf of the person A.H., while the latter on behalf of the person I.F. The relevant part of the Judgment of the Supreme Court states as follows:

> *"During the evaluation, this court ascertained that the second instance court has correctly established that the documentation attached to the referral for the death registration of IF in PDR does not comply with the documentation issued by the Republic of Kosovo. All this because of the fact that the documents on the basis of which are required to register the deaths which were issued by the Swedish authorities have been found that all are on the name of AH, while the death registration was required to be made on the name of IF. This Court has also assessed the claims of the claimant that this is about the same person since the deceased IF lived in Sweden and death happened there, but as such, these claims for registration of the death in the PDR cannot be approved as grounded, since they are contrary to the Article*

15 of Administrative Instruction 02/2012 which clearly sets out the criteria which should be met by the applicant."

Applicant's allegations

42. The Applicant alleges that the Judgments of the regular courts were rendered in violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution. The Applicant also alleges a violation of his fundamental rights and freedoms guaranteed by the ECHR.

43. The Applicant before the Court refers to the evidence proving the death of his son and claims that the latter have not been taken into account by the regular courts, and which, in addition to refusing to register his son's death in the PDR, have also affected the civil status of the wife and son of the deceased I.F.

44. The Applicant requests the Court to declare his Referral admissible and declare invalid the Judgments of the regular courts, remanding the case for retrial or to order the Civil Registration Agency to register the death of his son I.F. in the PDR, "*in order to regulate the civil status of the latter's wife and son*".

Clarifications provided by the Applicant and other parties participating in the public hearing

45. At the public hearing on 10 February 2020, the Applicant clarified that (i) the name of A.H. was imagined by I.F. for asylum purposes in Sweden, and that he does not know the reasons that led his son to register with another identity in Sweden; (ii) medical report "*was issued by Sweden on behalf of A.H*"; (iii) regarding the burial permit, he stated that "*I have the bill, I will attach it to you, I have all of it here, I also have the bill of the Islamic religion that I went to, the boards, the imam that I paid, these are all, even the washing of the corpse, and the bill of the Company that transported it, nothing here is a problem only that he appeared by that name*"; (iv) Regarding the civil status of the wife and son of the deceased, the Applicant stated that his son is evidenced as alive in the civil registry and consequently "*his son is in school Joni is in the 5th grade, he is registered in a team for young people in football, we wanted to send him abroad, but he cannot get his passport or any other document. And now without having permit of both parents he cannot go abroad, they are not issuing those documents, even his wife cannot exercise any right of*

civil status, inheritance and other rights"; (v) he stated the fact that Judgment [A. No. 1652/13] of the Basic Court in 2014 approved his statement of claim remanding the case for reconsideration to the Civil Registration Agency, but "*in the enacting clause of this judgment, the Ministry of Internal Affairs is not obliged to make the registration in the death register*"; and (vi) stated the importance of the submission [no. 09/13] of 8 June 2013 issued by the Embassy of the Republic of Kosovo in Sweden through which "*The Kosovo authorities were informed that the citizen of Kosovo, Mr. I.F. passed away*",

46. The Municipality of Prishtina and the Civil Registration Agency, in essence, among others, stated that (i) their respective decisions are based on the applicable law, as a result of which a death cannot be registered in the PDR, in the absence of a medical report, while in the circumstances of the present case, "*the documentation of the Republic of Kosovo does not correspond to the documentation issued by the state of Sweden"* and that the *"death documentation, issued by the institution where the death occurred, which is not a death certificate, namely the personal data that appear in them do not match the personal data which appear in the certificate of birth, marriage and ID of the Republic of Kosovo*", and that consequently, the circumstances of the case intertwine "*two identities and with contradictory data*"; and (ii) despite the fact that Judgment [A. No. 1652/13] of the Basic Court approved the statement of claim of the Applicant, remanding the case for reconsideration to the Civil Registration Agency, in "*the enacting clause of this judgment, the Ministry of Internal Affairs is not obliged to make the registration in the death register*". Following this decision and the rejection of the Civil Registration Agency to register the deceased in the PDR, the Basic Court and the Court of Appeals confirmed the position of the Municipality of Prishtina and the Civil Registration Agency, by Judgments [A. no. 1185/2014] of 5 June 2017 and [AA. No. 333/2017] of 20 October 2017, respectively. The latter were later upheld by the Supreme Court.

47. The public hearing also clarified, *inter alia*, issues related to (i) the burial permit; (ii) the international death certificate; (iii) the civil status of A.H .; and (iv) international legal cooperation.

48. Regarding the first issue, the representative of the Municipality of Prishtina stated that "*There is no permission from the Municipality of Prishtina in the case file, the only evidence I can say for the funeral are the bills of the Islamic community which the party received for the funeral of the deceased and the Municipality of Prishtina does not have any permission given to him for burial".* In the request of the

Court addressed to the Municipality of Prishtina on 14 February 2020 regarding the necessary clarifications regarding the burial permit of the deceased, the Municipality, through its response of 19 February 2020, clarified once again *that "it could not provide any documents related to the death/burial of the I.F., as in the civil status system this person is listed as alive".*

49. With regard to the second issue, it was clarified by the State Advocacy that in the circumstances of the case, despite the submission of the Embassy of Kosovo in Sweden, there is no international death certificate. Whereas, regarding the third issue, the Municipality of Prishtina and the State Advocacy, as to the status of A.H. clarified that (i) "*proof of identity of A.H was never requested";* and *(ii)* that the latter was not registered as dead, because *"here we are dealing with two identities and a request which was submitted for registration and there was a discrepancy between these two, two identities and for that reason he was not registered, I have no information if it is registered*". While, at the end and regarding the fourth issue, the Civil Registration Agency, but also the State Advocacy, emphasize the role of the Swedish state, stating, among other things, that through communication with this state it could be required correction of the medical report, on the basis of which correction, the registration in PDR could then be done. According to them (i) through international legal cooperation, the biometric data of the person could be exchanged, even through the comparison of biometric data and fingerprints, it could be accurately identified that the person is not A.H. but I.F., thus resulting in the conclusion of this case; but (ii) also confirmed that the regular courts have never initiated any proceedings concerning international legal cooperation.

Admissibility of the Referral

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

51. In this respect, the Court, by applying paragraph 1 and 7 of Article 113 of the Constitution, the relevant provisions of the Law as to the procedure in the case set out in paragraph 7 of Article 113 of the Constitution; Rule 39 and Rule 76 [Request pursuant to Article 113.7 of the Constitution and Rule 46, 47, 48, 49 and 50 of the Rules of Procedure] initially shall examine whether: (i) the Referral was submitted by the authorized party; (ii) an act of public authority is challenged; and if (iii) all legal remedies prescribed by law have been exhausted; (iv) the rights and freedoms allegedly violated have been

clarified; (v) timelines have been met; (vi) the referral is manifestly ill-founded; and (vii) there are any additional admissibility criteria under paragraph (3) of Rule 39 of the Rules of Procedure that have not been met.

(i) Regarding the authorized party and the act of public authority

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

53. The Court also refers to Article 47 [Individual Requests] of the Law, which establishes:

> "*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. [...]."*

54. The Court also refers to item (a) of paragraph (1) of Rule 39 [Admissibility Criteria] of the Rules of Procedure which stipulates:

> *(1) The Court may consider a referral as admissible if:*
>
> *(a) the referral is filed by an authorized party.*

55. The Court also refers to paragraph (2) of Rule 76 of the Rules of Procedure which, *inter alia*, foresees: *"(2) A referral under this Rule must accurately clarify [...] what concrete act of public authority is subject to challenge"*.

56. With regard to the fulfillment of these criteria, the Court notes that in the circumstances of the present case two issues must be determined (i) whether the Referral was submitted by an authorized party; and (ii)

if an act of public authority is challenged. The second issue, namely the act of the public authority, is not challenged in the circumstances of the present case because the Applicant challenges the Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court. While, the first issue, which relates to the authorized party, based on the aforementioned provisions of the Constitution, Law and Rules of Procedure, should be assessed in terms of "*status of the victim*" of the Applicant.

57. More specifically, based on the provisions cited above, an Applicant in order to qualify as an authorized party before the Court must file alleged violations "*of his her individual rights and freedoms"*, namely to have the status of victim. In the circumstances of the present case, the Court recalls that the Applicant addressed the Court regarding the registration of his son's death in the PDR. In this context and before ascertaining whether the Applicant can be considered as an authorized party before the Court, the latter must determine whether in the circumstances of the present case, the father can submit an individual referral for his son, namely if the status of "victim" is recognized to him. To determine whether the latter can have this status before the Court, the Court will further elaborate on the basic principles of the case law of the European Court of Human Rights (hereinafter: the ECHR) regarding the status of the victim, in order to apply them, then, to the circumstances of the present case.

58. In this regard, the Court first notes that based on the case law of the ECtHR, the notion of "*victim*" is interpreted autonomously and notwithstanding domestic provisions such as interest and legal capacity to file a claim (see ECtHR case), *Gorraiz Lizarraga and Others v. Spain*, Judgment of 27 April 2004, paragraph 35), although the relevant courts must take into account whether the Applicant was a party to the proceedings before the regular courts (see, in this context, the cases of ECtHR, *Aksu v. Turkey*, Judgment of 15 March 2012, paragraph 52; and *Micallef v. Malta*, Judgment of 15 October 2009, paragraph 48). The ECtHR also states that the interpretation of the concept of "*victim*" should be done without excessive formalism (see, in this context, and *inter alia*, the case of the ECtHR *Gorraiz Lizarraga and others v. Spain*, cited above, paragraph 38) and that in this assessment, the relevance to the merits of the case may be important (see, in this context and, *inter alia*, the cases of the ECtHR, *Siliadin v. France*, Judgment of 26 July 2005, paragraph 63; and *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, paragraph 111).

59. Furthermore, and relevant to the circumstances of the present case, based on the case law of the ECtHR, the term "*victim*" in the context of individual claims, means persons who have been directly or indirectly affected by the alleged violation. Therefore, the term "*victim*" means not only the direct victim of the alleged violation, but also the indirect victims to whom the violation may cause harm or who would have a personal and valid interest in seeing the alleged violation brought to an end. (See, in this context and *inter alia*, the case of the ECtHR, *Vallianatos and Others v. Greece*, Judgment of 7 November 2013, paragraph 47). More precisely, the Court notes that the case law of the ECtHR consequently recognizes the status of direct, indirect and potential victim. (For more on these three categories, see the Practical Guide on ECtHR Admissibility Criteria of 30 April 2019; 3. Victim Status). While direct victims are all those whose rights have been directly violated by the alleged violation, and consequently the recognition of their victim status before the Court is not a contested issue, the situation is different in the case of indirect or potential victims, because the recognition of their victim status before the Court is conditional on the fulfillment of certain criteria, and which are determined through the case law of the ECtHR.

60. In this regard, the Court notes that based on the case law of the ECtHR, the status of indirect victim has been recognized only to relatives who have a legal interest in filing an individual claim in the event of death or the disappearance of persons on whose behalf they act. (See ECHR case, *Varnava and Others v. Turkey*, Judgment of 18 September 2009, paragraph 112).

61. However, and moreover, the case law of the ECtHR has linked the recognition of the status of indirect victim with the nature of the alleged violation and the importance of the effective implementation of one of the most fundamental rights of the ECtHR system. (See the case of the ECtHR, *Fairfield v. The United Kingdom*, Judgment of 8 March 2005). More specifically, the ECtHR has determined that "*transferable*" are only the most fundamental rights guaranteed through the ECtHR, and consequently through its case law, it has accepted the status of victim family members only when they alleged violations of (i) Article 2 (Right to Life) of the ECHR, namely when the death was alleged to engage the responsibility of the State (see, in this context, the cases of the ECtHR, *Van Colle v. the United Kingdom*, Judgment of 13 November 2012, paragraph 86; and *Tsalikidis and others v. Greece*, Judgment of 16 November 2017, paragraph 64); (ii) Article 3 (Prohibition of torture) and Article 5 (Right to liberty and security) of the ECHR, provided that the alleged violation is closely linked to Article 2 of the ECHR (see the case of the ECtHR,

Khayrullina v. Russia, Judgment of 19 December 2017, paragraphs 91-92 and 100-107); and (iii) Article 8 (Right to private life), if the moral interest of the family has been demonstrated that the deceased victim be exonerated of any finding of guilt (see ECtHR cases *Nölkenbockhoff v. Germany*, Judgment of 25 August 1987, paragraph 33 and *Grădinar v. Moldova*, Judgment of 8 April 2008, paragraphs 95 and 97-98) or the need to protect their reputation and that of their family (see ECtHR cases *Brudnicka and others v. Poland*, Judgment of 3 March 2005, paragraphs 27-31; *Armonienė v. Lithuania*, Judgment of 25 November 2008, paragraph 29; and *Polanco Torres and Movilla Polanco v. Spain*, Judgment of 21 September 2010, paragraphs 31-33).

62. On the contrary, in cases where the alleged violation of the ECHR was not closely related to the death or disappearance of the direct victim, the ECtHR applied a much more limited approach to recognizing the status of indirect victim. (See the case of the ECtHR, *Karpylenko v. Ukraine*, Judgment of 11 February 2016, paragraph 104). For example, despite filing claims on behalf of a deceased person, the ECtHR has emphasized that the rights guaranteed by Article 6 of the ECHR are, in principle, "*non-transferable*" rights. (See in this regard, the ECtHR case *Bic and Others v. Turkey*, Judgment of 2 February 2006, paragraphs 17-24). The same court found and consequently refused to accept the victim status of one of the Applicants in the joint cases no. KI149/18, KI150/18, KI151/18, KI152/18, KI153/18 and KI154/18, Applicants *Xhavit Aliu and 5 others*, Resolution on Inadmissibility of 9 August 2019 - regarding the assessment of the victim status, see paragraphs 62 to 75 of this case). However, the ECtHR has exceptionally recognized the victim status to the Applicants who have alleged a violation of Article 6 of the ECHR, if they have managed to demonstrate a direct effect on their rights. (See, in this context, inter alia, the case of the ECtHR *Nölkenbockhoff v. Germany*, cited above, paragraph 33).

63. Consequently and in principle, beyond the recognition of victim status in cases where claims are filed by the relatives of a deceased, whose death may be attributed to the State in violation of Article 2 of the ECHR, the recognition of victim status to family relatives certain is made only exceptionally, and only if a legal interest can be established and which is directly related to the violated right; an important moral interest is proved; or has been able to demonstrate a direct effect on the rights of the respective Applicants.

64. The Court recalls that in the circumstances of the present case it is the father of the deceased I.F. who submits a claim to the Court. The death

of the deceased I.F. is natural death and is not related to the responsibility of the state. The court proceedings were in fact initiated and conducted by the Applicant only after the death of his son and are related to the registration of his death in the PDR, a registration which was rejected by the Civil Registration Agency as well as all regular courts. Furthermore, the Applicant, beyond the allegation of violation of his rights, alleges that those of his nephew and the wife of his son, namely the deceased I.F.

65. Having said that, the Court also cannot fail to emphasize the special specifics of this case and related to a civil dispute which was initiated in relation to the deceased and only after his death, the conclusions of which result in the impossibility of his registration as deceased in the basic death register, resulting in not only the continued suffering of his family but also the unresolved civil status of his wife and son.

66. In the light of the case law of the ECtHR with regard to the flexible and non-excessive interpretation of the concept of "*victim*" and the importance of merit that raises a certain issue, and emphasizing the specifics of this case, the Court recalls that (i) it is the father of the deceased who submits the claim to the Court, and that based on the case law of the ECtHR and the Court, provided that other criteria are met, in principle, he is recognized the status of indirect victim before the Court; (ii) the Applicant has been a party to all public authorities in the dispute in question; (iii) the legal interest, namely the resolution of the civil status of the wife and son of the deceased, has been proved by the Applicant; (iv) the circumstances of the present case, involve interests of great importance for the future of the family of the deceased, namely his wife and son, from the point of view of the resolution of their civil status, and on the other hand, their future would remain hostage to the non-registration of the deceased I.F. in the PDR; and (v) the circumstances of the present case also include issues of privacy related to aspects of the psychological and moral integrity of the Applicant and his family, as guaranteed by Article 36 of the Constitution in conjunction with Article 8 of the ECHR. Consequently and for these reasons, the Court acknowledges the Applicant's status as an indirect victim.

67. Therefore, and finally, the Court concludes that the Applicant (i) is an authorized party; and (ii) challenges an act of a public authority, as established in paragraph 7 of Article 113 of the Constitution; in paragraph 1 of Article 47 of the Law; item (a) of paragraph (1) of Rule 39 and paragraph (2) of Rule 76 of the Rules of Procedure.

(ii) Regarding the exhaustion of legal remedies

68. With regard to exhaustion of legal remedies , the Court refers to paragraphs 1 and 7 of Article 113 of the Constitution, cited above; paragraph 2 of Article 47 of the Law; and item (b) of paragraph (1) of Rule 39 of the Rules of Procedure, which establish:

Article 47
[Individual Requests]

"[...]

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

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."

69. The Court notes that in the circumstances of the present case, the Applicant challenges the Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court after having exhausted all legal remedies provided by law, and consequently finds that the Applicant has met the admissibility criteria related to the exhaustion of legal remedies set out in 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.

(iii) Regarding the specification of referral and deadline

70. In addition, the Court also examines whether the Applicant has met the admissibility requirements as defined by the Law and the Rules of Procedure. In this regard, the Court first refers to Articles 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

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. [...]

71. The Court recalls that the same criteria are further specified in items (c) and (d) of paragraph 1 of Rule 39 and paragraphs (2) and (4) of Rule 76 of the Rules of Procedure.

72. With regard to the fulfillment of these criteria, the Court notes that the Applicant has accurately clarified what fundamental rights and freedoms guaranteed by the Constitution he claims to have been violated and has specified a concrete act of public authority which he challenges in accordance with Article 48 of the Law and the relevant provisions of the Rules of Procedure; and has filed the referral within the time limit of four (4) months foreseen in Article 49 of the Law and the relevant provisions of the Rules of Procedure.

(iv) As to other admissibility requirements

73. At the end and after examining the Applicant's constitutional complaint, the Court considers that the Referral cannot be considered as manifestly ill-founded on constitutional basis as provided for by paragraph (2) of Rule 39 of the Rules of Procedure and there is no other basis to declare it inadmissible, as none of the requirements laid down in paragraph (3) of Rule 39 of the Rules of Procedure are applicable in the present case.

Conclusion regarding the admissibility of the referral

74. The Court concludes that the Applicant (i) is an authorized party, because in the circumstances of the present case, the Court has accepted "*the status of indirect victim*" to the Applicant; (ii) challenges an act of a public authority; (iii) has exhausted legal remedies prescribed by law; (iv) has specified the fundamental rights and freedoms guaranteed by the Constitution which he claims to have been violated; (v) has filed the referral within the time limit; (vi) the referral is not manifestly ill-founded on constitutional basis; and (vii) there is no other admissibility requirement that has not been met.

75. Accordingly, the Court declares the Referral admissible.

Relevant constitutional and legal provisions

CONSTITUTION OF THE REPUBLIC OF KOSOVO

Article 36
[Right to Privacy]

1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.

[...]

Article 54
[Judicial Protection of Rights]

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8
(Right to respect for private and family life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13
(Right to an effective remedy)

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

LAW No. 04/L –003 ON CIVIL STATUS

CHAPTER VII
DEATH ACT REGISTRATION

Article 46
Death certificate

1. Death certificate legally certifies the death of a person.
2. The act of death is the minutes that are kept for each deceased, signed by the civil status official and the pleader.
3. The act of death contains:
3.1. the civil status office, where is kept the act of death;
3.2. the number and date of keeping the act of death;
3.3. place and time of death;
3.4. cause of death, according to the doctor;
3.5. the identity and number of identity of the dead, or confirmation of the special charge, for the bodies found without identity;
3.6. identification number, personal name of the medical or legal expert, who has issued the report;
3.7. personal identification number, personal name of pleader;
3.8. number on the letter of the prosecutors, who authorized the action on the cases stipulated in this Law;
3.9. personal name, of civil status official.

Article 47
Declaration of death

1. The declaration of death can be made by any adult family member or by persons close to the family and in their absence or for persons without relatives, the special acting official of municipality, the civil status official, where the citizen has a dwelling/ residence or where was found dead.
2. Declarations are valid when accompanied by medical report.
3. The declaration of death is made within thirty (30) days from the occurrence or from the day the corpse is found and within sixty (60) days, when death occurred abroad.
4. Directors of the hospitals, prisons, correctional institutions and other institutions are obliged to notify in written note the closest

civil status office, within five (5) days, for deaths occurring in their institutions.
5. When death takes place during the days of vacation and could not secure funeral permission, burial service responsibilities requires documents that prove the death of these documents and makes the declaration of death in the civil status office, the first working day.
6. By the declaration of death, the civil status office provides the burial permit.
7. The Civil Status Office, when it receives the death notice, under paragraph 4 of this Article and for those times when relatives of victims don't appear to make the declaration, requires verification by local representatives. If the death is confirmed, then holding the act of death, this must sign, as appropriate, representatives of local government, or burial service representative, as interested party.
8. Civil Status Service registry, when they have indications that dead people remain registered with the Registry of Civil Status, can raise charges in court against entities that are obliged to make request to confirm the death, after all administrative procedure are used.
9. The Agency is obliged to generate each month from the Civil Status Registry list of citizens who have reached age one hundred (100) years and for each month following the date 5 distributes the list, according to the civil status office.

Article 48
Certification of legal fact of death

1. The citizen shall be verified that he/she has died in fact when proven by the medical report stating the identity, fact, time, place, and cause of his/her death.
2. The citizen is proclaimed dead also when the interested person and body do the factual verification by a judicial method, according to the provisions of the Law on Out Contentious Procedure.
3. When the corpse cannot be identified, when signs are noticed, or there are suspicions for a violent death, the report shall be issued by the forensics expert. In such cases, regardless of commencement or not of the prosecution, the actions in the civil status shall be done only with the permission of the prosecutor.
4. The decision of the court announcing citizen as dead shall be registered in the Civil Status Register, in the "remarks" column, no death certificate was held.

5. Deaths taking place abroad shall be verified according to the Law of the country where death took place, except when death occurs in the territory of diplomatic representation offices or in the airplane, train, in international areas, where this Law shall be implemented.

Article 49
Death confirmation

Death shall be certified by the competent doctor, where the death took place (doctors, health center, hospital, emergency, etc.). When the corpse undergoes autopsy, death shall be verified by the doctor who has carried out the autopsy. The verification of violent or suspicious deaths, as well as of deaths taking place at detention centers shall be invalid unless verification was not done by the forensic expert and by an order issued from the court.

Article 50
Burial permit

1. A person can be buried only after obtaining the permit from the civil status office.
2. In cases when it cannot be acted according to paragraph 1 of this Article, then a notification should be made in the office of civil status within three (3) working days.
3. The document certifying the death while filing the request for registration in the master register; there are also the witnesses according to paragraph 1 of this Article.
4. A burial permit should not be issued without a doctor's report/official confirmation of death or without court order as determined by Law on Forensics. 5. In cases when the burial is not taking place in the area in which master register of the deceased person is, and the burial permit is given by the subjects determined by this Law from another civil status office, the office that issues the burial permit informs the office of civil status, which keeps the principal civil status register of the deceased citizen.

Article 52
Registration of the death of a Kosovo citizen living abroad

1. The death of a Kosovo citizen taken place abroad shall be done in the Principal Civil Status register at the residence place where he/she used to live in Kosovo.

2. The registration of the death of a Kosovo citizen living abroad shall be done through the civil status service of the Kosovo diplomatic mission in that country, by presenting the following documentation: International death certificate, or the verified death certificate issued by the civil status office translated into official languages of Kosovo, documentation verifying the Kosovo nationality or place of residence, identity card, or passport.
3. If there are no conditions for registration as set out in paragraph 2 of this Article, the registration shall be done directly in the civil status service.

CHAPTERVIII SUBSEQUENT REGISTRATION AND RE-REGISTRATION

Article 54 Subsequent registration

1. In cases where birth or death does not occur within thirty (30) days then the registration is done by a decision of the Civil Status Office.
2. Criteria, forms, ways and procedures of subsequent registration will be regulated by Minister's sub legal act.
3. The provisions of this Article shall also apply to persons born in the territory of the Republic of Kosovo who fulfill the requirements to obtain citizenship found in Article 29 of the Law on Citizenship and who were never registered in the civil status registry.

Article 55 Re-registration

1. Every registration of births, deaths and/or marriages previously registered in municipal civil status registry books where the applicant is able to prove the previous registration on the basis of documents issued by the civil status registry and/or the Ministry of Interior and the civil status registry books which contained the original registration have subsequently been lost and/or destroyed.
2. Criteria, forms, ways and procedures of re-registration will be regulated by Minister's sub legal act.
3. The provisions of this Article shall also apply to persons born in the territory of the Republic of Kosovo who fulfill the requirements to obtain citizenship found in Article 29 of the Law

on Citizenship and who were previously registered in civil status registry.

CHAPTER IX
CIVIL STATUS SERVICE

Article 56
Nature and Function

The Civil Status Service is a unique state service. This service under this law is exercised as delegated function also by local government bodies. It complements updates and manages the Central Civil Status registry, keeps the civil status acts, issues certificates under definitions of this law and performs other services in accordance with applicable law.

ADMINISTRATIVE INSTRUCTION No. 02/2012 - MIA ON THE LATE REGISTRATIONS IN THE CIVIL STATUS RECORDS

Article 15
Criteria for late registrations of deaths in the register of the dead

1. Upon application for late registration of deaths in the register of the dead, the following criteria must be met:
1.1. death certificate from the health care institution, if the death has occured in a public or private heath care institution;
1.2. birth certificate;
1.3. marriage certificate for those who have been married;
1.4. photocopy of identity document or travel document of the person to whom the certificate is required;
1.5. the testimony of two witnesses that have seen the dead or have identified the body without any doubt whether the death occured outside the health care institution;
1.6. international death certificate, or equivalnt (similar) issued from the state where the death occured;
1.7. payment receipt that proves the paid fine as determined in article 63 of the Law on Civil Status.

Merits of the Referral

76. The Court initially recalls that based on the case file, the Applicant's son, namely I.F., died at a health facility in Sweden on 7 June 2013. Based on the case file, he was transported from Sweden to Kosovo on 16 June 2013 and was buried in Prishtina on the same date. Based on

the case file, it also follows that in the documentation issued by Sweden regarding this death, the person A.H. is marked, while in the documentation of the Republic of Kosovo, the person I.F. This discrepancy in the relevant death documentation prevented the Applicant from registering his son with PDR. Initially he addressed the Municipality of Prishtina and the Civil Registration Agency and then the regular courts, and the decisions of all of them resulted in the rejection of the Applicant's request for the registration of his son in the PDR.

77. The Municipality of Prishtina rejected the request of the Applicant for the subsequent registration of death in th PDR, initially by the Decision [No. 01-203-194645] of 16 October 2013. This decision was confirmed by the Civil Registration Agency by the Decision [No. 86/013] of 18 November 2013. The Basic Court by Judgment [No. 1652/13] of 16 May 2014 annulled the latter, remanding the case for retrial, emphasizing, *inter alia,* but specifically, that the submission [No. 09/13] of 8 June 2013, issued by the Embassy of the Republic of Kosovo in Sweden, was not taken into account during the decision-making. The Basic Court did not order the registration of the relevant death in the PDR, but only remanded the case for retrial.

78. The Civil Registration Agency by the Decision [No. 30/2014] of 24 June 2014 again confirmed its preliminary decision and upheld the first decision of the Municipality of Prishtina, namely Decision [No. 01-203-194645] of 16 October 2013, thus finally rejecting to register the subsequent death in the PDR. The following court proceedings resulted in the confirmation of this decision. The Basic Court, the Court of Appeals and the Supreme Court rejected the claim, the appeal and the request for extraordinary review of the court decision, namely, reasoning that based on the documentation provided by the Applicant, the registration of the subsequent death of the son, namely I.F., in the PDR, was contrary to Article 15 of the Administrative Instruction on the criteria for the subsequent registration of deaths in the PDR.

79. The Applicant alleges that the judgments of the regular courts were rendered in violation of his fundamental rights and freedoms guaranteed by Articles 24, 31, 53 and 54 of the Constitution. He emphasizes that the refusal of the public authorities to register the death of his son in the PDR, has directly affected the civil status of the wife and son of the deceased I.F., requesting the Court to order the latter to register the respective death in the PDR.

80. In the context of the Applicant's allegations, the Court initially notes that Article 53 of the Constitution does not contain in itself

fundamental rights and freedoms, but it establishes the obligation of the public authorities to interpret them in accordance with the ECtHR case law. The Court will apply the latter when addressing the Applicant's allegations. Regarding other allegations of violation of the Applicant's rights and freedoms , namely those guaranteed by Articles 24, 31 and 54 of the Constitution, the Court recalls that the refusal of the public authorities to register his son in the PDR has affected the civil status of the wife and son of the deceased, in violation of his constitutional rights guaranteed by the Constitution and the ECHR. In relation to these allegations, the Court considers that the substance of the Applicant's allegations, encompasses aspects of the Applicant's right to (i) private life guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR; and (ii) judicial protection of rights and the effective remedy guaranteed by Article 54 of the Constitution and Article 13 of the ECHR.

81. In terms of dealing with the allegations of the Applicant within the scope of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, the Court, referring to the case law of the ECtHR, emphasizes that it does not consider itself bound by the characterisation of the alleged violations given by the Applicant. By virtue of the *jura novit curia* principle, the Court is the master of the characterisation of the constitutional issues that a case may include, and may consider of its own motion the respective complaints, relying on provisions or paragraphs which the parties have not expressly invoked. Based on the case law of the ECtHR, a complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments expressly relied on by the parties. (See, *mutatis mutandis,* case of the ECtHR *Talpis v. Italy,* Judgment of 18 September 2017, paragraph 77 and the references stated therein). Therefore, and in the following, the Court will address the Applicant's allegations from the point of view of the rights guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

82. In this regard and in order to address the essence of the Applicant's allegations, for respect for private life, the Court will first consider: (I) the general principles of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, insofar as they are relevant in the circumstances of the present case, in order to assess the applicability of these articles; to continue with (II) the general principles of Article 54 of the Constitution and Article 13 of the ECHR, insofar as they are relevant to the circumstances of the present case, in order to assess the applicability of these Articles, and then to proceed with the application of these general principles, in the circumstances of the present case.

I. General principles regarding the right to respect for private and family life and their applicability in the circumstances of the present case

General principles

83. Initially, the Court recalls that although the scope of Article 36 of the Constitution and Article 8 of the ECHR is not unlimited, the ECtHR has broadly defined the scope of Article 8 of the ECHR, including cases where a specific right is not specifically highlighted in this article. (See Guide on Article 8 of the ECHR, Part A. Scope of Article 8, item 2). The primary purpose of Article 8 of the ECHR, according to the ECtHR case law, is to protect individuals from arbitrary "*interference"* with their (i) private; (ii) family life; (iii) home; or (iv) correspondence. (See, in this context, *inter alia,* ECtHR cases*: P. and S. v. Poland*, Judgment of 30 October 2012, paragraph 94; and *Nunez v. Norway*, Judgment of 28 June 2011, paragraph 68). Certain issues can undoubtedly affect more than one of the interests protected by abovementioned articles. (See ECHR Guide on Article 8 of the ECHR, The Right to Respect for Private and Family Life, Part I. Structure of Article 8, paragraph 1). These rights, based on the ECHR system and the relevant case law of the ECtHR, are secured through (i) negative obligations, namely the obligation of the state not to "*interfere*" with private and family life; and (ii) positive obligations , namely the obligation of the state to ensure that these rights are effectively enjoyed.

84. More specifically, whereas the ECtHR states that the primary purpose of Article 8 of the ECHR is to provide protection against arbitrary "*interference*" with the private, family, home and correspondence by a public authority, an obligation of the classical negative type, member states also have positive obligations to ensure that the rights of Article 8 of the ECHR are respected even between private parties. (See, in this context and, *inter alia*, the case of the ECHR, *Bărbulescu v. Romania*, Judgment of 5 September 2017, paragraphs 108-111). These positive obligations may include the adoption of measures necessary to ensure respect for a private life, including the provision of a legal framework that protects the rights of individuals and, where appropriate, the definition and implementation of specific measures, including those related to the effective respect of the physical and psychological integrity of the respective Applicants. (See, for example, the case of the ECHR, *Evans v. The United Kingdom*, Judgment of 10 April 2007, paragraph 75 and the references used therein and the case of *R.R. v.*

Poland, Judgment of 26 May 2011, paragraphs 184 and 185 and the references used therein).

85. In each case before the ECtHR and which contains allegations relating to Article 8 of the ECHR, the ECtHR, having assessed and ascertained the applicability of Article 8 of the ECHR in the circumstances of the present case, assesses whether its view in the consideration of the respective case should be from the aspect of the negative or positive obligation of the state. While the ECtHR itself has emphasized that the distinction between these two aspects is not always clear, the case law of the ECtHR highlights some rules on which the ECtHR is based in determining this point of view. (See Guide to Article 8 of the ECHR, Part I. Structure of Article 8, point B). In principle, it is important to assess whether the state has acted, namely ""*interfered"*, or the state has failed to act, more precisely if the state respectively, has failed to ensure through its legal or administrative system the right to respect for private and family life in the circumstances of this case. (See the ECtHR case *Gaskin v. The United Kingdom*, Judgment of 7 July 1989, paragraph 41).

86. If the ECtHR finds that the present case contains aspects of negative obligations, the ECtHR first assesses whether, in its circumstances, there is an "*interference*" with the rights guaranteed by Article 8 of the ECHR, and in the case of an affirmative assessment, the ECtHR further assesses whether this "*interference*", (i) has been done in accordance with the law, namely whether it is "*prescribed by law*"; (ii) pursues a legitimate aim, namely those aims set out in paragraph 2 of Article 8 of the ECHR; and (iii) it is *is necessary in a democratic society*" (For a detailed explanation regarding these three criteria, see the Guide to Article 8 of the ECHR, Part I. Structure of Article 8, points C, D and E).

87. Whereas, if the ECtHR considers that the present case contains aspects of positive obligations, it should take into account whether the importance of the interest in question requires the imposition of a positive obligation required by the Applicant, e.g. for the state to do or take any action so that the Applicant can enjoy his right guaranteed by Article 8 of the ECHR. In this regard, based on the ECtHR case-law, several factors have been considered, namely those related to the respective applicants and those relating to the role of the respective state. With regard to the former, it is important to assess the importance of the interests of the respective Applicant and whether they relate to "*fundamental values*" or "*essential aspects*" of his/her private life, whereas regarding the second it is important to assess whether the alleged obligation of the state is "*narrow and precise*" or

"*broad and indeterminate*" and what is the burden that the obligation would impose to the respective state. (See, Guide to Article 8 of the ECHR, Part I. Structure of Article 8, B. paragraph 5; see also ECHR case *Hämäläinen v. Finland*, Judgment of 14 July 2014, paragraph 66 and the references therein).

88. Having said that, in both cases, regard must be paid to the following three issues (i) the fair balance to be struck between the competing interests of the individual and the community as a whole (see the cases of the ECtHR, *Dickson v. The United Kingdom*, Judgment of 4 December 2007, paragraph 70; *Evans v. The United Kingdom*, cited above, paragraph 75; *Gaskin v. The United Kingdom*, cited above, paragraph 40; *Hamalainen v. Finland*, cited above, paragraph 65; and *Odievre v. France*, Judgment of 13 February 2003, paragraph 40 and references used therein). In this regard, the ECtHR has also emphasized that in achieving this balance, in the case of positive obligations of the State, the legitimate aims referred to in the second paragraph of Article 8 of the ECHR may be of a certain relevance, despite the fact that this paragraph refers only to legitimate aims in the context of "*interference*" with the right protected by the first paragraph of the same article, namely the negative obligations of a state (see, *inter alia*, the case of the ECtHR, *Gaskin v. the United Kingdom*, cited above, paragraph 42); (ii) the purpose of the ECHR to guarantee rights which are not "*theoretical or illusory*" but rights which are "*practical and effective*" (see, *inter alia*, the case of the ECtHR *R.R. v. Poland*, cited above, paragraph 191 and the references used therein); and (iii) a fair decision-making process and which includes the necessary guarantees for the observance of the interests of the individual protected by Article 8 of the ECHR, despite the fact that the latter does not contain clear procedural requirements (see in this regard and among others, the cases of the ECtHR, *Buckley v. the United Kingdom*, Judgment of 29 September 1996, paragraph 76; *Tanda Muzinga v. France*, Judgment of 10 July 2014, paragraph 68; and *M.S. v. Ukraine*, Judgment of 11 July 2017, paragraph 70).

89. Finally, it must be noted that the states enjoy a "*certain margin of appreciation*" for determining the breadth of which a number of factors must be taken into account. Fort example, when an important aspect of an existence and identity of individual is at stake, the allowed margin of appreciation for the state is more limited. (See, for example, ECtHR cases: *X and Y v. the Netherlands*, Judgment of 18 January 1989, paragraphs 24 and 27; *Christine Goodwin v. the United Kingdom*, Judgment of 11 July 2002, paragraph 90; and *Pretty v. the United Kingdom*, Judgment of 29 April 2002, paragraph 71). However, in cases where there is no consensus within the Council of

Europe Member States, neither on the importance of the question at stake nor on the best way to safeguard that interest, especially in cases where issues sensitive to morals or ethics are raised, the margin of appreciation will be wider. (See ECtHR cases *X, Y and Z v. the United Kingdom*, Judgment of 22 April 1997, paragraph 44; *Frette v. France*, Judgment of 26 February 2002, paragraph 41; and *Christine Goodwin v. United Kingdom*, cited above, paragraph 85).

Application of the general principles to the circumstances of the present case

90. Based on this constitutional obligation, based on the case-law of the ECtHR, regarding Article 8 of the ECHR, the Court will next address the Applicant's allegations by applying to this assessment the relevant case-law of the ECtHR. The Court will first address, the question of the applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR in respect of the concrete issues of this case, namely, the rejection of the Applicant's request to register his deceased son I.F. in the PDR by the public authorities of the Republic of Kosovo. Having determined the applicability of the relevant Articles of the Constitution and the ECHR in the circumstances of the present case, the Court will further, review and determine whether the request should be dealt with in the light of the negative or positive obligation of the Republic of Kosovo. In case it should be dealt from the perspective of the negative obligation, the Court will assess whether there has been an "*interference*" with the Applicant's rights and whether such "*interference*": (i) has been "*in accordance with the law*" or "*prescribed by law*"; (ii) has "*pursued a legitimate aim*"; and (iii) was *"necessary in a democratic society"*; If the specific issue is to be dealt with in the light of the positive obligation, the Court will examine whether, in the circumstances of the present case, the state had an obligation to take measures to ensure the effective exercise of the Applicant's right to a private life, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction to Article 8 of the ECHR.

Applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR in the circumstances of the present case

91. In this respect, the Court notes that the right to private life is included in (i) paragraph 1 of Article 36 of the Constitution, which expressly states that: "*Everyone enjoys the right to have her/his private life respected* [...]"; and, as noted above, (ii) paragraph 1 of Article 8 of the ECHR, which expressly states that "*Everyone has the right to respect for his private life [...]*".

92. The case-law of the ECtHR in interpreting this right encompasses both the physical, pschycological and moral integrity of a person. (See the ECtHR Guide of 31 August 2018 on Article 8 of the ECHR; Part II. Private life; B. Physical, Psychological or Moral Integrity). In the framework of this right, the case law of the ECtHR includes cases related to death, including its manner, but also those related to burial, cases that before the ECtHR have been raised mainly by family members of the deceased. More precisely, the category of private life of Article 8 of the ECHR includes the case law of the ECtHR, both in relation to matters of end of life and those relating to burial. The case law relating to the former consists mainly of cases relating to the right to decide the manner of death of a person. (See the ECtHR cases, *Pretty v. the United Kingdom,* cited above, paragraph 67; *Haas v. Switzerland,* Judgment of 20 January 2011, paragraph 51; *Koch v. Germany,* Judgment of 19 July 2012, paragraph 52; and *Gard and others v. the United Kingdom,* Decision of 13 June 2017, paragraphs 118-124). Whereas, the case law related to the second, namely the issues related to the burial, mainly related to cases regarding the way in which the body of a deceased relative was treated, as well as issues regarding the ability to attend the burial and pay respects at the grave of a relative. (See the ECtHR cases, *Solska* and *Rybicka v. Poland,* cited above, paragraphs 106-108; *Lozovyye v. Russia*, cited above, paragraphs 32-35; and *Hadri-Vionnet v. Switzerland,* Judgment of 14 February 2008, paragraphs 51-52).

93. The Court emphasizes that the case of the Applicant differs from the cases of the ECtHR set in this context because it does not directly include an issue related to the manner of burial of the deceased I.F. The Court recalls that, based on the case file, the deceased I.F. was buried on 16 June 2013 and the Applicant's allegations are not related to the manner of his burial, but to the fact that the state, namely the public authority in the Republic of Kosovo, have refused to register the deceased in the PDR.

94. However, the Court notes that the non-registration of the deceased in the PDR is directly related to the death of the deceased and namely to the psychological and moral integrity of his family, and moreover to the civil status of his wife and son as a result of his death. The Applicant's family was unable to complete the psychological process of his son's death in formal and legal terms because he does not appear to be dead in the civil registry.

95. In this context, the Court must find that the circumstances of the Applicant fall within the scope of the right to a private and family life and, consequently, paragraph 1 of Article 36 of the Constitution in

conjunction with Article 8 of the ECHR are applicable in the circumstances of the present case. As a result, the Court will further consider whether the refusal of the Applicant's request by public authorities to register the death of his son I.F in the PDR., first by the Civil Registration Agency, and then by the regular courts, is in accordance or not with the rights guaranteed by the abovementioned Articles. Having said that, and as explained above, preliminarily, the Court must assess whether the circumstances of the present case are to be assessed from the point of view of the negative or positive obligation of the Republic of Kosovo.

(i) The nature of the State's obligation – whether the case encompasses "interference" or a positive obligation

96. As noted above, following the determination regarding the applicability of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, based on the case law of the ECtHR, the Court must determine whether the Referral and the Applicant's allegations must be treated from the perspective of the negative or positive obligations of the state. While, as the ECtHR itself emphasized, the difference between these two categories of obligations is not always strict, in principle the first category relates to the obligation of the state not to interfere with fundamental rights and freedoms, while the second category is related to the examination of shortcomings and flaws, which are mainly related to the state obligation to take measures through which the guarantee of the respective Applicant's right to a private family is secured.

97. The Court recalls that in the circumstances of the present case, the request of the Applicant for the subsequent registration of the death of his son in PDR was rejected by the Municipality of Prishtina, the refusal which was confirmed by the Civil Registration Agency. The latter confirmed the same decision even after the initial Judgment of the Basic Court, namely the Judgment [No. 1652/13] of 16 May 2014. The decision of the Civil Registration Agency was again challenged before the regular courts, which, as mentioned above, upheld the latter, finally refusing the subsequent registration of the deceased in the PDR. Consequently, from the beginning of the respective proceedings, namely the first request of the Applicant for the subsequent registration of his son in the PDR in October 2013 and until the challenged decision of the Supreme Court of 22 December 2017, five (5) years have passed, within which the deceased I.F. was not registered in the PDR, leaving the psychological and moral integrity of his family infringed and the civil status of his wife and son unresolved.

98. In such circumstances, the Court considers that the refusal of the public authorities to register his deceased son in the PDR constitutes an "*interference*" with the enjoyment of the Applicant's right to a private life, but the latter have failed to act. More precisely, the procedures followed of the administrative and judicial system have not resulted in the exercise of the Applicant's right to respect for his private life. (See, for a similar finding despite the difference in factual circumstances, the case of the ECtHR *Gaskin v. the United Kingdom*, cited above, 41). Consequently, the Court considers that the circumstances of the present case require an assessment from the point of view of the positive obligations of the state, namely whether the state had an obligation to take measures to ensure the effective exercise of the Applicant's right to a private life, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

99. To determine whether the public authorities have taken all necessary actions, namely have acted in accordance with their positive obligations to respect the private life of the Applicant, based on the case law of the ECtHR, and as explained above, the Court next must analyze the fair balance between the competing interests of the individual and the community as a whole, namely private and public interests. In determining this balance, account must be taken of (i) the importance of the Applicant's interest, namely the importance of registering his deceased son in the PDR and regulating the civil status of the spouse and son of the deceased, and whether this issue relates to the "*fundamental values*" or "*essential aspects*" of his private life; and (ii) the nature of the public authorities' obligation, namely whether the alleged obligation of the State is "*narrow and precise*" or "*broad and indefinite*" and the burden that the relevant obligation would impose on the state. This assessment should also take into account whether the decision-making process regarding the Applicant's rights to a private life has been fair and has resulted in the exercise of "*practical and effective*" rights for the Applicant and not merely "*theoretical or illusory*", because such a result would not be in accordance with either the Constitution or the ECHR. Therefore, in the following, the Court will consider whether in the circumstances of the present case, the necessary balance has been reached to protect the interests of the Applicant in respect of his right to a private life.

(ii) Balance between competing interests - the Applicant's right to respect for private life and state obligations

100. Based on the abovementioned principles which are relevant to determining the fair balance between the competing interests of the individual and the community as a whole, the Court first emphasizes the importance of the Applicant's interest, namely the importance of registering the his deceased son in the PDR.

101. In this regard, the Court notes that in the circumstances of the present case, it is not disputable that (i) I.F. died in Sweden; (ii) that his death has been confirmed through the submission [No. 09/13] of 8 June 2013 issued by the Embassy of the Republic of Kosovo in Sweden through which "*Kosovo authorities were notified that the citizen of Kosovo, Mr. I.F. died*" and it has been confirmed that "*there are no obstacles to his repatriation to the Republic of Kosovo*"; and (iii) that the latter was buried on 16 June 2013 in Prishtina. His death has not been disputed by any of the public authorities in the Republic of Kosovo. The same authorities, however, have refused to register the citizen I.F. as dead at the PDR, given that there is no medical report on behalf of I.F. and which confirms his death, this request for registration of a deceased in the PDR, determined through the Law on Civil Status and the relevant Administrative Instruction.

102. The Court also notes that it is not disputable that the registration of the death of the deceased I.F. with the PDR is of great importance to the Applicant and his family. The Court has already recognized his victim status, emphasizing the fact that (i) the inability to register his son as dead at the PDR even after seven (7) years from his death, has resulted in the continuous suffering of his family in violation of psychological and moral integrity as one of the protected aspects under the right to privacy, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR; and (ii) the unresolved civil status of the wife and son of the deceased remains hostage to the refusal to register I.F. as dead at PDR. More specifically, in civil registers, I.F. appears to be alive, making it impossible for his wife and his minor son to regulate their civil status. Refusal by public authorities to register the deceased I.F. in the PDR, makes impossible the regulation of this civil status, affecting, among other things, the possibility of movement of the minor son outside the state of Kosovo, only with his mother. Therefore, the circumstances of the case reflect the great importance for the Applicant and his family, for the registration of the death of the deceased I.F. in the PDR. These circumstances undoubtedly contain "*essential aspects*" for the exercise of the right to a private life, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. (See, in this context, despite the difference in factual

circumstances of the case the assessment of the ECtHR in case *Dickson v. the United Kingdom*, cited above, paragraph 72).

103. As explained above, based on the case law of the ECtHR, the importance of the issues involved in a case must be balanced with the obligations of the state. In this regard, it is initially very important to assess (i) whether the alleged obligation of the state is "*narrow and precise*" or "*broad and indefinite*"; and (ii) what is the burden that the relevant obligation would impose on the state. The Court in this context reiterates that in the circumstances of the present case, the Applicant's request is the registration of his deceased son in the PDR. This requirement in relation to the obligation of the state in the context of its right to a private life is (i) in fact "*narrow and precise*" and not "*broad and indefinite*"; and (ii) the Applicant's request for action to be taken by the State does not constitute a disproportionate burden on the State. These two findings of the Court are based on the review of similar cases arising from the case law of the state, and in which, among other things, the nature of the allegations and the burden that they impose on the state has been examined. For example, in contrast to the circumstances of the present case, in case *Botta v. Italy*, the ECtHR found that the Applicant's allegations of access to the means necessary for persons with disabilities during his holiday at a resort far from his place of residence were of such a "*broad and indefinite*" nature that they could not result in a direct link between the measures that the state should take to ensure the requirements to a private life of the Applicant concerned. (See *Botta v. Italy*, Judgment of 24 February 1998, and in particular paragraph 35 thereof for the relevant finding of the ECtHR). On the other hand, also in contrast to the circumstances of the present case, in case *Rees v. the United Kingdom*, the ECtHR found that the exercise of the Applicant's request would require very substantial changes in the way of managing birth registers with consequences of administrative nature for the rest of the population, therefore, the Applicant's request would impose disproportionate obligations on the state, and would exceed the necessary balance of the Applicant and the interests of others, emphasizing that the scope of the guarantees of Article 8 of the ECHR, cannot go that far. (See *Rees v. the United Kingdom*, Judgment of 17 October 1986, and in particular paragraph 43 thereof for the relevant finding of the ECtHR).

104. Therefore, and based on the abovementioned explanations, the Court must find that the aspects involved in the circumstances of the present case are of great importance to the Applicant and that they are "*narrow and precise*" and as such, do not burden the state with disproportionate obligations. Having said that, and in this context, in

the following Court must also assess whether the actions taken by the public authority, namely the Civil Registration Agency and the regular courts, are in line with the State's obligations to respect the Applicant's private life; and consequently, whether they have guaranteed a fair balance between the competing interests of the Applicant and the community as a whole.

105. In this regard, and initially the Court recalls that the Municipality of Prishtina, the Civil Registration Agency and the regular courts have refused to register the deceased I.F. in the PDR, on the grounds that the medical report confirming I.F.'s death is missing, and that the report issued by the Swedish health authorities is on behalf of A.H. and not I.F. In this regard, the Court notes that it is not disputed that (i) the report of the health institution, namely the health institution in Sweden, finds the death of the person A.H. and not I.F.; (ii) the documentation of the Republic of Kosovo for the deceased is in the name of I.F., in whose name, any medical report confirming his death does not appear; and (iii) furthermore, it is also correct that the Applicant, both before the regular courts and at the public hearing, failed to clarify the relationship of his son I.F. with the person A.H., and who, according to the Applicant, is an "*imaginary*" name, and may have been made for reasons of asylum procedure.

106. In this respect, the Court emphasizes that the registration of the death certificate is regulated by Chapter VII on the Death Act Registration of the Law on Civil Status. Based on paragraph 3 of Article 47 (Declaration of death) of this law, the declaration of death is made within thirty (30) days from the occurrence or from the day the corpse is found and within sixty (60) days, when death occurred abroad. When deaths are reported after prescribed period, they are qualified in the category of subsequent registration regulated by Article 54 (Subsequent registration) within Chapter VIII on Subsequent Registration and Re-registration of the abovementioned law. Based on paragraph 2 of this Article, criteria, forms, ways and procedures of subsequent registration will be regulated by respective Ministry's sub legal act. This sub-legal act, in the circumstances of the present case is the referred Administrative Instruction, and which in its Article 15 defines the criteria for the subsequent registration of deaths in the register of the dead and which include: (i) death certificate from the health institution, if the death occurred in a public or private health institution; (ii) birth certificate; (iii) marriage certificate for those who have been married; (iv) photocopy of the identification document or travel document of the person for whom the certificate is required; (v) the testimony of two witnesses who saw the deceased with their own eyes or identified the body without any doubt whether the death

occurred outside the health institution; (vi) international death certificate, or equivalent document issued by the state where the death occurred; and (vii) the receipt proving the payment of the fine specified in this Instruction.

107. In the circumstances of the present case, and as defined by the reasoning of the regular courts, the documentation required through points 1.1 and 1.6 of the Administrative Instruction, do not match and are in contradiction with those defined through the points. 1.2, 1.3, 1.4 and 1.5 of the same Instruction. More specifically, the death certificate from the health institution does not match the birth certificate, marriage certificate, identification document of person I.F.

108. The Court recalls that based on the abovementioned explanations, the Civil Registration Agency and the regular courts have substantiated that the registration of the deceased I.F. in the PDR, would be contrary to Article 15 of the Administrative Instruction regarding the subsequent registration of deaths and the relevant provisions of the Law on Civil Status, because the documentation on death issued by the health institution, namely the Swedish health institution, does not match the documentation issued by the Republic of Kosovo.

109. The Court recalls the reasoning of the challenged decision, namely the Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court, and which in this respect, states as follows:

> *"During the assessment, this Court found that the court of second instance has correctly determined that the documentation attached to the request for registration of the death of I.F in the PDR does not match with the documentation issued by the Republic of Kosovo. All this is due to the fact that the documents on the basis of which death is requested to be registered and which are issued by the Swedish authorities, have been ascertained that all are in the name of AH, whereas the registration of death was required to be done in the name of IF. This Court has also assessed the claimant's allegations that it is about the same person after the deceased IF lived in Sweden and the death occurred there, but as such these allegations cannot be approved as grounded to register death in PDR, as they are contrary to Article 15 of AI 02/2012 which clearly defines the criteria to be met by the applicant."*

110. Having said that, and while it is not disputed that the existence of a medical report for the subsequent registration of death in the PDR is a criterion and requirement of the relevant Administrative

Instruction, the Court notes that the extremely formal interpretation and application of applicable law in the circumstances of the present case, notwithstanding the Applicant's special circumstances and the consequences of refusing to register his deceased son in PDR, public authorities, including the regular courts, have not reflected "*due diligence*" in respecting private and family life of the Applicant guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR and the relevant case law of the ECtHR.

111. This finding is primarily because beyond the Constitutional Court, and which based on Article 112 [General Principles] of Chapter VIII [Constitutional Court] of the Constitution is the final authority in the Republic of Kosovo for the interpretation of the Constitution, is also a constitutional obligation of administrative authorities and regular courts to assess and interpret allegations of violation of fundamental rights and freedoms based on the fundamental rights and freedoms guaranteed by the Constitution. This obligation derives from Article 21 [General Principles] of Chapter II [Fundamental Rights and Freedoms] of the Constitution, according to which, *inter alia*, fundamental human rights and freedoms "*are the basis of the legal order of the Republic of Kosovo*".

112. These fundamental rights and freedoms include those guaranteed by international agreements and instruments, included in Article 22 of the Constitution. The Court recalls that international agreements and instruments guaranteed by Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution include also the ECHR. The Court also recalls that all fundamental rights and freedoms guaranteed by international agreements and instruments (i) are also guaranteed by the Constitution; (ii) apply directly to the Republic of Kosovo; and (iii) have priority, in case of conflict, over the provisions of laws and other acts of public institutions. The Court further states that the interpretation of these fundamental rights and freedoms, all administrative authorities, regular courts and the Constitutional Court, are obliged to comply with the court decisions of the ECtHR. Such an obligation derives from Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo which specifically stipulates that: "*Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights"*.

113. In this context, the Court notes that it is already clear that the relevant case law of the ECtHR requires that in assessing allegations relating to

the right to a private life, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR, (i) must take into account the circumstances of an Applicant and the relevance of the respective allegations to the effective observance of a private life; and (ii) that the decision-making process regarding the same allegations should be fair in its entirety and result in the exercise of "*practical and effective*" rights for the Applicant, and not merely "*theoretical or illusory*", because such an outcome would be inconsistent with the Constitution and the ECHR.

114. In the circumstances of the present case, and contrary to these principles, the Court notes that beyond the extremely formal interpretation and application of the applicable law, the public authorities have not taken into account either the particular circumstances of the Applicant or the consequences of their decision-making on the Applicant's right to private and family life. This is because, despite the fact that it is not disputed that in the circumstances of the present case there is no medical report on behalf of I.F., it is also not disputed that I.F. died and that his non-registration as such in the PDR, has serious consequences for the wife and minor son of the deceased I.F., leaving the former, with unresolved civil status and also without any opportunity to resolve the latter in the future.

115. Furthermore, despite the obligations contained in paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR and the respective case law of the ECtHR, the public authorities, including the regular courts, in restricting the rights of the Applicant. guaranteed by the articles above, have not undertaken any analysis of the fair balance to be struck between the competing interests of the individual and the community as a whole and, moreover, have not included in their decisions any single reasoning regarding the legitimate aims on the basis of which the guaranteed rights to private and family life may be restricted. The Court recalls that in terms of assessing the exercise of these rights from the point of view of the positive obligations of the state, the legitimate aims on the basis of which the respective rights and freedoms may be restricted, as defined in paragraph 2 of Article 8 of the ECHR, are not determinative because they are in principle related to the assessment of negative obligations of the state, namely those of the obligation of non "*interference*", however the latter, should also be taken into account because based on the case law of the ECtHR, they have a certain relevance also in the context of assessing the positive obligations of the state.

116. In the circumstances of the present case, the public authorities of the Republic of Kosovo, the Civil Registration Agency and the regular courts, despite (i) the direct implementation of the ECHR in the Republic of Kosovo and its priority, in case of conflict, with the provisions of laws and other acts of public institutions, as set out in Article 22 of the Constitution; and (ii) the obligation that the fundamental rights and freedoms guaranteed by the Constitution be interpreted in accordance with the court decisions of the ECtHR, as established in Article 53 of the Constitution, beyond the application of the Law on Civil Status, have neither considered nor reasoned the fair balance needed between the competing interests of the individual and the community nor the legitimate aims on the basis of which the right to a private and family life could be restricted, as required regarding the right to a private life guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

117. In addition, the Court notes that while the public authorities rejected to register the deceased I.F. in the PDR, on the grounds that the medical report in his name is missing, they did not take into account (i) the fact that the public authorities of the Republic of Kosovo have confirmed the death and facilitated the return of the deceased I.F. from Sweden to Kosovo; (ii) the possibility of using international legal cooperation in this matter, in order to clarify the circumstances related to the medical report and, consequently, to enable the registration of the deceased in the PDR; and (iii) the possibility that the declaration of the deceased as dead and the relevant registration in the civil registers, be made based on the relevant provisions of the out contentious procedure.

118. More precisely and with regard to the first issue, it is not disputable that I.F. died in Sweden on 7 June 2013. This was confirmed by the submission [no. 09/13] of 8 June 2013 of the Embassy of the Republic of Kosovo in Sweden. The body was transported to Kosovo through the company responsible for funeral services in Linkoping. The deceased was buried in Prishtina on 16 June 2013. Having said that, and despite these facts, in the circumstances of the present case, there is (i) an international death certificate or death certificate issued by the civil registry of the place of death translated in the official languages of Kosovo; and (ii) there is no official burial permit issued by the Office of Civil Status. Despite the lack of this documentation, the state has facilitated the return of the body from Sweden to the Republic of Kosovo and has allowed the burial of the lattter, while at the same time, has refused its registration in the PDR.

119. More specifically, and with regard to the international death certificate, the Court notes that despite the requirements set out in paragraph 2 of Article 52 (Registration of death of a Kosovo citizen living abroad) of the Law on Civil Status, there is no international certificate of death or death certificate issued by the civil registry of the place of death translated into the official languages of Kosovo for the deceased I.F. However, despite the lack of the above certificate, and the lack of a medical report in the name of the deceased I.F., his death was confirmed by the submission [no. 09/13] of 8 June 2013 issued by the Embassy of the Republic of Kosovo in Sweden, and consequently, the latter was transferred from Sweden to the Republic of Kosovo, through Prishtina International Airport. Regarding the burial permit, the Court notes that despite the fact that paragraph 1 of Article 50 of the Law on Civil Status, stipulates that burial can be done only after obtaining permission from the Office of Civil Status, and that based on paragraph 4 of this article, the burial permit cannot be issued without a certificate from the doctor confirming the death or without a court order, in the circumstances of the deceased I.F., there is no official burial permit. The latter is also confirmed by the Municipality of Prishtina during the discussion in the public hearing, but also through the explanatory letter submitted to the Court on 19 February 2020, through which it is specifically clarified that the Municipality of Prishtina "*cannot provide any document related to the death/burial of I.F., since in the civil status system this person appears as alive*". However, I.F was buried on 16 June 2013 in Prishtina.

120. Consequently, despite the fact that the public authorities of the Republic of Kosovo, namely the Embassy of Kosovo in Sweden, recognize the fact that I.F. died; that the latter is allowed to return to the Republic of Kosovo and in this respect, no obstacles are presented, and despite the fact that there is no dispute regarding whether I.F. died and that he was buried in Prishtina seven (7) years ago, the relevant public authorities of the Republic of Kosovo, refused to register his death in the PDR, on the grounds that there is no medical report confirming his death despite the fact that the lack of this report, and moreover, the lack of an international death certificate, did not prevent the confirmation of death and the return of the body from Sweden to Kosovo and his burial in Prishtina on 16 June 2013. Such uncoordinated actions and separated from each other by the public authorities of the Republic of Kosovo, have resulted in the violation of the rights of the Applicant for his private life guaranteed by the Constitution and the ECHR.

121. On the other hand, and with regard to the second issue identified above, the Court also notes the fact that, beyond the suggestions of the

Civil Registration Agency and the State Advocacy, in the public hearing regarding the possibility of international legal cooperation in the circumstances of the present case, the regular courts, from the beginning of the court proceedings in 2014 until the issuance of the challenged decision in 2017, did not approach this opportunity to attempt to clarify the connection between the late I.F. and that A.H. or even lack of medical report on behalf of I.F. from the Swedish health institution.

122. In this regard, the Court notes that (i) the only Law governing international legal cooperation in the Republic of Kosovo is that relating to criminal matters, namely Law No. 04/L-213 on International Legal Cooperation in Criminal Matters, which is not applicable in the circumstances of the present case; (ii) in the Official Gazette of the Republic of Kosovo, no International Agreement has been published with the Swedish state regarding international legal cooperation; but nevertheless it states that (iii) The Ministry of Justice, on 30 September 2009, issued Administrative Instruction no. 2009/1-09 on the Procedure for the Provision of International Legal Aid in Criminal and Civil Matters which aims to address requests for international legal assistance in civil and criminal matters, and which, despite the fact that it is of a general nature, could have served as a basis for initiating proceedings for international legal cooperation in the circumstances of the present case. The courts have not approached this possibility, nor have they justified the lack of such an initiative.

123. Similarly, and with regard to the third issue, the public authorities have acted regarding the possibility of declaring the death of the deceased I.F., through paragraph 2 of Article 48 of the Law on Civil Status in conjunction with Articles 73 and 74 of Law no. 03/ L-007 on Out-Contentious Procedure (hereinafter: LCP). Part c) of the latter, namely "The procedure of proving a person's death", in its articles 73 and 74, defines the possibility of ascertaining the death of a person through a ruling, if the actual death of a person cannot be proved by means of the document provided by the law on civil registers. Based on the same law, namely Article 4 thereof, this procedure, in addition to the proposal of the natural or legal person, can be initiated through the proposal of the state body. The courts have not approached this possibility, nor have they justified the lack of such an initiative.

124. Consequently, the public authorities, including regular courts, beyond the extremely formal approach of application and mechanical interpretation of the law, have not taken into account all the circumstances of the case and the serious consequences for the Applicant, contrary to the case law of the ECtHR with regard to the

interpretation of Article 8 of the ECHR, thus resulting in a situation in which the constitutional rights and those guaranteed by the ECHR to the Applicant are merely "*theoretical and illusory*" rights and not "*practical and effective*" *rights,* as required by the Constitution, the ECHR and the case law of the ECtHR, but also that of this Court. (See, in this context, the cases of the ECtHR, *Nada v. Switzerland*, Judgment of 12 September 2012, paragraph 182; *Emonet and Others v. Switzerland*, Judgment of 13 December 2007, paragraph 86; and *Artico v. Italy*, Judgment of 13 May 1980, paragraph 33).

125. Consequently, the Court considers that the extremely formal approach of the Civil Registration Agency and the regular courts, in the interpretation and application of the relevant provisions of the Law on Civil Status and Administrative Instruction, in the complex and specific circumstances of the present case, without regard to the legal effects that would produce their decisions regarding the civil status of the spouse and son of the deceased I.F., has prevented the "*practical and effective*" exercise of the Applicant's fundamental rights and freedoms guaranteed by the Constitution. Such an approach runs counter to the obligation of public authorities under Article 8 of the ECHR to have "*due diligence*" that the rights relating to a private life must be respected both through the negative obligations or self-restraint of public authorities, as well as through positive obligations. In both cases, the action must be justified and be proportionate to the individual circumstances of the case. (See ECtHR case, *Płoski v. Poland*, Judgment of 12 November 2002, paragraphs 35-39; and *Nada v. Switzerland*, cited above, paragraph 182).

126. Therefore and based on the explanations above, the Court notes that in the circumstances of the present case, the rejection of the Applicant's application for registration of the deceased son in the PDR, does not reflect the fair balance between the competing interests of the individual and the community in whole. Despite the fact that public authorities have not "*interfered*" with the rights of the Applicant for a private life, the latter, from the point of view of positive obligations, have failed to take the necessary actions to ensure effective respect for the rights of the Applicant for a private life. More precisely, the procedures followed by the administrative and judicial system did not result in the exercise of the Applicant's right to respect for his private life, as guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. On the contrary, they have resulted in mere "*theoretical and illusory*" rights for the Applicant, despite the fact that in the circumstances of the case (i) the Applicant's allegations are of a very serious nature and relate to the "*essential aspects*" of private life; whereas (ii) the Applicant's request is of a

"*narrow and precise*" nature and the burden, namely the obligation of the State to fulfill this request, is not disproportionate.

127. Therefore and finally, the Court finds that the refusal of the public authorities to register the deceased I.F. in the PDR, in the circumstances of the present case, does not strike a fair balance between private and public interest, thus resulting in a violation of the Applicant's rights guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. (See, despite the difference in factual circumstances of the case, the similar finding of the ECtHR in case *Dickson v. the United Kingdom*, cited above, paragraph 85; and *Gaskin v. the United Kingdom*, cited above, paragraph 49). Consequently, the Court also concludes that the public authorities, including the regular courts, failed to fulfill their positive obligations to provide the Applicant with the rights to his private life, thus resulting in a violation of Article 8 of the ECHR. (See, despite the difference in the factual circumstances of the case, the similar assessment of the ECtHR in case R. *R. v. Poland*, cited above, paragraph 214).

128. Based on the aforementioned clarification, the Court must find that the Judgment [ARJ. UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court in conjunction with the Judgment [AA. No. 333 2017] of 20 October 2017 of the Court of Appeals, Judgment [A. No. 1185/2014] of 5 June 2017 of the Basic Court and Decision [No. 30/2014] of 24 June 2014 and [No. 86/013] of 18 November 2013 of the Civil Registration Agency and that of the Municipality of Prishtina [No. 01-203-194645] of 16 October 2013, have been rendered in violation of the fundamental rights and freedoms of the Applicant guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

129. In the light of this finding, the Court will in the following also examine the compatibility ECHR of the challenged decisions with Article 54 of the Constitution and Article 13 of the ECHR. To this end, the Court will elaborate on the general principles deriving from the case law of the Court and the ECtHR with regard to the abovementioned articles and will apply them in the circumstances of the present case.

II. General principles regarding the rights to judicial protection of rights and the right to an effective remedy and their application in the circumstances of the present case

General Principles

130. As far as it is relevant to the circumstances of the present case, the Court notes that Article 54 of the Constitution consists of two rules, but which must be read together and interdependently. The first rule is general and states that "*everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied*". This rule in principle implies that judicial protection is a right guaranteed to each individual, natural or legal, to whom an existing right guaranteed by the Constitution or by law may have been "*violated*" or the right to acquire or enjoy any rights guaranteed by the Constitution or by law has been "*denied*". The second rule of this article speaks and guarantees the right to "*effective legal remedies*" in cases when it is found that a right protected by the Constitution or by law has been violated. (See, *inter alia*, the case of the Court, KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019, paragraph 195).

131. Article 54 of the Constitution is also supplemented and should be closely read in conjunction with Article 32 [Right to Legal Remedies] of the Constitution and Article 13 (Right to an effective remedy) of the ECHR and with the relevant case-law of the Court and the ECtHR. Article 13 of the ECHR guarantees the right to an "*effective remedy*" in the event of a violation of the rights guaranteed by ECHR, before a public authority. (See, *inter alia*, the case of the Court, KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019, paragraph 197).

132. Therefore, in principle and in its entirety, Article 54 of the Constitution on the judicial protection of rights, and Article 13 of the ECHR for an effective remedy guarantee: (i) the right to judicial protection in case of violation or denial of a right guaranteed by the Constitution or by law; (ii) the right to use a legal remedy when it is found that a right has been violated; and (iii) the right to an effective legal remedy at national level if a right guaranteed by the ECHR has been violated. (See, *inter alia*, the case of the Court, KI48/18, Applicant *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019, paragraph 198).

133. Based on the case law of the ECtHR, in principle, the purpose of Article 13 of the ECHR is to provide a legal remedy through which the individuals can reach an effective remedy for violations of their rights guaranteed by the ECHR at the domestic level, before the grievance machinery is set in motion before the ECHR. (See, *inter alia*, the case of the ECHR, *Kudła v. Poland*, Judgment of 26 October 2000, paragraph 152). On the contrary, the absence of relevant legal remedies would weaken and make illusory the guarantees of Article 13 of the ECHR, while the latter, as already stated, does not aim to

guarantee "*theoretical or illusory*", but rights that are "*practical and effective*". (See, *inter alia*, the case of the ECtHR, *Scordino v. Italy* (no. 1), Judgment of 29 March 2006, paragraph 192).

134. Furthermore, and insofar as it is relevant to the circumstances of the present case, this case-law on the interpretation of Article 13 of the ECHR states that when an individual has a "*substantiated*" claim that he is the victim of a violation of the rights provided by the ECHR, he/she must have a legal remedy before a "*national authority*", which enables the respective claim to be decided on the substance and, if appropriate, enables him/her to make the appropriate correction.

135. The Court notes that with regard to the notion of "*arguability*", the ECtHR has not formulated a precise definition. However, it emphasized that "*where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress*". (See, *inter alia*, ECtHR, *Leander v. Sweden*, Judgment of 26 March 1987, paragraph 77). It also added that if the claim is "*arguable*", it should be determined in the light of specific facts and the nature of the legal issue or issues raised in each particular case. (See, *inter alia*, ECtHR cases *Boyle and Rice v. the United Kingdom*, Judgment of 27 April 1988, paragraph 55; and the *Platform "Arzte für das Leben" v. Austria*, Judgment of 21 June 1988, paragraph 27) . In principle, when the "*arguability*" of a complaint on merits is out of the question, the ECtHR finds Article 13 applicable in the circumstances of that case. (See ECtHR, *Vilvarajah and Others v. the United Kingdom*, Judgment of 30 October 1991, paragraph 121; and *Chahal v. the United Kingdom*, judgment of 15 November 1996, paragraph 147). The ECtHR has emphasized, however, that Article 13 of the ECHR cannot reasonably be interpreted so as to require a remedy in domestic law in respect of any supposed grievance that an individual may have, no matter how unmeritorious his complaint may be: the grievance must be an arguable one in terms of the ECHR. (See, *inter alia*, ECtHR cases *Boyle and Rice v. the United Kingdom*, cited above, paragraph 52; and *Maurice v. France*, judgment of 6 October 2005, paragraph 106).

136. The Court also notes that based on the case law of the ECtHR, Article 13 of the ECHR does not exist independently; it merely complements the other essential provisions of the ECHR and its protocols. (See, in this context, the case of the ECtHR, *Zavoloka v. Latvia*, Judgment of 7 July 2009, paragraph 35 (a)). This article may be applied only in combination with, or in the light of, one or more other articles of the ECHR or relevant protocols for which a violation has been alleged.

However, Article 13 of the ECHR can be highlighted without violating another provision of the ECHR. (See, *inter alia*, case of the ECtHR, *Klass and Others v. Germany*, Judgment of 6 September 1978, paragraph 64). Consequently, the fact that another right has been violated cannot be a precondition for the application of Article 13 of the ECHR. Thus, even if the ECtHR has not found a violation of a provision, the complaint may remain "*arguable*" for the purposes of Article 13 of the ECHR. (See cases of the ECtHR, *Valsamis v. Greece*, Judgment of 18 December 1996, paragraph 47; and *Ratushna v. Ukraine*, Judgment of 2 December 2010, paragraph 85).

137. With regard to the connection between Article 13 and Article 8 of the ECHR, which is relevant to the circumstances of the present case, the Court notes that the ECtHR has found a violation or not of Article 13 in conjunction with or in the light of Article 8 of the ECHR in different cases. In all these cases it was emphasized that an effective legal remedy in the context of cases involving claims in relation to Article 8 of the ECHR, implies that the relevant authorities must examine the balance between the interests of the individual and the obligations of the State. (See, *inter alia*, case of the ECtHR, *Gorlov and Others v. Russia*, Judgment of 2 July 2019, paragraph 108).

138. For example, the Court notes that the ECtHR found violations of Articles 8 and 13 of the ECHR, *inter alia*, in all of the following cases: *Gorlov and Others v. Russia*, cited above; *B.A.C v. Greece*, Judgment of 13 October 2016; *Keegan v. United Kingdom*, Judgment of 18 July 2006; *Reiner v. Bulgaria*, Judgment of 23 May 2006; and *T.P and K.M v. the United Kingdom*, Judgment of 10 May 2001. Violation of Article 8 of the ECHR, in some cases was found from the point of view of negative state obligations, while in others from the point of view of positive state obligations. Taking into account the violation of Article 8 of the ECHR in these cases, the ECHR also found a violation of Article 13 of the ECHR. The latter, in all these cases, was reasoned through the following arguments: (i) taking into account the finding of a violation under Article 8 of the ECHR, the ECtHR found that the Applicants concerned had an "*arguable*" claim before it with respect to Article 13 of the ECHR; (ii) the reasoning of the relevant Judgments stated that the right to an effective remedy guaranteed by Article 13 of the ECHR requires that the Applicants' allegations be examined on the merits and taking into account that the respective cases had not considered the balance between the interest of the respective Applicants and the obligations of the State, found that the legal remedies at the domestic level were not effective, and consequently Article 13 of the ECHR has been violated; and (iii) in certain cases, it also emphasized the extremely formal and limited analysis of local

courts and the disregard of the specifics of the case, finding consequently that the criteria of Article 13 of the ECHR have not been met.

Application of general principles in the circumstances of the present case

139. Based on the aforementioned general principles, the Court must further assess whether, in the circumstances of the present case, the Applicant has an "*arguable*" claim before the Court with respect to Article 54 of the Constitution in conjunction with Article 13 of the ECHR; and if this is the case, the Court must assess whether the Applicant had available legal remedies which enabled him to "*implement the substance of the rights of the Convention …*". (See case of the ECtHR *Keegan v. the United Kingdom*, cited above, paragraph 41, and references used therein).

140. In this context and initially, the Court notes that in view of the finding of a violation of paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR in the circumstances of the present case, the Applicant's allegations of a violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, are clearly "*arguable*". (See ECtHR cases *Gorlov and Others v. Russia*, cited above, paragraph 104; and *Keegan v. the United Kingdom*, cited above, paragraph 41; see also case No. KI193/18, Applicant *Agron Vula*, Judgment of 22 April 2020, paragraph 130). Therefore, in the following, it must be assessed whether the legal remedies available to the Applicant, have enabled him to examine the substance of the content of his allegations and claims.

141. In this regard, the Court recalls that it has already found that the rejection of the Applicant's request for registration of his deceased son in the PDR by the public authorities, was in violation of his right to a private life, guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. Also, the Court has already found that public authorities, including regular courts, in addressing the Applicant's allegations had an extremely formal approach to interpreting and applying the law, and have not addressed the substance of the Applicant's allegations and the specifics of his case, thus resulting in the impossibility of carrying out the necessary correction for respect of his rights to a private life, and that the outcome of the proceedings before the same public authorities, in their entirety, has resulted in only "*theoretical* or illusory", not "*practical and effective*" rights for the Applicant, contrary to the Constitution and the ECHR.

142. Furthermore, and contrary to the requirements of Articles 8 and 13 of the ECHR, the Civil Registration Agency and the regular courts, in addition to not addressing the substance of the Applicant's allegations, did not even consider the proper balance between competing interests, nor issues related to the specifics of the present case and the reasonableness and proportionality of the rejection of the Applicant's request for registration of his deceased son in the PDR.

143. The Court reiterates in this regard that the extremely formal approach to the interpretation and application of the law and the limited consideration of the Applicants' respective claims, bypassing the substance and content of the Applicant's allegations, in the absence of any attempt to find fair balance between the competing interests, beyond violation of Article 8 of the ECHR, disabling the proper redress also results in a violation of Article 13 of the ECHR based on the case law of the ECtHR. (See, notwithstanding differences in factual circumstances of the case, the same finding and reasoning of the ECtHR, *inter alia*, in case *Reiner v. Bulgaria*, cited above, paragraphs 141, 142 and 143)

144. In such circumstances, based on the case law of the ECtHR, the Court must find that the Applicant did not have effective legal remedies available to redress the violations of his right to a private life guaranteed by paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR. Therefore, for the reasons explained in this Judgment, the Court must also find that in the circumstances of the present case, there has also been a violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR. (See, notwithstanding the differences in the factual circumstances of the case, the ECtHR same finding and reasoning, *inter alia*, in case *Keegan and Others v. the United Kingdom*, cited above, paragraphs 42 and 43).

Conclusion

145. The Court found that Judgment [ARJ.UZVP. No. 67/2017] of 22 December 2017 of the Supreme Court in conjunction with the Judgment [AA. No. 333/2017] of 20 October 2017 of the Court of Appeals, Judgment [A. No. 1185/2014] of 5 June 2017 of the Basic Court and the Decision [No.30/2014] of 24 June 2014 and Decision [No. 86/013] of 18 November 2013 of the Civil Registration Agency and that of the Municipality of Prishtina [No. 01-203-194645] of 16 October 2013, are rendered in violation of paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR and Article 54 of the Constitution in conjunction with Article 13 of the ECHR.

146. In order to reach the finding above, the Court first clarified that the circumstances of the present case, namely the refusal of the public authorities to register the death of the Applicant's deceased son, involve issues related to the right to a private life of the Applicant and his right to judicial protection of rights and effective legal remedies, as guaranteed by Articles 36 and 54 of the Constitution and 8 and 13 of the ECHR, respectively. In this context and during the examination of this case, the Court has elaborated the general principles deriving from the case law of the Court and the ECtHR regarding the abovementioned articles and has subsequently applied the latter in the circumstances of the present case.

147. With regard to the issues relating to the right to a private life, the Court, applying the case law of the ECtHR insofar as it is relevant to the circumstances of the case, has clarified, *inter alia*: (i) the State's obligations to protect the private life as guaranteed by the Constitution and the ECHR; (ii) the distinction between the negative and positive obligations of the State with regard to the protection of this right; (iii) the fact that in the circumstances of the present case, the State did not necessarily "*interfere*" with the rights of the Applicant, but failed to act to protect them, resulting in an assessment of the circumstances of this case from the point of view of positive obligations of the state; (iv) that the positive obligations of the state require, *inter alia*, that public authorities consider the specifics of a case and take measures to ensure the effective protection of the right to a private life, or by providing a legal framework that protects individuals or by determining the application of special measures appropriate to the circumstances of a case; and (v) that in such cases, public authorities are obliged to consider the balance between the interests of the individual, including the nature of the claims and whether they relate to "*essential aspects*" of private life, and the obligations of the state, including whether they relate to "*narrow and precise*" or "*broad and indefinite*" obligations and the potential burden they impose on the state.

148. With regard to the issues related to the right to judicial protection of rights and effective remedy, the Court, applying the case law of the ECtHR insofar as it is relevant to the circumstances of the case, has clarified, *inter alia* (i) that these rights imply the existence of a legal remedy which examines the essence of the content of the dispute, namely the allegations of an Applicant and enables the appropriate redress; (ii) the notion of "*arguable*" claim for the purposes of Article 54 of the Constitution and Article 13 of the ECHR; and (iii) the fact that in the context of claims for the protection of a private right, the legal remedy must enable consideration of the substance of the

respective allegations, and an assessment of the balance between competing interests. In both cases, the purpose of the Constitution and the ECHR is important, to guarantee "*practical and effective*" rights and not "*theoretical or illusory*" rights..

149. In applying these principles in the circumstances of the present case, with regard to Article 36 of the Constitution in conjunction with Article 8 of the ECHR, the Court emphasized that public authorities, including regular courts, go beyond finding that in relation to the death of the son of the Applicant lacks the medical report confirming his death, a finding that has resulted in the refusal to register the Applicant's son in the PDR, with the serious consequence of leaving the civil status of the wife and minor son of the deceased unresolved, have not taken into account the fact that (i) it is not disputed that the Applicant's son died; and (ii) such a fact was confirmed by the public authorities of the Republic of Kosovo, namely the Embassy of Kosovo in Sweden, where the death occurred. Furthermore, the public authorities, rejecting the Applicant's request for registration of his son's death in the PDR, despite the fact that the same death was not contested, (i) not only had they formally applied the applicable law, by not taking into account either the possibility of international legal cooperation with the Swedish state or the possibilities provided through the provisions of the out contentious procedure, but (ii) contrary to the constitutional requirements and those of the ECHR, had not considered the balance between competing interests, namely the essence and specifics of the Applicant's allegations and the obligations of the state to protect the right to a private life.

150. The Court has clarified that the examination of such a balance would result in the finding that the Applicant's allegations and request are "*narrow and clear*" and do not result in disproportionate obligations to the State. Moreover, through such a refusal in the absence of a medical report, without taking into account any of the circumstances and specifics of the case, the decisions of public authorities resulted in only "*theoretical and illusory"* constitutional rights for the Applicant and not "*practical and effective*" constitutional rights, as required by the Constitution and the ECHR. Consequently, the Court found that the proceedings followed by the administrative and judicial system, contrary to the positive obligations of the state, did not result in the exercise of the Applicant's right to respect for his private life, contrary to paragraph 1 of Article 36 of the Constitution in conjunction with Article 8 of the ECHR.

151. With regard to Article 54 of the Constitution in conjunction with Article 13 of the ECHR, the Court stated that taking into account the

abovementioned finding, the Applicant's allegations of a violation of Article 54 of the Constitution in conjunction with Article 13 of the ECHR, are clearly "*arguable*", as established in the case law of the Court and the ECtHR. Further, the Court notes that contrary to the requirements of the abovementioned articles and relevant case law, the legal remedies in the circumstances of the present case, did not result in the review of the substance of the Applicant's allegations, nor did they enable proper redress. The Court reiterates that the limited and extremely formal review of the Applicant's allegations, in isolation from the specifics of the case and the relevant consequences, had also resulted in a lack of practical and effective protection of judicial rights and that of the Applicant's effective remedy, contrary to Article 54 of the Constitution in conjunction with Article 13 of the ECHR.

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

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.7 and 116.1 of the Constitution, Articles 47 and 48 of the Law and Rules 59 (1), 64 (2) and 66 of the Rules of Procedure, on 22 July 2020, with majority of votes

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 36 [Right to Privacy] of the Constitution, in conjunction with Article 8 [Right to respect for private and family life] of the European Convention on Human Rights;

III. TO HOLD that there has been a violation of Article 54 [Judicial Protection of Rights] of the Constitution in conjunction with Article 13 (Right to an effective remedy) of the European Convention on Human Rights;

IV. TO DECLARE invalid the decisions, as follows:

a) Judgment [ARJ. UZVP. No. 67/2017] of the Supreme Court of 22 December 2017;
b) Judgment [AA. No. 333/2017] of the Court of Appeals of 20 October 2017;
c) Judgment [A. No. 1185/2014] of the Basic Court of 5 June 2017;
ç) Decisions [No. 30/2014] of 24 June 2014 and [No. 86/013] of 18 November 2013 of the Civil Registration Agency; and
d) Decision [No. 01-203-194645] of the Sector of Civil Status of the Municipality of Prishtina of 16 October 2013;

V. TO ORDER the Civil Registration Agency of the Ministry of Internal Affairs and the Sector of Civil Status of the Municipality of Prishtina that by 30 October 2020, register the death of I.F. in the Principal Death Register;

VI. TO ORDER the Civil Registration Agency of the Ministry of Internal Affairs and the Sector of Civil Status of the Municipality of Prishtina to submit information to the Court, in accordance with Rule 66 (4) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court;

VII. TO REMAIN seized of the matter, pending compliance with that order;

VIII. TO NOTIFY this Judgment to the Parties;

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

X. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI214/19 Applicant: Murteza Koka, constitutional review of Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 2019#

KI214/19 – Judgment of 29 July 2020, published on 24 August 2020
Keywords: *Individual referral, admissible referral, property dispute, admissibility of revision, res judicata principle*

The main issue raised by the Applicant in his Referral before the Constitutional Court was whether the Supreme Court by Decision [Rev. No. 195/2019] reopened the Applicant's case decided by Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, which approved the Applicant's lawsuit and confirmed that the Applicant is the owner of the property that was the subject of the dispute.

In this regard, after the Judgment [AC. No. 3332/2013] of the Court of Appeals, the Municipality of Gjakova, through the Basic Court, filed a revision with the Supreme Court. While the Applicant submitted a response to the revision challenging the admissibility of the revision because according to him, the value of the dispute was 200.00 euro, while according to Article 211, paragraph 3 of the Law on Contested Procedure, the revision is not allowed if the value of the object of the dispute does not exceed the amount of 3000.00 euro. The Basic Court, by Decision [C. No. 38/2012], rejected the revision of the Municipality of Gjakova as inadmissible on the grounds that the value of the dispute in the lawsuit and the statement of claim was below the amount of 3000.00 euro.

The Court of Appeals, by Decision [Ac. No. 3860/18], approved as grounded the complaint of the Municipality of Gjakova and remanded the case for retrial and reconsideration, after assessing that the first instance court should have applied Article 36 of the LCP *ex officio* to verify the value of the dispute indicated in the lawsuit and then make a decision on determining the value of the dispute. The Basic Court after the Decision [Ac. No. 3860/18] of the Court of Appeals, forwarded the case file to the Supreme Court to decide on the revision. Whereas, the Supreme Court by the Decision [Rev. No. 195/2019] approved the revision as grounded, annulled the Judgment [AC. No. 3332/2013] of the Court of Appeals of 26 April 2018 and the Judgment [C. No. 38/2012] of the Basic Court of 30 April 2013, confirming the right of ownership of the Applicant for the disputed property, and remanded the case for retrial.

The Applicant alleged before the Constitutional Court that the challenged decision of the Supreme Court by which the case decided by Judgment [C.

No. 38/2012] of 30 April 2013 of the Basic Court which has become final by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals, was remanded again for decision on merits in the Basic Court without a reasoning on the admissibility of the revision according to the allegations presented in the Applicant's response to the revision, and this allegedly has violated his right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, as well as the right to equality before the law and the right to protection of property guaranteed by Articles 24 and 46 of the Constitution.

The Constitutional Court, based on its previous case law, as well as that of the European Court of Human Rights, concluded that the Supreme Court, by the challenged decision, reopened the Applicant's case decided by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court and which became *res-judicata*, taking into account the value of the dispute which according to court decisions, was below the amount for which revision is allowed, while the value of the object of the dispute was not challenged and corrected by any decision of the regular courts.

Therefore, quashing Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals, which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, without assessing the admissibility of the revision, the Supreme Court violated the principle of legal certainty and denied the Applicant a fair and impartial trial regarding his rights and obligations within the meaning of Article 31, paragraph 2 of the Constitution and Article 6, paragraph 1 of the ECHR.

With regard to the Applicant's allegation of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution, the Court stated that given that the Court concluded that the challenged decision violated the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and declared invalid Decision Rev. No. 195/2019, of the Supreme Court of Kosovo, of 23 July 2019, the Court did not find it necessary to address separately the allegations of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution.

JUDGMENT

in

Case No. KI214/19

Applicant

Murteza Koka

Constitutional review of Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 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 is submitted by Murteza Koka from Gjakova (hereinafter: the Applicant), who is represented by Prenk Pepaj, a lawyer from Gjakova.

Challenged law

2. The Applicant challenges Decision Rev. No. 195/2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 23 July 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights, guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution),

and 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 also requests the Court to not disclose his identity.

Legal basis

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

Proceedings before the Constitutional Court

6. On 25 November 2019, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral which he submitted by mail service on 21 November 2019.

7. On 27 November 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Gresa Caka-Nimani (members).

8. On 20 December 2019, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit to the Court the Referral Form of the Court as well as the power of attorney proving that he represents the Applicant before the Court.

9. On 13 January 2020, the Court received from the Applicant's representative, by mail, the Referral Form, some documents which were submitted with the initial referral and a general power of attorney by which the Applicant authorized his representative "*to represent me in a general manner, in all court and administrative proceedings*".

10. On 27 January 2020, the Court requested again the Applicant's representative to submit to the Court the power of attorney proving that he represents the Applicant before the Court.

11. On 5 February 2020, the Court received from the Applicant's representative a power of attorney which was not valid for the Applicant's representation before the Court, as the document was a copy of the power of attorney signed by the Applicant showing the Applicant's personal number, but his identification document was not shown.

12. On 27 February 2020, the Court requested the representative of the Applicant to submit to the Court the certified power of attorney to the notary, with proves without doubt that the representative is authorized to represent the Applicant before the Court as well as a copy of an identification document of the Applicant.

13. On 16 March 2020, the Court received a valid notarized power of attorney certifying that the representative is authorized to represent the Applicant before the Court.

14. On 26 March 2020, the Court notified the Supreme Court about the registration of the Referral.

15. On the same date, the Court requested the Basic Court to notify the Court "*about the actions taken by the Basic Court in Gjakova, as the case concerning the Applicant [regarding the admissibility of the revision] was remanded to the Basic Court in Gjakova by the Court of Appeals of Kosovo, by Decision [Ac. No. 3860/18] of 12 March 2019*".

16. On 5 May 2020, the Basic Court submitted to the Court the complete case file C. No. 38/2020, which is related to the Referral KI214/20, but did not answer the question posed by the Court.

17. On 10 June 2020, the Court returned the case file to the Basic Court and again asked the latter:

> *"to notify the Constitutional Court about the actions taken by the Basic Court in Gjakova, as the case was remanded for retrial by the Court of Appeals of Kosovo by Decision [Ac. No. 3860/18] of 12 March 2019.*
> *Specifically, if after the case was remanded for retrial by the Court of Appeals of Kosovo by Decision [Ac. No. 3860/18], the Basic Court in Gjakova:*
>
> *1) has rendered any decision according to the findings of the Decision [Ac. No. 3860/18] of the Court of Appeals of Kosovo; or*

2) only proceeded the case as such for review according to the Revision in the Supreme Court of Kosovo".

18. On the same date, the Court notified the Municipality of Gjakova about the registration of the Referral and notified the latter that it could submit comments, if any, regarding the Applicant's Referral.

19. On 2 July 2020, the Court received the comments of the Municipality of Gjakova regarding the Referral.

20. On 3 July 2020, the Court received from the Municipality of Gjakova a submission with corrections of the comments received by the Court on 2 July 2020.

21. On 7 July 2020, the Basic Court, responding to the letter of the Court of 10 June 2020, notified the Court that after the case C. No. 38/2012 was remanded by the Court of Appeals, the hearing was scheduled for 05.08.2020.

22. On 13 July 2020, the Court again requested the Basic Court to answer the questions raised by the Court in the letter of 10 June 2020, as well as to submit to the Court the complete file of the present case.

23. On 20 July 2020, the Basic Court submitted its response to the Court stating that *"in this case no decision has been rendered by the Basic Court in Gjakova, according to the findings of Decision AC. No. 380/18 of the Court of Appeals [...], but only the court hearing was scheduled, as I informed you in the letter of 06.07.2020".*

24. On 29 July 2020, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral.

25. On the same date, the Court unanimously decided that the Referral is admissible and that: *i)* there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights; *ii)* it is not necessary to examine whether there has been a violation of Article 24 and Article 46 of the Constitution of the Republic of Kosovo; *iii)* Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 2019 and Decision Ac. No. 3860/18 of the Court of Appeals of 12 March 2019, are repealed; *iv)* Judgment AC. No. 3332/2013 of the Court of Appeals, of 26 April 2018 and Judgment C. No. 38/2012 of the Basic Court, of 30 April 2013, are final and binding, and as such *res judicata*; v) the request for non-disclosure of identity is rejected.

Summary of facts

26. On 8 March 2006, the Applicant filed a lawsuit against the Municipality in the Municipal Court in Gjakova (hereinafter: the Municipal Court), for the confirmation of the ownership right related to the immovable property with a culture house in a surface area of 0-06-92 ha, the foundations in a surface area of 0-00-090 ha and permanent user of immovable property with culture yard in a surface area of 0-06-46 ha, in a total surface area of 0-08-28 ha, part of the immovable property registered as parcel no. 4380/2, according to possession list no. 856, CZ Gjakova-J city (hereinafter: disputed property). The lawsuit stated that the value of the dispute is 200.00 euro.

27. On 16 July the Applicant extended the lawsuit by adding as a respondent the person M.U.B.

28. On 4 June 2010, the Municipal Court, by Judgment [C. No. 124/06], approved the Applicant's lawsuit in its entirety and established that the Applicant is the owner of the disputed property.

29. Against the Judgment of the Municipal Court [C. No. 124/06], the Municipality filed an appeal with the District Court in Peja due to essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

30. On 10 January 2012, the District Court in Peja, by Decision [Ac. No. 9/2011], quashed the Judgment of the Municipal Court [C. No. 124/06] and remanded the case for retrial.

31. On 30 April 2013, in the repeated procedure, the Basic Court, by Judgment [C. No. 38/12], again approved the Applicant's lawsuit and confirmed that the Applicant is the owner of the disputed property. The value of the dispute recorded in this Judgment was 200.00 euro.

32. Against the Judgment of the Basic Court in Gjakova, the Municipality filed an appeal with the Court of Appeals, on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

33. On 24 April 2018, the Court of Appeals, by Judgment [AC. No. 3332/2013], rejected the appeal of the Municipality and upheld the

Judgment [C. No. 38/12] of the Basic Court. The value of the dispute recorded in this Judgment was 200.00 euro.

Procedure regarding the revision of the Municipality of Gjakova against Judgment [AC. No. 3332/2013] of the Court of Appeals and Judgment [C. No. 38/12] of the Basic Court

34. Against Judgment [AC. No. 3332/2013] of the Court of Appeals, the Municipality, through the Basic Court, filed a revision with the Supreme Court.

35. The Applicant submitted a response to the revision challenging, *inter alia*, the admissibility of the revision because according to him, the value of the dispute was 200.00 euro, while according to Article 211, paragraph 3 of the Law on Contested Procedure, revision is not allowed if the value of the object of the dispute does not exceed the amount of 3000.00 euro.

36. On 19 July 2019, the Basic Court, by Decision [C. No. 38/2012], rejected the revision of the Municipality as inadmissible on the grounds that the value of the dispute in the lawsuit and the statement of claim was set at 200.00 euro, and not above the value provided in Article 211, paragraph 3 of the LCP, 3000.00 euro.

37. Against Decision [C. No. 38/2012] of the Basic Court, of 19 July 2019, the Municipality filed an appeal with the Court of Appeals on the grounds of essential violations of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

38. On 12 March 2019, the Court of Appeals, by Decision [Ac. No. 3860/18], approved as grounded the complaint of the Municipality and remanded the case for retrial and reconsideration. The Court of Appeals reasoned that the of first instance court should have applied Article 36 of the LCP *ex officio* to verify the value of the dispute indicated in the lawsuit and then make a decision on determining the value of the dispute. In the present case, the value of the dispute, claimed according to the lawsuit and the statement of claim, is much lower than it really is. The Court of Appeals further reasoned that the first instance court, contrary to Article 36 of the LCP, continued the procedure with a small amount of dispute, compared to the real amount, while the Municipality was unable to present the extraordinary legal remedy, the revision. The Court of Appeals noted that *"the first instance court in the repeated procedure is instructed*

to act in accordance with Article 219 of the LCP and then forward the revision together with the case file within the legal deadline to the Supreme Court […]".

39. From the original case file there is no evidence that the Basic Court acted according to the order of the Court of Appeals "*to issue a decision on the value of the dispute*" or that it rendered a decision after the Decision [Ac. No. 3860/18], but forwarded the case file to the Supreme Court to decide on the revision.

40. On 23 July 2019, the Supreme Court by Decision Rev. No. 195/2019 approved the revision as grounded, annulled Judgment AC. No. 3332/2013, of 26 April 2018 of the Court of Appeals and Judgment C. No. 38/2012 of 30 April 2013, of the Basic Court and remanded the case for retrial, *inter alia*, *"for the reason that the enacting clause of the Judgment is contrary to the reasoning of the Judgment and that the reasoning does not contain sufficient convincing, factual and legal reasons on the decisive facts to decide on this legal matter. Also, due to the irregular investigation, the first instance court has erroneously applied the substantive law"*. The Supreme Court did not address the Applicant's allegation raised in his response to the revision regarding the unlawfulness of the revision due to the set amount of the lawsuit from 200,00 euro.

Applicant's allegations

41. The Applicant alleges that by the challenged decision the Supreme Court has violated his right to fair and impartial trial, guaranteed by Articles 31 of the Constitution and Article 6 of the ECHR, the right to equality before the law and the right to protection of property guaranteed by Articles 24 and 46 of the Constitution.

42. The Applicant states that *"The Court of Appeals […], by the [challenged decision], approves as grounded the appeal of [the Municipality] and remands the case to the [Basic] Court for reconsideration and retrial. […] The Basic Court […], sends the case file to the Supreme Court […], as it could not act according to the suggestions of the Court of Appeals, as the same decision was contrary to legal provisions, since any action of the Basic Court in Gjakova , according to the Decision of the Court of Appeals would be unlawful"*.

43. Therefore, the Applicant alleges that *"Decision of the Supreme Court of Kosovo is unlawful, since […] it was taken in violation of Article 211.3 of the Law on Contested Procedure, as in this case the value of*

the dispute was 200.00 (Two hundred) euro, therefore based on Article 211.3 of the LCP is decisively provided that: Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3000 €"

44. In this regard, the Applicant alleges that the Supreme Court had no right to deal with the revision as it was inadmissible and did not substantiate his allegation presented in the response to revision regarding the value of the dispute, stating that "*The Supreme Court of Kosovo by the challenged Decision does not declare itself regarding the allegations [of the Applicant] in response to the revision, of 11 June 2018".*

45. Finally, the Applicant requests the Court to find that his right to a fair trial, the right to equality before the law and the right to protection of property have been violated by the Supreme Court and to annul the challenged decision.

Comments of the Municipality of Gjakova

46. The Municipality of Gjakova in its response regarding the Referral states that according to the challenged Decision, the Applicant's case was remanded to the Basic Court and that so far the latter has not decided according to the suggestions of the Supreme Court, therefore, the Applicant's Referral is premature.

47. Regarding the amount of the dispute, the Municipality of Gjakova states that the prohibition to file a revision due to the small amount is unlawful as this was done due to the unfair actions of the Applicant, as in this case it is about a total surface area of 8 area, then it is suspected that the courts have allowed the court proceedings to take place with this small value of the dispute. According to the Municipality of Gjakova, the regular courts were obliged *ex officio* to not allow the procedure to take place until the claimant makes a specification - increasing the value of the dispute. Therefore, the Municipality alleges that due to the actions of the Applicant the Municipality cannot be harmed, and lose the right to revision.

48. Therefore, the Municipality requests that the Applicant's Referral be declared inadmissible.

Relevant Legal Provisions

Law No. 03/L-006 on Contested Procedure, Amended and Supplemented by Law No. 04/L-118

"Article 36

If the claimant did not specify the value of the disputed facility in the claim filed to the court, or the amount is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant. In such a case, the decision of the court is not subject to appeal.
[...]

Article 211

[...]
211.3 Revision is not permitted in the property-judicial contests, in which the charge request doesn't involve money requests, handing items or fulfillment of other proposal, if the value of the object of contest shown in the charge doesn't exceed 3,000 €.
[...]

Article 218

1. A belated, impermissible or incomplete revision shall be dismissed by a ruling of the court of first instance without conducting a main hearing.
2. The revision is not permissible:
a) if it is presented by an unauthorized person;
b) a person who has withdrawn it;
c) a person who has no legal interest or is against a judgment;
d) not subject to revision according to the law.

Article 219

219.1 A sample of a timely presented revision, a complete revision and allowed will be sent within period of seven days to the opposing party by the court of first instance.
219.2 The opposing party owns the right that within seven days starting from the day receiving the revision, answer the revision by presenting the answer to the court of first instance.

219.3 When the answer to revision was presented, or the deadline for answer to revision has passed, and the answer, if presented will be sent to the court of revision by the court of the first instance, through a judge of the second instance court within the period of seven days.
[...]

Article 221

A later revision, an incomplete or not allowed one will be rejected by the court of revision, if it wasn't done by the court of the first instance within its authorizing boundaries (article 218 of this law).
[...]"

Admissibility of the Referral

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

50. 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."

51. In addition, the Court also examines whether the Applicant has met the admissibility requirements as defined by Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

52. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party, has clarified the act of public authority, which constitutionality he challenges, namely Decision Rev. No. 195/2019, of the Supreme Court of Kosovo, of 23 July 2019 and has specified the constitutional rights which he claims to have been violated by the challenged decision, and has submitted the request within the prescribed time limit.

53. With regard to the exhaustion of legal remedies, the Court recalls that the Municipality of Gjakova states that the Applicant's case was remanded to the Basic Court and that so far the latter has not decided according the suggestions of the Supreme Court, therefore the Applicant's Referral is premature. .

54. However, the Court notes that in relation to the substantive issue complained of by the Applicant which concerns the admissibility of the revision as a result of the value of the dispute, the Applicant has no other remedy to appeal against the decision of the Supreme Court.

55. This is due to the fact that after the Supreme Court by Decision [Rev. No. 195/2019] remanded the case for retrial to the Basic Court, the Basic Court has the obligation to reconsider the case regarding the ownership right regarding the disputed property and cannot review the admissibility of the revision submitted by the Municipality to the Court of Appeals, the Basic Court is no longer competent to address the Applicant's allegations regarding the admissibility of the revision submitted in his response to the revision.

56. The Basic Court was able to make such an assessment as the case was remanded for retrial by the Kosovo Court of Appeals by Decision [Ac. No. 3860/18] of 12 March 2019. However, in that case, the Basic Court decided to forward the revision to the Supreme Court and not to decide on its admissibility, as suggested by the Court of Appeals by Decision [Ac. No. 3860/18]. Also, the Supreme Court has not decided on the admissibility of the revision submitted by the Applicant in his response to the revision.

57. Consequently, the Court finds that the Applicant has exhausted the legal remedies provided by law in relation to his Referral.

58. The Court also finds that the Applicant's Referral meets the admissibility criteria set out in paragraph 1 of Rule 39 of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph 3 of Rule 39 of the Rules of Procedure.

59. Furthermore, the Court also considers that this Referral is not manifestly ill-founded in accordance with paragraph 2 of Rule 39 of its Rules of Procedure and should therefore be declared admissible (see, also, the case of the European Court of Human Rights, *Alimuçaj v. Albania*, application No. 20134/05, Judgment of 9 July 2012, paragraph 144).

Merits of the Referral

60. The Court recalls that the Applicant complains that the Supreme Court, by the challenged decision deciding upon the revision submitted by the Municipality of Gjakova, annulled Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals and Judgment [C. No. 38/2012] of 30 April 2013, of the Basic Court which confirmed the right of ownership over the disputed property and remanded the case for retrial. However, he alleges that against Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals, the revision was not allowed given that the value of the dispute according to the court decisions of the regular courts was 200.00 euro, namely below the amount of 3000.00 euro provided in Article 211, paragraph 3 of the LCP.

61. Therefore, he alleges that the challenged decision of the Supreme Court in which the case decided by Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court which has become final by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals, was remanded again for decision on merits in the Basic Court without a

reasoning on the admissibility of the revision according to the allegations presented in the Applicant's response to the revision, and hereby alleges violation of his right to fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, as well as the right to equality before the law and the right to protection of property guaranteed by Articles 24 and 46 of the Constitution.

62. The Court notes that according to its case-law and the case-law of the European Court of Human Rights (hereinafter: the ECtHR), based on Article 53 [Interpretation of Human Rights Provisions], the Court is obliged to interpret human rights, it is master of the characterization to be given in law to the facts of the case *vis-a-vis* constitutional norms, and that it does not consider itself bound by the characterization given by an applicant (see the case of Court KO171/18, Applicant, *The Ombudsperson*, Constitutional review of articles 2, 3 (paragraph 1, subparagraphs 2, 3 and 4), 4 (paragraph 1), 6, 7 (paragraph 1, subparagraphs 2, 3 and 4), 11 (paragraph 3), 18, 19 (paragraphs 5, 6, 7 and 8), 20 (paragraph 5), 21, 22, 23, 24 and 25 (paragraphs 2 and 3) of Law No. 06/L-048 on Independent Oversight Board for Civil Service in Kosovo, Judgment of 25 April 2019, paragraph 148; see also, case of the ECtHR, *Guerra and others v. Italy,* Judgment of 19 February 1998, paragraph 44).

63. In this context, the Court notes that the Applicant essentially complains that the Supreme Court, by the challenged decision, reopened the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court which had become final – *res judicata*, by Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals, as he was not allowed to submit a revision due to the fact that the amount of the dispute presented in the court decisions was 200.00 euro, while the revision in accordance with Article 211, paragraph 3 of the LCP is not allowed if the amount of the dispute is in the amount of 3000.00 euro, and has not given any justification for this.

64. While the Municipality of Gjakova on the other hand, as a party affected by the challenged decision, holds the position that in this case it is about the contested property with a total surface area of 8 are, and it is indisputable that the value of the contested property is over the amount of 3000.00 euro, and this made the revision permissible. The Municipality does not question the fact that during the whole procedure the amount of the dispute that appeared in the court decisions was 200.00 euro, but emphasizes that the regular courts had an *ex-officio* obligation to improve the amount of the dispute and the Municipality cannot be penalized to use the legal remedy due to the actions of the Applicant who filed in the lawsuit the unreal value of the

disputed property and the regular courts which have not improved *ex-officio* the amount of the dispute during the proceedings before them.

65. In this respect, the Court will continue to assess whether the Supreme Court, by the challenged decision, has violated the Applicant's right to fair and impartial trial regarding legal certainty and compliance with a final and binding court decision, and who has become *res judicata*.

(i) General principles regarding the right to legal certainty and respect for a final judgment, as developed by the case law of the Court and the ECtHR

66. The Court recalls that the right to a fair trial requires that a matter which has become *res judicata* is to be considered irreversible, in accordance with the principle of legal certainty (see case of the Court KO122/17, Applicant, *Česká Exportní Banka A.S*, Constitutional review of Decision Ae. No. 185/2017 of the Court of Appeals, of 11 August 2017, and Decision IV. EK. C. No. 273/2016 of the Basic Court in Prishtina, of 14 June 2017, Judgment of 18 April 2018, paragraph 149; see also the case of the ECtHR: *Brumărescu v. Rumania*, application no. 28342/95, Judgment of 28 October 1999).

67. The Court recalls that the ECtHR has provided a definition of the concept of *res judicata* stating that: "*According to the explanatory report to Protocol NO.7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of resjudicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them"* (see case of the Court KO122/17, cited above, paragraph 150; see also case *Nikitin v. Russia*, application no. 50178/99, ECtHR, Judgment of 15 December 2004, paragraph 37).

68. The Court and the ECtHR emphasized that the principle of legal certainty presupposes respect for the principle of *res judicata "[…] the right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which presupposes respect for the principle of res judicata that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and*

binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. [...] A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character." (see case of the Court KO122/17, cited above, paragraph 151; see also the case ECtHR *Ponomaryov v. Ukraine*, application no. 3236/03, Judgment of 3 April 2008, paragraph 40).

69. The ECtHR has elaborated on the principle of legal certainty in relation to the right to a fair trial in other cases as well. In the case *Ryabykh v. Russia*, Judgment of 24 July 2003, the ECtHR stated the following: *"Legal certainty presupposes respect for the principle of res judicata (ibid., §62), that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of afinal and 25 binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character. [...].The Court considers that the right of a litigant to a court would be equally illusory if a Contracting State's legal system allowed a judicial decision which had become final and binding to be quashed by a higher court on an application made by a State official."* (see case of the Court KO122/17, cited above, paragraph 153; also the case ECtHR *Ryabykh v. Russia,* application no. 52854/99, Judgment of 24 July 2003, paragraphs 52 and 56).

70. The Constitutional Court also refers to the Judgment of 17 December 2010 in case No. KI08/09, The Independent Union of Workers of IMK Steel Factory in Ferizaj, the Court stated: "*The rule of law is one of the fundamental principles of a democratic society and presupposes respect for the principle of legal certainty, particularly as regards judicial decisions that have become res judicata. No party is entitled to seek for a review of a final and binding judgment merely for tlle purpose of obtaining a rehearing and a fresh determination of the case (see, for example Sovtransavto Holding v. Ukraine, no. 48553/99, § 72, ECHR 2002 VII). Were that not the case, the reversal of final decisions would result in a general climate of legal uncertainty, reducing public confidence in the judicial system and consequently in the rule of law. [...] (*see case of the Court KI08/09, *The Independent Union of Workers of IMK Steel Factory in Ferizaj*, Judgment of 17 December 2010 paragraph 62).

71. Furthermore, in the Judgment of 12 February 2016 in case No. KI132/15, Applicant *Visoki Decani Monastery*, the Court stated that *"the Court considers that the Applicant had a legitimate expectation that its case had been decided in final instance by the Ownership Panel and that it could not be re-opened before the Appellate Panel. As such, the Applicant should have seen the Judgments of the Ownership Panel executed.*
[...]
Based on these considerations and its previous case law, as well as that of the ECtHR, the Court concludes that the Judgments of the Ownership Panel of 27 December 2012 (No. SCC-08-0226 and No. SCC-08-0227) had become res judicata on the basis of the earlier final and binding decision of the Appellate Panel of 24 July 2010 regarding the authorized parties.
[...]
By using the appeal procedure to overturn these Judgments of the Ownership Panel and to refer the original property dispute back to the regular courts, the Court finds that by its Decisions of 12June 2015 (Nos. AC-I-13-0008 and AC-I13-0009) the Appellate Panel infringed the principle of legal certainty and denied the Applicant a fair and impartial hearing on its rights and obligations within the meaning of Article 31,paragraph 2, of the Constitution and of Article 6, paragraph 1,of the ECHR" (see case of the Court KI132/15, Applicant *Visoki Decani Monastery*, Judgment of 12 February 2016, paragraphs 95-97).

72. In this regard, the Court notes that its case law as well as the case law of the ECtHR mentioned above, clearly and explicitly emphasize that the right to a fair trial under Article 6 of the ECHR and Article 31 of the Constitution includes the principle of legal certainty, which includes the principle that final court decisions which have become *res judicata* must be respected and cannot be reopened or appealed.

(ii) Application of the abovementioned principles in the present case

73. In the Applicant's Referral the main issue to be assessed is whether the Supreme Court by Decision [Rev. No. 195/2019] reopened the Applicant's case decided by Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, which approved the Applicant's claim and it was confirmed that the Applicant is the owner of the disputed property.

74. Following Judgment [AC. No. 3332/2013] of the Court of Appeals, the Municipality, by the Basic Court, filed a revision with the Supreme Court. While the Applicant had submitted a response to the revision challenging the admissibility of the revision, because according to him, the value of the dispute was 200.00 euro while according to Article 211, paragraph 3 of the Law on Contested Procedure, the revision is not allowed if the value of the object of dispute does not exceed the amount of 3000.00 euro. The Basic Court by Decision [C. No. 38/2012], rejected the revision of the Municipality as inadmissible on the grounds that the value of the dispute of the lawsuit and the statement of claim was below the amount of 3000.00 euro.

75. The Court of Appeals, by Decision [Ac. No. 3860/18], after the appeal of the Municipality, remanded the case for retrial and reconsideration after assessing that the first instance court pursuant to Article 36 of the LCP should have *ex officio* verified the value of the dispute indicated in the lawsuit and then make a decision on determining the value of the dispute. In the present case, according to the Court of Appeals, the Municipality was not able to file the extraordinary legal remedy, the revision. The Court of Appeals noted that *"the first instance court in the repeated procedure is instructed to act in accordance with Article 219 of the LCP and then to forward the revision together with the case file within the legal deadline to the Supreme Court. […]".*

76. From the case file it is noted that the Basic Court after the Decision [Ac. No. 3860/18] of the Court of Appeals, forwards the case to the Supreme Court to decide on the revision. Whereas, the Supreme Court by the Decision [Rev. No. 195/2019] approved the revision as grounded, annulled the Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals and the Judgment [C. No. 38/2012] of 30 April 2013, of the Basic Court, which confirmed the right of ownership of the Applicant over the disputed property, and remanded the case for retrial.

77. The Court notes that neither the Basic Court, after remanding the case from the Court of Appeals by Decision [Ac. No. 3860/18] regarding the admissibility of the revision, nor the Supreme Court addressed the Applicant's allegation regarding the unlawfulness of revision due to the set amount of the lawsuit of 200.00 euro and justifies its decision based on the content of the challenged claims.

78. In this context, it is not disputed that if the value of the dispute is below the amount of 3000.00 euro, according to paragraph 3 of Article 211 of the Law on Contested Procedure, when the revision is not allowed.

Also, the Court will not enter the issue of what is the real value of the dispute in the procedure. The main question before the Court is to what extent it is possible to challenge the value of the dispute during the proceedings.

79. The Court notes that it is disputable if the value of the dispute which was presented in the court decisions until the Applicant's case was decided by the Court of Appeals by Judgment [AC. No. 3332/2013] was accurate and whether this was to be corrected during the court proceedings. It is also disputable that regardless of the amount stated in the lawsuit and court decisions, what is important when assessing the admissibility of the revision is the real value of the object of the dispute or the value presented in lawsuits and court decisions.

80. In this regard, the Court recalls Article 36 of the Law on Contested Procedure which stipulates that "

> *[I]f the claimant [...]the value of the disputed facility in the claim filed to the court, [...] is much higher or lower than the actual value, the court shall, according to its official duty or objections of the defendant, at the preliminary hearing at latest, or if there was no preliminary hearing held, at the principal hearing session of the legal matter but before the start of the principal proceeding, promptly and appropriately determine or verify accurately the value claimed by the claimant."*

81. In this regard, the Court notes that regarding the amount of the dispute, and if the amount of the object of the dispute is not correct, the court either "*ex officio"* or *"according to the objection of the respondent"* but *"before considering the main issue"* will verify the accuracy of the value shown in the lawsuit by the claimant. In the present case, during the entire procedure, the amount of the object of the dispute was 200.00 euro. This amount was not challenged either *ex-officio* by the court and the Municipality did not challenge that this amount was not correct in order for the Basic Court to decide before the main trial regarding the exact amount of the object of the dispute.

82. Therefore, the Court notes that based on the clear language of Article 36 of the Law on Contested Procedure, the issue of the amount of the dispute, regardless of how much it was in reality, should have been corrected by the beginning of the main trial. The Court notes that this possible correction of the value of the dispute was not made during the court hearing.

83. The Municipality states that the Basic Court had obligation *ex-officio* to verify the value of the object of the dispute and that the Municipality as a party cannot bear the consequences of the errors of the courts. However, the Court notes that the Municipality was legally entitled to raise this issue before the Basic Court but did not do so. Furthermore, this was not done either by the Basic Court as the Applicant's case regarding the admissibility of the revision was remanded for retrial by the Court of Appeals by Decision [Ac. No. 3860/18] nor by the Supreme Court, which had reviewed the revision of the Municipality and the response to the revision submitted by the Applicant and where he raised the issue of the admissibility of the revision.

84. In this regard, the Court also refers to Article 221 of the Contested Procedure which stipulates that "*A later revision [...] not allowed one will be rejected by the court of revision, if it wasn't done by the court of the first instance within its authorizing boundaries (article 218 of this law*).
[...]."

85. Therefore, it was the obligation of the Supreme Court, as a final instance, that before assessing the revision regarding the object of the disputed issue, to assess whether the revision is allowed, based on the legal provisions mentioned above by the Court.

86. Consequently, and based on these assessments as well as on its previous case law, and that of the ECtHR, the Court concludes that the Supreme Court by the challenged decision reopened the Applicant's case decided by Judgment [AC. No. 3332/2013], of 26 April 2018 of the Court of Appeals which upheld Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, and which became *res-judicata*, given the value of the dispute which according to court decisions was below the amount for which revision is allowed, while the value of the object of the dispute was not contested and corrected by any decision of the regular courts.

87. Consequently, quashing Judgment [AC. No. 3332/2013] of 26 April 2018 of the Court of Appeals, which upheld the Judgment [C. No. 38/2012] of 30 April 2013 of the Basic Court, without assessing the admissibility of the revision, the Supreme Court violated the principle of legal certainty and denied the Applicant a fair and impartial trial regarding his rights and obligations within the meaning of Article 31, paragraph 2 of the Constitution and Article 6, paragraph 1 of the ECHR.

88. The Court therefore concludes that there has been a violation of the Applicant's right to fair and impartial trial protected by Article 31 paragraph 2 of the Constitution in conjunction with Article 6 paragraph 1 of the ECHR.

89. With regard to the Applicant's allegation of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution, taking into account that the Court has just concluded that the challenged Decision has violated the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, and declares invalid Decision Rev. No. 195/2019, of the Supreme Court of Kosovo, of 23 July 2019, the Court does not consider it necessary to address separately the allegations of violation of the right to protection of property and the right to equality before the law guaranteed by Articles 46 and 24 of the Constitution.

Request for non-disclosure of identity

90. The Court recalls that the Applicant also requested that his identity be not disclosed.

91. In this respect, the Court refers Rule 32 (6) of the Rules of Procedure, which provides:

> *" Parties to a referral who do not wish their identity to be disclosed to the public shall so indicate and shall state the reasons justifying such a departure from the rule of public access to information in the proceedings before the Court. [...]".*

92. However, the Court notes that the Applicant has not shown or presented any evidence to justify his request for non-disclosure of his identity, and consequently, this Applicant's request is rejected as ungrounded.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 29 July 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD THAT there has been a violation of Article 31 of the Constitution of the Republic of Kosovo in conjunction with Article 6 of the European Convention on Human Rights;

III. TO HOLD THAT it is not necessary to examine whether there has been a violation of Article 24 and Article 46 of the Constitution of the Republic of Kosovo;

IV. TO HOLD that Decision Rev. No. 195/2019 of the Supreme Court of Kosovo, of 23 July 2019 and Decision Ac. no. 3860/18 of the Court of Appeals of 12 March 2019, are repealed;

V. TO HOLD THAT Judgment AC. No. 3332/2013 of the Court of Appeals, of 26 April 2018 and Judgment C. No. 38/2012 of the Basic Court, of 30 April 2013, are final and binding, and as such *res judicata*;

VI. TO REJECT the request for non-disclosure of identity;

VII. TO ORDER the Supreme Court to inform the Constitutional Court as soon as possible, but not later than 23 December 2020, about the measures taken to implement the Judgment of this Court, in accordance with Rule 66 (4) of the Rules of Procedure;

VIII. TO REMAIN seized of the matter, pending compliance with that order;

IX. TO ORDER that this Judgment be notified to the parties, and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

X. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI27/20 Applicant: Vetëvendosje! Movement, Constitutional review of Judgment [A.A-U.ZH. No. 16.2019] of 10 October 2019 of the Supreme Court of Kosovo

KI27/20 Judgment of 22 July 2020, published on 07 September 2020
Keywords: *Individual referral, admissible referral, election campaign, freedom of expression, limitations on human rights*

Person E.B had filed a complaint with the Election Complaints and Appeals Panel (hereinafter: the ECAP) against the Applicant, alleging that on 4 October 2019, the Applicant's candidate for deputy M.B. for the elections of 6 October 2020, had published/distributed a video recording on the social network Facebook, where, among other things, in the video recording *i)* the premises of the Kosovo Police building were used; and *ii)* his photo was used without his permission, desecrating, according to E.B., his name, dignity and position as director of the Kosovo Police. He alleged that these actions violated the election rules.
The ECAP by Decision [No. 233/2019], approved as grounded the complaint of the party E.B., and imposed on the Applicant a fine in the amount of 9,500.00 (nine thousand five hundred) euro, due to: *i)* publication in the election campaign spot of the Kosovo Police facility in Prishtina; and *ii)* the involvement of the private person E.B., without his permission in the electoral promotional activity in violation of Article 33 [Prohibited Actions by Political Entities] of the Law on General Elections. The above-mentioned decision of the ECAP was also confirmed by the Supreme Court by Judgment [No. A.A-U.ZH. No. 16/2019], which rejected the Applicant's appeal as ungrounded.
In this regard, the Applicant requested from the Constitutional Court the constitutional review of Judgment [AA-U.ZH. nr. 16/2019] of 10 October 2019 of the Supreme Court, by which it was alleged that it was fined in violation of the Law on General Elections, among other things, because the spot of the election campaign was published outside the election campaign. In this regard, the Applicant alleged violation of its rights guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution as well as Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights.
The Constitutional Court, after finding that the Applicant's Referral meets the admissibility criteria, during the assessment of the merits of the case, initially assessed the Applicant's main allegation related to the freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR. In this regard, the Constitutional Court elaborated on the general

principles of freedom of expression set out in the case law of the European Court of Human Rights and in applying these principles in the present case found that the restriction of freedom of expression alleged by the Applicant was provided by law, had the legitimate aim of protecting the rights of others and guaranteeing a fair and just electoral process, and fulfilled the principle of proportionality. Therefore, the Court found that the Applicant's allegations that in the present case the right to freedom of expression, guaranteed by Article 40 of the Constitution and Article 10 of the ECHR has been violated. In addition, the Court also assessed the allegations of violation of other rights alleged by the Applicant and found that the Judgment [AA-U.ZH. No. 16.2019] of 10 October 2019 of the Supreme Court, has not violated the rights established in Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law] of the Constitution, Article 14 [Prohibition of discrimination] of the ECHR, and Article 7 of the Universal Declaration of Human Rights.

JUDGMENT

in

Case No. KI27/20

Applicant

VETËVENDOSJE! Movement

Constitutional review of
Judgment [A.A-U.ZH. No. 16/2019] of 10 October 2019
of the Supreme Court of the Republic of Kosovo

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 is submitted by the political entity VETËVENDOSJE! Movement, represented by Blerim Sallahu (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment [A.A-U.ZH. No. 16/2019] of 10 October 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter of this Referral is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's rights guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct

Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) as well as Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights (hereinafter: the UDHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraph 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 4 February 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 6 February 2020, the Applicant submitted to the Court the power of attorney authorizing Blerim Sallahu from Prishtina to represent the Applicant before the Court.

7. On 11 February 2020, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi (Presiding) Bajram Ljatifi and Safet Hoxha.

8. On 20 February 2020, the Court notified the Applicant about the registration of the Referral, as well as sent a copy of the Referral to the Supreme Court and to the Election Complaints and Appeals Panel (hereinafter: ECAP).

9. On 10 June 2020, the Court requested the Applicant to submit to the Court the appeal he had submitted to the Supreme Court.

10. On 18 June 2020, the Court received from the Applicant the appeal requested on 10 June 2020.

11. On 22 July 2020, after having considered the report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral.

12. On the same date, the Court voted, unanimously, that the Referral is admissible; and by majority of votes, found that there has been no violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights, as well as Article 7 of the Universal Declaration of Human Rights.

Summary of facts

13. On 26 August 2019, the President of the Republic of Kosovo rendered Decree [no. 236/2019] on the appointment and announcement of early elections for the Assembly of the Republic of Kosovo, which were scheduled for 6 October 2019.

14. On 27 August 2019, the Central Election Commission (hereinafter: the CEC) rendered Decision [no. 824-2015] on Setting the Deadlines for Electoral Activities for the Early Elections for the Assembly of Kosovo. Point l) of this Decision provided that *"The Election Campaign and the deadlines for election campaigns begin on 25 September and end on 4 October 2019"*.

15. On 5 October 2019, E.B filed a complaint with the ECAP against the Applicant alleging that on 4 October 2019 their candidate for deputy M.B. published/distributed a video recording on the social network Facebook, where, among other things, in the video recording *i)* the premises of the Kosovo Police building were used; and *ii)* his photo was used without his permission, desecrating, according to him, his name, dignity and position as director of the Kosovo Police. He claimed that these actions violated the rules of the CEC.

16. On 6 October 2019, the Applicant filed a response to the complaint of E.B. addressed to the ECAP stating that: *(i)* the complaint is inadmissible and ungrounded on the grounds that E.B, has no active legitimacy to file a complaint regarding the electoral process under Article 19 paragraph 1 of Law no. 03/L-073 on General Elections in the Republic of Kosovo (hereinafter: LGE); *(ii)* the published photo of the complainant E.B. was previously published on a page of the newspaper kallxo.com and was not used for the first time (iii) the complainant did

not make a detailed description of the date, time and place of the alleged violation as provided by the election rules; and the publication of the video in question, was made on 19 September 2019, out of the campaign period, outside the election silence period and outside the Kosovo Police building, namely on the sidewalk and not in the Kosovo Police building.

17. On 6 October 2019, the ECAP by Decision [no. 233/2019], approved as grounded the complaint of the party E.B., and imposed on the Applicant the fine in the amount of 9,500.00 (nine thousand five hundred) Euros, due to: *i)* publication in the spot of the election campaign of the Kosovo Police building in Prishtina; and ii) the involvement of the private person E.B., without his permission in the electoral promotional activity in violation of Article 33 [Prohibited Actions by Political Entities] of the LGE. The ECAP in decision [no. 233/2019], regarding the allegations of the Applicant in response to the complaint reasoned as follows:

(i) With respect to the Applicant's allegations that E.B. has no active legitimacy for filing a complaint, the Panel assessed that this allegation does not stand for the fact that the Law on General Elections, namely its Article 119, paragraph 1 stipulates that: "*A person who has a legal interest in a matter within the jurisdiction of ECAC, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAC*". That person in question has legitimacy in this matter to file a complaint relates to the fact that his photograph was used during the promotion of a political entity, and taking into account that the photograph in question is used in a negative connotation and without the consent of the same, in which case his dignity has been violated.

(ii) Regarding the complainant's allegations that Emin Beqiri's photograph had previously been published on a page of the newspaper kallxo.com, the Panel assessed that this did not constitute a justification for using the photographs mentioned by others without his permission. The photo in the media is used for the purpose of informing the public, which is the main task of the media about an event, while the use by the candidate for deputy, as in this case, was done during the promotion of the candidate M.F. in the election campaign.

(iii) With regard to the allegations of non-specification of the place, time and date when the violation occurred, the Panel

considers that the time limit for the complainant starts from the moment when the complainant becomes aware of the violation committed, within the meaning of Article 5 paragraph 5 of the ECAP Rules and Procedures no. 02/2015, in this case the complainant found out about the violation on 04.10.2019. in the evening hours, from which it follows that this was during the election campaign.

18. In addition to the above, the ECAP also took into account the fact that the political entity in question was given the opportunity to respond to the complaint and correct the violation committed, however, in response to the complaint, the political entity in question stated that the procedure does not contain a violation according to the legal provisions of the legislation in force, without providing any evidence on their part that actions have been taken to avoid the violation, as required by Article 120, paragraph 1, point c) of the LGE, and these are actions that have affected the amount of the fine imposed, as in the enacting clause of this decision and within the meaning of Article 120, paragraph 1, point c) of the LGE.

19. On 9 October 2019, the Applicant filed an appeal with the Supreme Court against Decision [no. 233/2019] of 6 October 2019, where he challenged the legality of the decision in question alleging erroneous determination of factual situation and erroneous application of law, arguing, *inter alia*, that the published sport was done outside the election campaign and as a result the provisions of the LGE which are applied only during the election campaign are not applied, therefore, the action sanctioned by the ECAP was unlawful.

20. On 10 October 2019, the Supreme Court by Judgment [No. A.A-U.ZH. No. 16/2019] rejected as ungrounded the Applicant's appeal, stating that:

"Article 33.1 (b) of the LGE stipulates that a political entity, its supporters or candidates shall be prohibited from displaying notices, placards and posters, or otherwise placing their names or slogans related to the election campaign, in or on public buildings or structures, on or above public roads, on public road traffic signs, in or on premises or structures occupied or otherwise used by international organizations, or in private premises without permission of the owners or users.

Based on the abovementioned provisions, the Supreme Court found that the Applicant, the political entity (LVV), during the campaign, for electoral purposes, in violation of the law (Article

33 point b LGE), due to the publication of a video- spot, the public building of the Kosovo Police in Prishtina and the involvement of another person without his permission. The Supreme Court also found that the factual situation was correctly established and that the ECAP correctly established and implemented the law, approving as grounded the complaint of E.B. from Lipjan, imposing on the political entity (LVV) a fine in the amount of 9,500 euro, pursuant to Articles 33.1 (b) and 120.1 (c) of the LGE".

Applicant's allegations

21. The Applicant alleges before the Court that the Judgment [No. AA-U.ZH.no.16/2019] of 10 October 2019 of the Supreme Court, violates its fundamental rights and freedoms guaranteed by Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the ECHR- as well as Article 7 of the UDHR.

22. The Court notes that in essence the Applicant's allegations regarding the violations can be summarized as follows:

i. Applicant's allegations regarding the violation of freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.
ii. Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR.
iii. Allegations in relation to Article 7 [Values] of the Constitution.
iv. Allegations relating to Articles 21 [General Principles], and 22 [Direct Applicability of International Agreements and Instruments], of the Constitution.

(i) Applicant's allegations regarding violation of freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR

23. With regard to the content of the video recording published by the Applicant's candidate, he refers to freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR, stating that the action of its candidate for deputy qualifies within the framework of freedom of expression.

24. The Applicant emphasizes that freedom of expression is a fundamental constitutional and international right, which protects not only information or ideas that are favorably preferred or considered non-offensive or indifferent, but also those that offend, shock or concern. The expression, protected by Article 10, is not limited to words, whether written or spoken, but also extends to drawings, images and actions intended to express an idea or present information. In this regard, the Applicant alleges that in its case it is also related to the dissemination of information, which also falls within the framework of freedom of expression. The Applicant therefore states that the freedom to provide information and ideas is of paramount importance to the political life and democratic structure of a country, and that free elections cannot be held democratically in the absence of this freedom.

25. The Applicant further, referring to Article 10 of the ECHR, states that this Article protects opinions, critics and speculations which may not be proved to be true. According to it, Article 10 of the ECHR also guarantees opinions expressed in exaggerated language in election campaigns, for purposes of public interest, public debates, where opinions and criticisms given to public authorities are expressed harshly. In relation to these allegations, it refers to several ECtHR cases such as: *Thorgeirson v. Iceland*, Judgment of 25 June 1992; *Dalban v. Romania*, Judgment of 28 September 1999; *Narodni List DD v. Croatia*, Judgment of 8 November 2018; as well as *Groppera Radio AG and others v. Switzerland*, Judgment of 28 March 1990, *Handyside v. the United Kingdom*, Judgment of 7 December 1976.

26. The Applicant alleges that the candidate for deputy M.B., on 19 September 2019, published a video spot outside the police building, in which two photos borrowed from the kallxo.com portal were displayed. With this, it claims that their candidate for deputy has only re-displayed information received from the portal in question, and that this according to it, constitutes the provision of information protected by freedom of expression defined by Article 40 of the Constitution paragraph 2 in conjunction with Article 10 paragraph 2 of the ECHR, and is in line with the decisions of the ECtHR. In this regard, the Applicant alleges that the decision of the ECAP and the Judgment of the Supreme Court violated the freedom of expression of their candidate for deputy, because the publication of the video in question was intended to inform about "*corruption offenses and the failure of the justice system to prosecute and adjudicate criminal offenses of corruption committed by certain police officers within the Kosovo Police*" and that was out of the election campaign period.

Video recording has also transmitted an issue of public interest. Consequently, this video recording is entirely qualified within the concept of freedom of expression.

(ii) Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR

27. The Applicant regarding the allegation of violation of Article 24 of the Constitution in conjunction with Article 14 of the ECHR states that the ECAP and the Supreme Court have issued arbitrary decisions in complete violation of substantive law, adding that *"in no other case except this case, the ECAP has not sanctioned political entities according to the LGE, for actions which were carried out and published outside the election campaign*".

28. The Applicant further alleges that the assessment of the case, which took place outside the election campaign, was erroneously qualified under the framework of the electoral legislation, and that the ECAP decision and the Judgment of the Supreme Court "*constitutes legal inequality and discrimination due to political or other opinions represented by Vetëvendosje Movement*". In this regard, he claims that they were not treated the same compared to other political entities, because other political entities were sanctioned only during the election campaign.

29. Regarding this allegation the Applicant mentions two other cases where ECAP has sanctioned political entities for publishing video recordings and photos, but only during the election campaign, specifically (i) ECAP Decision [A. No. 93/2019] of 27 September 2019 where the ECAP fined the Democratic Party of Kosovo (PDK) in the amount of 3,100 because a party candidate published a photo of the President of Shtime who was also a candidate for deputy from the PDK , which belongs to his party, in his office in the municipality, these actions sanctioned by the provision of Article 35.1 of the LGE and (ii) the Decision of the ECAP [Anr/108/2019] of 30 September 2019 by which the ECAP imposed a fine in the amount of 9500 euro on the political entity AAK-PSD because their candidate for Prime Minister had published on Facebook a video showing members of the Kosovo Police and had written "*2000 additional police officers until the end of the mandate*", and by this, the election rule no. 13/2013 was amended and supplemented with the election rule no. 20/2019 has been violated. The Applicant also refers to the Decision of the ECAP [A. 181/2019] of 4 October 2019, which was rejected as ungrounded

the complaint filed by the Emergency Management Agency against the Applicant as the complainant did not submit evidence and did not attach any evidence regarding the allegations of violation of election rules by the Applicant. Therefore, the Applicant alleges that they were treated differently in relatively similar situations.

(iii) Allegations related to Article 7 [Values] of the Constitution

30. The Applicant initially complains about the interpretation of the ECAP and the Supreme Court of the timely application of the election rules. It claims that "*the election campaign started on 25 September 2019, while the publication of the video recording on Facebook was made on 19 September 2019, thus, outside the election campaign*" determined by the CEC Decision [no. 824-2919]. In this regard it adds that the Judgment of the Supreme Court is contrary to Article 7 of the Constitution specifically with the rule of law and legal certainty because the Supreme Court and the ECAP "*have acted arbitrarily by issuing unconstitutional decisions for actions which are not foreseen and are not prohibited by law at the time of commission*".

31. This is because the ECAP starts to operate from the date of the beginning of the election campaign, on 25 September 2019, and any prohibited action of political entities or publication during this period is considered a violation of the LGE. This allegation is based by the Applicant based on Article 33 of the LGE which stipulates that "*During the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following [...].*

32. The Applicant further adds that if the video recordings of the candidates for deputies continue to remain on their social networks and are noticed by certain persons in the upcoming election campaign, even then they may be subject to similar sanctions. This allegation, the Applicant relates to the decision of the ECAP Anr: 181/2019, of 4 October 2019, in which the ECAP rejected a request of a complainant precisely because the complainant in that case did not specify the time when the spot in question was recorded and published. Therefore, in this case the ECAP assessed that a necessary condition to qualify a case whether it is an action committed or prohibited during the election campaign is the date of publication of the video recording and not the date of its observation.

33. The Applicant also refers to Rule no. 02/2015 of the Rules and Procedures, The Election Complaints and Appeals Panel (hereinafter: Rule no. 02/2015 of the ECAP), namely Article 5 paragraph 7 which

sets out the formal criteria for which should be met in a complaint stating that a complaint should contain "*a detailed description including the date, time and place of the alleged violation*". According to the Applicant, the person E.B. when submitting the complaint to the ECAP has not complied with Rule no. 02/2015 of the ECAP, but the ECAP "*has intentionally avoided the full application of Article 5 of this rule, by erroneously applying the paragraph, which as a result has produced violations of constitutional provisions, international acts and domestic laws"*. Thus, the Applicant states that "*the alleged date, time and violation as well as the viewing of the assumed action as prohibited by the LGE, must occur during the election campaign period, in order to fully respect the hierarchy of legal acts*" including Article 5 paragraph 5 of Rule No. 02.2015 of the ECAP which stipulates that *"for all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation"*.

(iv) Allegations relating to Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution

34. The Applicant does not justify the manner in which the violation of Articles 21 and 22 of the Constitution occurred, he only states that *"...the content of the judgment under the sign A.A.-U.zh. No. 16/2019 of the Supreme Court contains the violation..." and these two articles.*

35. Finally, the Applicant requests the Court to declare the Referral admissible and to declare the Judgment [A.A-U.ZH. No. 16/2019] of the Supreme Court contrary to the Constitution.

Admissibility of the Referral

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

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

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

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

38. The Court refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states:

"4. Fundamental rights and freedoms set forth for in the Constitution are also valid for legal persons, to the extent applicable".

39. In addition, the Court also examines whether the Applicant has met the admissibility criteria as set out in Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

40. The Court first notes that in accordance with paragraph 4 of Article 21 of the Constitution, the Applicant has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and

freedoms, applicable both to individuals and to legal persons (Constitutional Court of the Republic of Kosovo: Case No. KI41/09, Applicant: *AAB-RIINVEST University L.L.C.* against the Government of the Republic of Kosovo, Resolution on Inadmissibility of 3 February 2010, paragraph 14, *Party for Democratic Society and Others v. Turkey*, no. 3840/10, judgment of 12 January 2016.

41. Furthermore, and in this respect, the Court also notes that the ECtHR in its case law also provides guarantees to political parties as well as legal persons that they can appeal independently of their candidates (see, for example, *Labor Party of Georgia v. Georgia*, No. 9103/04, ECtHR, Judgment of 8 July 2008, paragraphs 72-74 and other references cited in that decision). Therefore, the Court concludes that the Applicant is an authorized party to file a Referral with the Constitutional Court.

42. With regard to the fulfillment of the other admissibility criteria set out in the Constitution and Law and elaborated above, the Court finds that the Applicant challenges an act of a public authority, namely Judgment [AA-U.ZH. No. 16/2019] of 10 October 2019 of the Supreme Court and has exhausted all legal remedies provided by law. The Applicant also clarified the fundamental rights and freedoms claimed to have been violated, in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

43. The Court finally concludes that this Referral is not manifestly ill-founded in accordance with Rule 39 (2) of the Rules of Procedure and is not inadmissible on any other ground as set out in the Rules of Procedure. Therefore, it is to be declared admissible.

Merits of the Referral

44. The Court recalls that the Applicant complaints to the Court regarding the challenged Judgment alleging a violation of his constitutional rights. Therefore, the Court will deal with the Applicant's allegations as follows:

    i. Applicant’s allegations regarding the violation of freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.
    ii. Applicant’s allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR.
    iii. Allegations in relation to Article 7 [Values] of the Constitution.

iv. Allegations relating to Articles 21 [General Principles], and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution.

45. Therefore, the Court will analyze and examine in detail each of the Applicant's allegations and will respond to each of the Applicant's allegations individually.

(i) Applicant's allegations regarding the violation of freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR

46. The Court will first deal with the Applicant's allegations in so far as they relate to the freedom of expression guaranteed by Article 40 of the Constitution and Article 10 of the ECHR.

General principles of freedom of expression including during the election campaign

47. In this regard, the Court refers to Article 40 [Freedom of Expression] of the Constitution, which stipulates:

> *"1. Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.*
>
> *2. The freedom of expression can be limited by law in cases when it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion.*

48. The Court further refers to Article 10 [Freedom of expression] of the ECHR, which provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national*

security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

49. The Court first notes that Article 10 of the ECHR has been interpreted in detail through the case law of the ECtHR, in line with which the Court under Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, in interpreting the allegations of violation of Article 40 of the Constitution in conjunction with Article 10 of the ECHR, the Court will refer to the case law of the ECtHR.

50. In this regard, the ECtHR has reiterated that "*freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment*" (see the case of the ECtHR *Scharsach and News Verlagsgesellschaft mbH v. Austria*, Case no. 39394/98, Judgment of 13 February 2004, paragraph 30; see also ECtHR case *Feldek v. Slovakia*, Case No. 29032/95; Judgment of 12 October 2001, paragraph 72). In this respect, the scope of freedom of expression has been widely interpreted by the ECtHR, to include not only the substance of information or ideas, but also the various ways in which they are manifested, transmitted and accepted (see, *mutatis mutandis*, the case of ECtHR *Sokołowski v. Poland*, application No. 75955/01, Judgment of 29 June 2005, paragraph 44).

51. The ECtHR has also emphasized that freedom of expression is not absolute in nature and as such may be restricted. As provided in paragraph 2 of Article 10 of the ECHR, this freedom is subject to exceptions or restrictions, which, however, must be clearly provided for, and the need for any restriction must be convincingly established. However, the ECtHR has clarified that despite the restrictions in paragraph 2 of Article 10 of the ECHR, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. *(*see case of ECtHR *Scharsach and News Verlagsgesellschaft mbh v. Austria*, Application no. 39394/98, Judgment of 13 February 2004, paragraph 30; see also the case of ECHR *Feldek v. Slovakia*, Judgment of 12 October 2001, para. *72 - 76).*

52. Therefore, according to the ECtHR. the test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of by the Applicants corresponds to a "pressing social need", whether it was necessary for the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. However, according to the ECtHR, this margin of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the ECtHR, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 of the ECHR. The ECtHR explained that its task in exercising its supervisory function is not to take the place of the national authorities, but, according to Article 10 of the ECHR rather to review in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation. In so doing, the ECtHR has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts. (see, *mutatis mutandis*, the case of ECtHR *Feldek v. Slovakia*, cited above, paragraph 73; see also ECtHR *Vogt v. Germany*, application no. 17851/91, Judgment of 26 September 1995, paragraph 52*)*.

53. The ECtHR also notes that general principles concerning freedom of expression under Article 10 of the ECHR also apply to freedom of political expression. In fact, the ECHR has given "special importance" to free political debate and political expression (see also the case of the ECHR *Féret v. Belgium*, Case No. 15615/07, Judgment of 10 December 2009, paragraph 63). The ECtHR also stated that there was little room under Article 10, paragraph 2 of the ECHR to restrict freedom of political expression (see ECtHR case *Perincek v. Switzerland*, Case No. 27510/08, Judgment of 15 October 2015, paragraph 197). In this context, the ECtHR has clarified that if allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see case of the ECtHR *Feldek v. Slovaka*, cited above, paragraph 83).

54. With regard to the Internet as a way of expressing and disseminating political views, the ECtHR has not set substantially different standards in Article 10 of the ECHR in relation to the general standards of freedom of expression set out above in accordance with the principle "what applies offline also applies online". However, in the case of

Delphi AS v. Estonia, the ECtHR noted that *"due to the special nature of the Internet, the "duties and responsibilities" given to news portals for the purposes of Article 10 of the ECHR may differ to some extent from those of traditional publishers in terms of third party content."* (see the case of the ECtHR *Delfi AS v. Estonia*, Case no. 64569/09, Judgment of 16 June 2015, paragraph 113). This is because the risk that can be caused by the content of online communications regarding the enjoyment of other human rights is greater than in publications through other means.

55. In this respect, freedom of expression includes the publication of political statements, programs of political entities and photographs as well as the expression of political opinions including the posting of political content on the Internet (see, *mutatis mutandis*, the case of the ECHR *Mariya Alekhina and others v. Russia*, Application no. 38004/12, Judgment of 3 December 2018, paragraph 251).

56. Furthermore, the ECtHR, in the context of the elections, has emphasized that freedom of expression must be balanced with the principles of Article 3 (Right to Free Elections) of Protocol No. 1. 1 of the ECHR aimed at establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see the case of the ECtHR *Davydov and others v. Russia*, Application No. 75947/11, Judgment of 30 May 2017, paragraph 274).

57. The ECtHR emphasized that free elections and freedom of expression, in particular freedom of political debate, together form the basis of a democratic system. The two rights are inter-related and operate to strengthen each other: for example, freedom of expression is one of the "conditions" necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. In the context of election debates, the unhindered exercise of freedom of speech by candidates has particular significance (see the case of the ECtHR *Orlovskaya Iskra v. Russia*, Application No. 42911/08, Judgment of 21 February 2017, paragraph 110).

58. In this context, the ECtHR reiterates that in certain circumstances, as explained above, the rights guaranteed by Article 10 and Article 3, Protocol No. 1 of the ECHR, may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the *"free expression of the opinion of the people in the choice of the legislature"*

(see ECtHR case *Orlovskaya Iskra v. Russia*, cited above, paragraph 111).

59. In this respect, the ECHR has recognized states with a margin of free appreciation as to the electoral systems. Consequently setting the balance between the rights under Article 10 of the Convention and Article 3 of Protocol No. 1, the Contracting States have a margin of appreciation, as they do generally with regard to their electoral systems. More recently, in a case concerning advertisement of a political nature, the ECtHR stated that the political nature of the advertisements that were prohibited called for strict scrutiny and a correspondingly circumscribed national margin of appreciation with regard to the need for the restrictions (see case of ECtHR *Orlovskaya Iskra v. Russia*, cited above, paragraph 111).

60. The Court therefore notes, based also on the foregoing, that it is not for it to express its views on the proper method chosen by the legislature to regulate a particular area. Its task is to assess only whether the chosen method and the effects they contain are in conformity with the Constitution and the ECHR.

61. Consequently, the Court considers that, according to the case law of the ECtHR, freedom of expression, including freedom of political expression through the Internet, is guaranteed. However, restrictions on freedom of expression, in particular including freedom of expression during the electoral process, may be imposed by states which have a discretionary decision-making space, provided that the exceptions set out in paragraph 2 of Article 10 of the ECHR and paragraph 2 of Article 40 of the Constitution are met.

62. In this respect the restriction of freedom of expression, including during the election campaign, can be done if: 1) such a thing is prescribed by law, 2) there is objective and reasonable justification, in other words, if the prescribed measure pursues a legitimate aim, and 3) when there is a reasonable relationship of proportionality between the means used and the aim intended to be achieved. (see, *mutatis mutandis*, the case of the ECtHR *Mariya Alekhina and others v. Russia*, cited above, paragraph 199).

63. In the light of these criteria and the case law of the ECtHR in conjunction with Article 10 of the ECHR, in the present case the Court will analyze the following criteria which must be met cumulatively:

1) 1) If there is an interference/restriction on freedom of expression, and if so, then:

a. whether the restriction of rights, specifically the right to freedom of expression during the election campaign is provided by law;
b. whether there was a legitimate aim intended to be achieved by restriction; and
c. whether the interference "is necessary in a democratic society" or whether there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued.

Application of these standards in the present case

1) If there has been an interference with freedom of expression

64. The Court notes that the video recording in connection with which the Applicant was fined was distributed by the Applicant's candidate for deputy through his page of the social network Facebook. Given what was stated above in the general principles that freedom of expression includes the publication of political statements, programs of political entities and photographs including the posting of political content on the Internet, the prohibition of these actions constitutes an interference with the Applicant's right to freedom of expression which must be justified on the basis of the abovementioned criteria.

65. As to the inclusion of the photo of the person E.B. at the election spot neither the ECAP nor the Supreme Court had challenged the fact that his photograph had previously been distributed by kallxo.com, and that the Applicant was not the author of the photograph nor did he publish the photograph for the first time. However, as explained in the general principles above, freedom of expression applies not only to the content of information, but also to its dissemination, as any restriction on the latter necessarily interferes with the right to receive and disseminate information. (see, *mutatis mutandis*, ECtHR case *Magyar Ketfarku Kutya Part v. Hungary*, Application no. *201/17* Judgment of 20 January 2020, paragraph 87).

66. Therefore, the publication of an election spot, including the distribution of a photo of a third party previously published by the media kallxo.com, may infringe on freedom of expression if the exceptions provided for in paragraph 2 of Article 10 of the ECHR, and paragraph 2 of Article 40 of the Constitution and Article 53 of the Constitution are not met. Restriction of freedom of expression in this case resulted in the imposition of a certain fine on the Applicant as the spot was distributed on social networks and did not directly restrict

the publication of the spot in question or the request, to be removed from the social network. Therefore, the restriction was made by a decision of the ECAP which was also confirmed by the Supreme Court.

67. Consequently, the Court will further assess whether such a restriction imposed through the challenged decisions of the ECAP and the Supreme Court had legal basis, and, if so, whether there was a legitimate aim intended to be achieved by a restriction, as well as whether the interference "is necessary in a democratic society" or whether there was a relationship of proportionality between the restriction of rights and the legitimate aim pursued.

a) Whether the interference was prescribed by Law

68. As regards the principle"prescribed by law", the Court finds it necessary to clarify, first, the meaning of the term "law" from the point of view of limiting human rights. In this respect, the Court recalls that according to the case law of the ECtHR, the latter has always understood the term "law" in its "substantive" sense, not its "formal" one. In this regard, the term "law" includes laws enactments of lower ranking statutes, or sub-legal acts, and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament. In addition, according to the ECtHR "law" must be understood to include both statutory law and judge-made "law". In sum, the term "law" is the provision in force as the competent courts have interpreted it (see*, mutatis mutandis,* ECtHR case *Gülcü v. Turkey*, Application no. 17526/10, Judgment of 19 January 2016, paragraph 104 and case *Leyla Şahin v. Turkey*, Application no. 44774/98, Judgment of 10 November 2005, paragraph 84).

69. The Court also recalls that according to the case law of the ECtHR, the expression "prescribed by law" included in paragraph 2 of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be foreseeable, accessible, there must be adequate safeguards against arbitrary interferences by public authorities and formulated with sufficient precision to enable a person to regulate his or her conduct in that law (see, *mutatis mutandis*, the case of ECHR *Magyar Ketfarku Kutya Part v. Hungary*, cited above, paragraph 93 and 94).

70. In the context of the assessment of fundamental rights and freedoms, the Court notes that the boundary between the jurisdiction of the Constitutional Court and the regular courts in assessing

constitutionality and legality is not always precisely defined. The Constitutional Court but also the regular courts are often in a position to interpret the law, the Constitution but also international instruments, such as those guaranteed by Article 22 of the Constitution. It is the principle of subsidiarity and the doctrine of the fourth degree, which in principle, but depending on the particular circumstances of each case, make this distinction.

71. In this regard, given the role of the Constitutional Court as well as the principle of subsidiarity, the Court will then consider the assessment of the ECAP and the Supreme Court, when assessing whether the Applicant's actions violated the legal provisions and, in this case, whether these findings constitute constitutional violations according to the principles and standards elaborated above.

72. The Court recalls once again that the Applicant's candidate for deputy on 25 September 2019 published on the social network Facebook a video recorded in front of the Kosovo Police building, where, among other things, the photo of police officer E.B. was used. Following the appeal filed by E.B., the ECAP by Decision [no. 233/2019], imposed a fine in the amount of 9,500.00 (nine thousand five hundred) euro.

73. The Court recalls that the Applicant regarding this restriction alleges that the election legislation under which the Applicant was fined was not applicable at the time the video was published, arguing that the election rules apply only during the election campaign which began on 25 September 2019, while the publication of the video recording was made on 19 September 2019. Therefore, the sanctioning of this action was not provided by law at the time the action was taken and this constitutes a violation of freedom of expression and the principle of rule of law and legal certainty. Also, the Applicant alleges that the publication of the spot by its candidate for deputy is protected by freedom of expression and cannot be restricted by the ECAP.

74. The Court notes that the Applicant repeats before the Court the same arguments he had submitted in the proceedings before the ECAP and the Supreme Court, in particular as regards the determination of the factual situation and the applicability of the election law in the present case (see paragraphs 12, 13 and 14). .

75. The Court recalls that its decision, the ECAP based on the LGE and the sub-legal acts deriving from the latter, namely Article 33 paragraphs (b) and (l) and Article 119, paragraph 4 of the LGE which set out the following:

Article 33
Prohibited Actions by Political Entities

During the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following:
[…]
b) displaying notices, placards and posters, or otherwise placing their names or slogans related to the election campaign, in or on public buildings or structures, on or above public roads, on public road traffic signs, in or on premises or structures occupied or otherwise used by international organizations, or in private premises without permission of the owners or users;
[…]

l) using language, in oral or written form, which incites or provokes, or is likely to incite or provoke, another person to commit an act of violence against other persons or property, or which incites or is likely to incite hatred towards others, or publishing or using pictures, symbols or any other material that has or is likely to have such effects;
[…]

Article 119 [Complaints]

119.1 A person who has a legal interest in a matter within the jurisdiction of ECAC, or whose rights concerning the electoral process as established by this law or electoral rule have been violated, may submit a complaint to the ECAC.
[…]

76. And Article 5 [Complaints] paragraph 5 of Rule No. 02/2015 of the ECAP which stipulates that:

Article
5 [Complaints]

[…]
5.5 For all issues that are not directly related to voting and re-counting, the complaint must be filed with the ECAP within 24 hours of the alleged violation".

77. Regarding the application of the abovementioned provisions, the Court recalls that the ECAP by Decision [no. 233/2019], approved as grounded the complaint of the party E.B., and imposed on the

Applicant a fine in the amount of 9,500.00 (nine thousand five hundred) euro, due to: *i)* the publication in the spot of the election campaign of the Kosovo Police facility in Prishtina; and *ii)* the involvement of another person E.B., without his permission in the electoral promotional activity in violation of Article 33 [Prohibited Actions by Political Entities] of the LGE. As to the allegation of non-specification by E.B. of the place, date and time when the alleged violation occurred, an allegation which the Applicant raised before the Court, the ECAP reasoned that E.B. had become aware of the violation on 4 October 2019, and that the deadline for the Applicant starts from the moment when the complainant becomes aware of the violation, which in this case turns out to be within the election campaign.

78. Following the Applicant's appeal, the Supreme Court by Judgment [no. AA-U.ZH. no. 16/2019] rejected as ungrounded the Applicant's appeal, finding that the ECAP decision is clear and comprehensible and contained sufficient reasons for the decisive facts, which were also accepted by the Supreme Court, finding that the substantive law was also applied correctly. The Supreme Court confirmed once again that the Applicant during the campaign, for electoral purposes, in violation of the law (Article 33 point b of the LGE), published a video-spot, which showed the Kosovo Police building in Prishtina and included the other person without his permission.

79. Whereas, regarding the allegation that the video recording was published on 19 September 2019, while the election campaign started on 25 September 2019, therefore, the imposed fine was imposed in contradiction with the LGE which is applied only during the election campaign, considers that the Decision of the ECAP, also upheld by the Supreme Court, was based on Rule no. 02/2015 of the ECAP which stipulates that a complaint must be filed with the ECAP within twenty-four (24) hours of the alleged violation, interpreting this deadline to begin not at the moment when the television spot was published, but at the time the complainant became aware of the alleged violation, provided that this was done within the election campaign, and this was the case with the distribution of the election spot of the Applicant's candidate for deputy.

80. The Court therefore agrees with the assessment of the ECAP and the Supreme Court that the restriction was provided by law, namely Article 33 paragraphs (b) and (l) and Article 119, paragraph 4 of the LGE as well as Article 5 [Complaints] paragraph 5 of Rule no. 02/2015 of the ECAP and sees no reason to deviate from this reasoning.

81. The Court also recalls Article 33 [Prohibited Actions by Political Entities] paragraph 1 that of the LGE which foresees that:

> *"during the campaigning period a Political Entity, its supporters or candidates shall be prohibited from doing any of the following [...]".*

82. Therefore the LGE has clearly stated that the actions prohibited by Article 33 of the LGE relate to the campaign period.

83. In this regard, the Court refers to Article 3 [Definitions] of the LGE which stipulates that:

> *"Campaign Period" shall mean the thirty (30) day period for election campaigning by Political Entities ending on the day immediately preceding the election day".*

84. According to the definition of "Election Period" set out in Article 3 [Definitions] of the LGE, for the purpose of the LGE, Article 33 [Prohibited Actions by Political Entities] of the LGE applies 30 days before the elections.

85. Therefore, the Court considers that regardless of and without prejudice to the date of the announcement of the elections by the President of the Republic and the date of the start of the election campaign according to point l) of Decision [no. 824-2015] for Setting the Deadlines of Electoral Activities for the Early Elections for the Assembly of Kosovo 2019 which stipulates that "The Election Campaign as well as the deadlines for election rallies begins on 25 September and ends on 4 October 2019", 30 days before the elections of 6 October 2019, has been relevant to the implementation of Article 33 [Prohibited Actions by Political Entities] of the LGE.

86. Consequently, taking into account the fact that the general elections in Kosovo were held on 6 October 2019, whereas the Applicant states that the video recording was published on 19 September 2019, notwithstanding the fact that when the person E.B. had filed a complaint with the ECAP, the video recording publication was also distributed within the time period during which Article 33 [Prohibited Actions by Political Entities] of the LGE was applicable. Therefore, the Court cannot agree with the Applicant that at the time of publication, Article 33 of the LGE was not in force.

87. Therefore, the Court finds that the Applicant's allegation that the restriction of freedom of expression was not foreseen by law as the

LGE was not applied at the time the election spot was published is ungrounded.

88. Furthermore, the Court finds that the legislation applied in the present case, was accessible and foreseeable for the Applicant all the more so given that the Applicant participated in the previous elections and was subject to the same electoral rules.

89. Therefore, in conclusion, the Court finds that the restriction of freedom of expression was "*prescribed by law*". The Court will further assess whether the restriction had a legitimate aim and whether the measure taken was proportionate.

b) Whether the restriction had a legitimate aim

90. With regard to the legitimate aim and the test of proportionality which must be met in order for a restriction to be justifiable, the Court notes that although the Applicant, in addition to arguments as to whether the measure provided for is not prescribed by law, does not specifically challenge, the Court will assess whether this measure - the restriction of freedom of expression - has a legitimate aim and whether it is disproportionate to achieving the legitimate aim pursued.

91. In this regard, the Court notes that according to the case law of the ECtHR, the prohibition of certain actions during the election campaign may have as its legitimate aim the protection of the reputation and rights of others as well as the public interest in ensuring the holding of free and fair parliamentary elections. (see, *mutatis mutandis*, ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008)

92. In the present case, the ECAP assessed that the election spot had been shot in front of the Kosovo Police building and included the photo of the other person E.B., without his permission in the election promotion activity, in which it violates the dignity of the person E.B.

93. The Court therefore considers that the restriction of freedom of expression in the present case has a legitimate aim - the protection of the reputation and rights of others, in this case the person E.B. as well as the public interest in ensuring that free and fair parliamentary elections are held.

94. Given that the restriction of freedom of expression was prescribed by law and has a legitimate aim, the Court will further assess whether the

interference "is necessary in a democratic society", respectively whether it is proportionate to the legitimate aim pursued.

c) whether the interference "is necessary in a democratic society" or whether it is proportionate to the legitimate aim pursued

95. In order to assess this criterion, it is necessary to assess how the ECAP and the Supreme Court handled the Applicant's case and whether the measure provided by law has been proportionate to achieve the aim pursued.

96. As explained in the general principles above, freedom of expression is subject to exceptions which must be narrowly interpreted and the necessity for any restriction must be decided in a convincing manner. Where what is at stake is the limit of acceptable criticism in the context of public debate on a political question of general interest, the Court, as the final authority for the interpretation of constitutional rights, must be satisfied that the ECAP and the Supreme Court have applied standards that are compatible, and moreover, in the performance of this function are based on an acceptable assessment of the relevant facts. (see, *mutatis mutandis*, ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008, page 11).

97. The Court notes that when the ECAP fined the Applicant for the fact that the publication of the election campaign spot was made in front of the Kosovo Police building in Prishtina and the fact that the published spot of the election promotion activity included a photo of another person E.B., without his permission and where the ECAP considered that this had violated his dignity.

98. Furthermore, in determining the amount of the fine, the ECAP took into account the nature of the violation and the impact on the electoral process, the fact that the Applicant participated in previous elections and was informed about the election rules and the fact that the Applicant committed such violations even earlier.

99. The Court also notes that the fine imposed on the Applicant was based on Article 120 [Remedies and Sanctions for Violations] in point (c) stipulates that in the event of a violation of the LGE or election rules the ECAP may "impose a fine against on a Political Entity or observer organization of up to two hundred thousand euro (€ 200,000). However, in the present case, the Applicant was fined in the amount of € 9,500 which is very low compared to the amount that the ECAP is allowed to impose.

100. Therefore, in the light of these findings, it cannot be said that the ECAP and the Supreme Court have exceeded the margin of appreciation they enjoy in deciding whether the measure taken is "necessary in a democratic society" specifically if there is a reasonable relationship of proportionality between the measure taken and the aim pursued. (see, *mutatis mutandis,* ECtHR case *Nataliya Mykhaylivna Vitrenko and others v. Ukraine*, Application no. 23510/02, Decision of 16 December 2008, page 12)

101. Therefore, the restriction of freedom of expression provided by law has been proportionate to achieving the legitimate aim of protecting the rights of others and ensuring a fair and just electoral process.

102. In conclusion, the Court finds that the Applicant's freedom of expression has been restricted, however, the restriction was prescribed by law, has a legitimate aim and has met the criterion of proportionality.

103. Therefore, based on the above, the Court finds that the Applicant's allegations that his right to freedom of expression has been violated, which is guaranteed by Articles 40 of the Constitution and Article 10 of the ECHR, are ungrounded.

(ii) Applicant's allegations regarding the principle of non-discrimination guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR

104. Regarding the principle of non-discrimination, the Applicant complains that the ECAP rendered contradictory decisions, as in similar situations it has issued different decisions regarding the time of committing a prohibited electoral action as in the case of the Applicant took into account the time of filing the complaint by the person E.B. while in other cases the time when the election spot is published. In essence, the Applicant challenges the factual situation and the manner of interpretation of the factual situation by the ECAP.

105. With regard to the Applicant's allegation of a violation of equality before the law, the Court refers to its case law, which notes that only differences in treatment based on an identifiable characteristic *or status*, may represent unequal treatment within the meaning of Article 24 of the Constitution. In addition, in order for an issue to be raised under Article 24, there must be a difference in the treatment of persons in analogous situations or similar situations (See, *mutatis mutandis* case of the Constitutional Court, KI157/18, Applicant *the*

Supreme Court of the Republic of Kosovo, Judgment of 13 March 2019, paragraph 33, see also ECtHR cases *Carson and Others v. United Kingdom*, Application No. 42184/05, 16 March 2010, paragraph 61).

106. The Court notes that the Applicant did not submit any *prima facie* evidence indicating by what identifiable characteristic or status they were discriminated against in the proceedings before the Supreme Court.

107. However, with regard to the allegation on the issue of conflicting decisions of the Supreme Court, the Court, referring to the case law of the ECtHR, recalls that the ECHR in principle associated the importance of the consistency of case law with the principle of the legal certainty and public confidence in the judicial system (See *mutatis mutandis*, *Brumărescu v. Romania*, application no. 28342/95, ECtHR Judgment of 28 October 1999, paragraph 61; see *Păduraru v. Romania*, application no. 1 December 2005; paragraph 98; *Ştefănică and Others v Romania*, application No. 38155/02, ECtHR Judgment of 2 November 2010, paragraph 38; *Balažoski and Others v. the former Yugoslav Republic of Macedonia*, application no. 45117/08 Judgment of the ECtHR of 25 April 2013, paragraph 29; *Nejdet Sahin and Perihan Sahin v. Turkey*, application No. 13279/05, Judgment of the ECtHR of 20 October 2011, paragraph 52; see also *Albu and Others v. Romania*, application no. 34796/09, Judgment of the ECtHR of 10 May 2012, paragraph 34).

108. However, the ECtHR, through its case law, has also maintained that the requirements of legal certainty and the protection of the legitimate confidence of the public, do not confer nor guarantee an acquired right to consistency of case-law. (see *Unedic v. France*, application no. 20153/04, ECtHR Judgment of 18 December 2008, paragraph 74; ECtHR Judgment of 20 October 2011, *Nejdet Sahin and Perihan Sahin v. Turkey*, cited above, paragraph 58; *Albu and Others v. Romania*, cited above, paragraph 34 and see also Constitutional Court Case, KII42/15, *Habib Makiqi*, Resolution on Inadmissibility of 27 October 2016, paragraph 38).

109. The ECtHR specifically stated that *"it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts [...]."* (See case *Ādamsons v. Latvia*, cited above, paragraph 118, and case *Nejdet Sahin and Perihan Şahin v. Turkey*, cited above, paragraph 50, and see also case of the Constitutional

Court, KI29/17, *Adem Zhegrova*, Resolution on Inadmissibility, of 2 October 2017, paragraph 47).

110. However, the ECtHR has established in its case law the criteria for assessing the conditions in which contradictory decisions of the last instance courts are in contradiction with the principle of legal certainty. In this respect, the ECtHR emphasizes that it must be established: a) whether there are any profound differences in the case law of the domestic courts: b) whether domestic law provides for a mechanism to overcome those inconsistencies; and c) whether this mechanism has been implemented and if so, to what extent (See *mutatis mutandis* the case of ECtHR *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02, Judgment of 2 October 2009, paragraph 49-52; and see also case of the Constitutional Court, KI29/17, *Adem Zhegrova*, Resolution on Inadmissibility, of 2 October 2017, paragraph 51).

111. The Court notes that in the case law of the ECtHR, the criterion for the existence of "profound and long-standing differences" is fundamental in assessing the consistency of case law (See *mutatis mutandis Lupeni Greek Catholic Parish and others v. Rumania*, Judgment of 29 November 2016, paragraphs 116-135; *Iordan Iordanov and Others v. Bulgaria*, Application no. 23530/02; cited above, paragraphs 49-52; *Nejdet Şahin and Perihan Şahin v. Turkey*, cited above, paragraph 53). In this context, the ECHR has also concluded that the effect of such a difference in relation to the number of other cases should be assessed (See *Abu et al. v. Romania*, Judgment of 10 June 2012, paragraph 38).

112. The Court underlines that it is not its duty to compare different decisions of the Supreme Court and that it fully respects the independence of the regular courts.

113. The Court recalls that in relation to this allegation the Applicant initially refers to the ECAP Decision [A. 181/2019] of 4 October 2019, rejecting as ungrounded the complaint filed by the Emergency Management Agency against the Applicant as the complainant did not submitted evidence and did not attach any evidence regarding the allegations of violation of election rules by the Applicant. ECAP more specifically reasoned that the complainant did not "*specify the time when the video in question was shot and published*".

114. The Applicant also refers to the Decision of the ECAP [A. No. 93/2019], of 27 September 2019, where the ECAP approved as grounded the Applicant's complaint against the Democratic Party of

Kosovo, in which case the ECAP found that Applicant's complaint of 26 September 2019 alleging that the Assembly member of the Municipality of Shtime from the Democratic Party of Kosovo on 25 September 2019, had published on the social network Facebook a photo with the Mayor of Shtime as the candidate for deputy of this party for the elections of 6 October 2020, these actions are sanctioned by the provision of Article 35.1 of the LGE.

115. The Applicant also refers to the Decision of the ECAP [Anr. 108/2019], of 30 September 2019, by which the ECAP approved as grounded the complaint of the Applicant and a non-governmental organization against the AAK-PSD coalition submitted on 27 September 2019, after the AAK-PSD candidate for Prime Minister on 26 September 2019 through his Facebook account, had included members of the Kosovo Police in their sport where he had written "2000 additional police officers until the end of the mandate", where with this was violated the election rule no. 13/2013 amended and supplemented with the election rule no. 20/2019.

116. However, referring to its case law and that of the ECtHR, the Court considers that the cases submitted by the Applicant which they relate to their case are not the same as the present case.

117. Regarding the Decision of the ECAP [A. 181/2019] of 4 October 2019, the ECAP had not addressed at all the issue of the date of publication of the spot in relation to the date when the complainants had noticed such a thing as the complainants in that case had not attached to their complaint any evidence relating to their allegations.

118. While regarding the Decision of ECAP A. No. 93/2019, of 27 September 2019, and the Decision of ECAP Anr. 108/2019, of 30 September 2019, in both these cases the publication of the election spot was done after the 25th September 2019 - after the election campaign had officially started and complaints were filed the next day after the election spots were published on social networks. Therefore, the ECAP did not address the issue of publishing the election spot in relation to the date when the election spot was noticed by the complainant, as this was not an issue that was raised before them.

119. Regarding the specific case, the Applicant alleges that the election spot was published before 25 September 2019, while the ECAP found that it is by a person who has a legal interest (complainant) E.B. on 4 October 2019.

120. Therefore, the Court considers that the circumstances of the present case and the cases in respect of which the Applicant alleges that the ECAP has decided otherwise, are not the same.

121. Consequently, this makes it unnecessary to assess a) whether there are profound and long-lasting differences in the case law of the domestic courts; b) if the domestic law provides a mechanism for overcoming these inconsistencies; and, c) whether this mechanism has been implemented and if so, to what extent.

122. Furthermore, the Court notes that the decisions referred by the Applicant are ECAP decisions against which the parties to the proceedings had the right to appeal to the Supreme Court and which become final only if no appeal is filed against them within the time limit or after being decided by the Supreme Court. The Applicant has not clarified and has not presented evidence proving that these ECAP decisions have been upheld as such by the Supreme Court.

123. Accordingly, the Court, referring to its case law and that of the ECtHR and the standards established by this practice, which principles this Court applies, finds it impossible to find that in the Applicant's case the criteria of the existence of conflicting decisions have been met.

124. Therefore, based on the above, the Court finds that the Applicant's allegations that his right to equality before the law has been violated are ungrounded, namely the right not to be discriminated, which is guaranteed by Article 24 of the Constitution, Article 14 of the ECHR, and Article 7 of the UDHR.

(iii) Allegations regarding Article 7 [Values] of the Constitution

125. The Court notes, first, that the Applicant tries to justify the violation of Article 7 [Values] of the Constitution by erroneous determination of factual situation and erroneous application of the substantive and procedural law, essentially repeating the allegations made in response to the complaint filed with the ECAP.

126. The Applicant links the erroneous determination of factual situation with the moment when the violation was committed, namely with the date on which the violation was committed, it further repeats the allegations regarding the formal criteria that the complaint must meet, and on this basis concludes that substantive and evaluative law has not been correctly applied.

127. With regard to these allegations of the Applicant which relate to the situation of erroneously determined factual situation and erroneous application of the substantive and procedural law, the Court notes that the ECAP substantially reasoned each of the Applicant's allegations and explained how it determined the factual situation and how it applied the substantive law and the procedural law, see paragraphs 12, 13 and 14.

128. The Court recalls that with regard to the Applicant's allegations of erroneous application and erroneous interpretation of the law, the Court reiterates in the first place, that it is not its duty to deal with errors of fact or erroneous application of the law allegedly committed by the regular courts, unless the errors and erroneous application of the law is such as to violate the rights and freedoms protected by the Constitution (*Garcia Ruiz v. Spain* [GC], no. 30544/96, 28 §, ECHR 1999-I).

129. The Court notes that all the responses of the ECAP and the Supreme Court are clear and reasoned, and that all of the Applicant's allegations, which were relevant to the resolution of the case, were duly heard and examined by the ECAP and the Supreme Court The Court therefore concludes that the proceedings before the ECAP and the Supreme Court, viewed in their entirety, were fair (see: *mutatis mutandis*, ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96. paragraphs 29 and 30).

130. In addition, regarding Article 7 [Values] of the Constitution, the Court notes that it is a general principle that the articles of the Constitution which do not directly regulate the fundamental rights and freedoms have no independent effect, as their effect is valid in relation to "the enjoyment of the rights and freedoms" guaranteed by the provisions of Chapters II and III of the Constitution. Accordingly, these articles cannot independently be applied if the facts of the case do not fall within the scope of one or more of the provisions of the Constitution pertaining to the "enjoyment of the rights and freedoms". (see, case of the Court Kl136/16, Applicant: *Vllaznim Bytyqi*, Resolution on Inadmissibility, of 18 October 2017, paragraph 40).

131. In this regard, the Court notes that it has addressed allegations relating to matters of the rule of law and legal certainty concerning the freedom of expression.

132. Therefore, based on the foregoing, the Court finds that the Applicant's allegations that the erroneous determination of factual situation and

erroneous interpretation of law violated the Applicant's right guaranteed by Article 7 [Values] of the Constitution are ungrounded.

(iv) Allegations regarding Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution

133. The Court recalls that the Applicant does not substantiate the violations of Articles 21 and 22 of the Constitution, but merely finds that "*... the content of the Judgment under the sign A. A. - U. ZH. no. 16/2019 of the Supreme Court contains a violation ...* " and these two articles.

134. With regard to Articles 21 [General Principles] and 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the Court notes that these articles do not in themselves entail a fundamental right or freedom.

135. Article 21 in its content refers to the indivisible, inalienable and inviolable character of human rights; protection and guarantee of human rights; the obligation to respect human rights, also stipulating that the rights and freedoms guaranteed by the Constitution, are also valid for legal persons to the extent applicable.

136. While Article 22 of the Constitution defines the status of human rights and freedoms guaranteed by international agreements and instruments, referred to in Article 22, in the legal system of Kosovo, as rights guaranteed by the Constitution, are directly applicable in the Republic of Kosovo and have priority, in case of conflict, over the provisions of laws and other acts of public institutions.

137. Therefore, the abovementioned articles are not articles that can be interpreted independently of other constitutional provisions relevant to this case. However, in considering this case, the Court took into account the principles set out in Article 21 of the Constitution but also the international agreements and instruments set out in Article 22 of the Constitution.

138. Therefore, based on the above, the Court finds that the Applicant did not reason or explain how the violations of Articles 21 and 22 of the Constitution occurred, therefore the allegations of the Applicant that the challenged Judgment violated the Applicant's right guaranteed by Article 21 [General Principles] and Article 22 [Direct Applicability of

International Agreements and Instruments] of the Constitution are ungrounded.

Conclusion

139. The Court considers that the Applicant has not submitted any evidence showing that the proceedings before the regular courts, violated in any way, his constitutional rights, and accordingly concluded:

(i) The Court finds that the Applicant's allegations that his right to freedom of expression which is guaranteed by Article 40 of the Constitution and Article 10 of the ECHR is violated are ungrounded;

(ii) The Court finds that the Applicant's allegations that his right to equality before the law, namely his right not to be discriminated against has been violated, which is guaranteed by Article 24 of the Constitution, Article 14 of the ECHR and Article 7 of the UDHR are ungrounded;

(iii) The Court finds that the Applicant's allegations that by erroneous determination of factual situation and erroneous interpretation of law his right guaranteed by Article 7 [Values] of the Constitution has been violated are ungrounded;

(iv) The Court finds that the Applicant did not reason or explain how the violation of Articles 21 and 22 of the Constitution occurred and that the Applicant's allegations that the Applicant's right guaranteed by Article 21 and Article 22 of the Constitution has been violated by the challenged Judgment are ungrounded.

140. Therefore, and based on the above, the Court based on the specific characteristics of the case, the facts presented, the allegations raised by the Applicant, the reasoning of the Supreme Court, as well as based on the established standards and principles set out in its case law and that of the ECtHR, does not find that Judgment [AA-U.ZH. No. 16.2019] of 10 October 2019 of the Supreme Court violated Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on

Human Rights, as well as Article 7 of the Universal Declaration of Human Rights.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.7 of the Constitution, Articles 46 and 48 of the Law and Rule 59 (1) of the Rules of Procedure, on 22 July 2020,

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, with majority of votes, that there has been no violation of Articles 7 [Values], 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 24 [Equality Before the Law], and 40 [Freedom of Expression] of the Constitution of the Republic of Kosovo, Articles 10 [Freedom of expression] and 14 [Prohibition of discrimination] of the European Convention on Human Rights, as well as Article 7 of the Universal Declaration of Human Rights;

III. TO NOTIFY this Judgment to the Parties;

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

V. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI209/19, Applicant: Memli Krasniqi, Constitutional review of Judgment Ka. No.664/2019 of the Court of Appeals of Kosovo, of 5 August 2019

KI209/19, Judgment adopted on 5 November 2020, published on 26 November 2020

Keywords: *individual referral, equality of arms, right to fair and impartial trial, conflict of interest*

In the circumstances of the present case, the Anti-Corruption Agency (ACA) filed a request for initiation of minor offence procedure with the Basic Court in Prishtina, on the basis of grounded suspicion that the Applicant, contrary to Article 14 paragraph 1 of Law No. 06 / L -011 on Prevention of Conflict of Interest, simultaneously exercises the functions of a Member of the Assembly of the Republic of Kosovo and of the First Vice-President of the Kosovo Olympic Committee (KOC).

The Basic Court due to the lack of evidence decided to conclude the minor offence procedure against the Applicant by suspending the procedure. Meanwhile, the ACA filed an appeal with the Court of Appeals against the aforementioned decision of the Basic Court, reiterating that there is a suspicion that the Applicant as a senior official, has come to a situation of conflict of interest because while being a Member of the Assembly of Kosovo at the same time he is exercising the post of the first Vice-President of the KOC.

The Court of Appeals approved the appeal of the ACA and amended the Decision of the Basic Court so that the Applicant for the violation of Article 14 paragraph 1 sanctioned according to Article 23, paragraph 1, point 1.1 of the Law no. 06 / L-011 on Prevention of Conflict of Interest, was imposed a fine of 1,500 (one thousand five hundred) Euros, which has to paid within 15 days from the date of receipt of the present Judgment. The Court of Appeals did not notify the Applicant regarding the appeal of the ACA filed against the Decision of the Basic Court in Prishtina, and consequently, the Court of Appeals had considered only the appeal claims of the ACA but not also the Applicant's arguments.

The Applicant filed a Referral with the Court alleging: (i) that he was not notified that the opposing party (ACA) had filed an appeal with the Court of Appeals against the decision of the Basic Court, which was favourable to him; (ii) The Court of Appeals has heard the allegations of only one party (ACA), while the Applicant has not been given the opportunity to present his evidence and arguments regarding the subject matter of the request and the

allegations of the other party in the trial (ACA). The Applicant alleged that the principle of equality of arms was violated contrary to the procedural guarantees of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (ECHR). The Applicant also requested the imposition of an interim measure against the Judgment of the Court of Appeals of Kosovo.

In the present case, the Court noted that the Court of Appeals (i) has read the Applicant's appeal filed with the Basic Court against the decision of the ACA; (ii) the statement given by the Applicant at the main hearing in the Basic Court; (iii) the testimony of witness B.H., President of the KOC; and (iv) the testimony of witness D.A., ACA official. The Court of Appeals amended the Decision of the Basic Court, by finding that on the basis of the case file, the Applicant is undoubtedly a Member of the Assembly of Kosovo, at the same time is exercising the duty of the first Vice-President of the Non-Governmental Organization – the KOC , in violation of Article 14.1 of the Law on Prevention of Conflict of Interest in Discharge of a Public Function. The Court also noted that on the basis of the complete file of the Referral but also of the content of the challenged Judgment of the Court of Appeals there isn't any document which indicates that the Applicant was notified about the court hearing held in the Court of Appeals, and initiated by appeal of the ACA.

The Court assessed that given that the Court of Appeals amended the decision of the Basic Court which was favorable to the Applicant, it considered that the Court of Appeals had a legal and constitutional obligation to notify the Applicant about the adjudication of his case, in order to provide the latter the opportunity to respond to the appeal of the ACA. The Court also assessed that it is inadmissible for one party to file an appeal with the Court of Appeals without the knowledge of the other party, namely the Applicant, and on which the latter has not had the opportunity to comment. The Court also assessed that the Applicant had to be summoned to the court hearing by the Court of Appeals not only to have knowledge about the date and the place of the hearing, but also to have sufficient time to prepare his case and attend the court hearing.

Finally, the Court found that in the present case 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.

The court also rejected the request for imposition of an interim measure because it considered that based on the content of the Referral it results that the requirements for irreparable risk or damage, or that public interest is in question, are not met.

JUDGMENT

in

Case No. KI209/19

Applicant

Memli Krasniqi

Constitutional review of the Judgment Ka. No. 664/2019 of the Court of Appeals of Kosovo, of 5 August 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 Memli Krasniqi (hereinafter: the Applicant) represented by Artan Qerkini, a lawyer in the Law Firm "Sejdiu & Qerkini" L.L.C from Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment Ka. no. 664/ 2019 of the Court of Appeals of Kosovo, of 5 August 2019, in conjunction with the Decision no. AKK-03-02-821/18 of the Anti-Corruption Agency, of 15 August 2018.

3. The Applicant requests the imposition of an interim measures against Judgment Ka. no. 664/2019 of the Court of Appeals of Kosovo, of 5 August 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly has violated the Applicant's fundamental rights and freedoms 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 on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 22 November 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 27 November 2019, the President of the Court appointed Judge Remzije Istrefi-Peci as Judge Rapporteur and the Review Panel composed of Judges Selvete Gërxhaliu-Krasniqi (presiding), Bajram Ljatifi and Radomir Laban.

8. On 23 January 2020, the Applicant was notified about the registration of the Referral and a copy of the Referral was sent to the Court of Appeals of Kosovo.

9. On 17 June 2020, the Court requested from the Basic Court in Prishtina to submit the complete case file related to Referral no. KI209/19.

10. On 29 July 2020, the Basic Court in Prishtina submitted the complete case file related to the Referral no. KI209/19.

11. On 5 November 2020, the Review Panel considered the Report of the Judge Rapporteur, and unanimously recommended to the Court the admissibility of the Referral as well as the violation of the right to fair

and impartial trial as guaranteed by Article 31 of the Constitution in conjunction with Article 6.1. of the ECHR.

Summary of facts

12. On 15 August 2018, the Anti-Corruption Agency (hereinafter: ACA) by Decision AKA-03-02-821/18, ascertained that: (i) there is a conflict of interest in the dealt case bearing the number AKK.-03-02-821/18, for the Applicant, a member of the Assembly of the Republic of Kosovo and at the same time the Vice-President of the Kosovo Olympic Committee (hereinafter: KOC); (ii) the ACA notifies the President of the Assembly and requests the initiation of legal proceedings against him; (iii) the ACA will request the initiation of minor offence proceedings by the competent Court; (iv) all decisions issued by the ACA regarding the conflict of interest are made public on the official website of the ACA.

13. In the abovementioned Decision ACA had reasoned: (i) that the Applicant exercises the position of deputy in conformity with the Law No. 03/L-111 on Rights and Responsibilities of the Deputy, while the position of the first Vice- President of the Kosovo Olympic Committee is exercised by him based on the Olympic Committee, which operates according to the provisions of the Law 2003/24 on Sports, Law No. 04/L-075 amending and supplementing the Law No. 2003/24 on Sports; (ii) the ACA has sent a letter of warning to the Applicant (ACA-DPK-03-02/ 1642/18) whereby it was ascertained that the simultaneous exercise of the function of a Member of the Assembly of Kosovo and of the first Vice-President of the Olympic Committee is prohibited by Law No. 06/L-011 on Prevention of Conflict of Interest in Discharge of a Public Function; (iii) the Applicant was requested to resign from one function within the legal deadline, otherwise the ACA is obliged to act in accordance with the Law No. 06/L-011 on Prevention of Conflict of Interest; and, that (iv) despite the legal deadline provided by the ACA, the Applicant has failed to take action in order to avoid the situation of conflict of interest in discharge of the public function.

14. On 22 August 2018, the ACA filed a request for initiation of a minor offence proceedings in the Basic Court in Prishtina-General Department- Division for Minor Offence (hereinafter: the Basic Court), on the grounded suspicion that the Applicant contrary to Article 14 paragraph 1 of the Law No. 06 / L-011 on Prevention of Conflict of Interest, simultaneously exercises the functions of the Member of the Assembly of the Republic of Kosovo and of the first Vice- President of the Kosovo Olympic Committee.

15. On 5 June 2019, the Basic Court by Decision K.no.2608/19, due to the lack of evidence, decided to conclude the minor offence proceedings against the Applicant by suspension of proceedings. The Basic Court, inter alia, reasoned that: (i) According to Article 6 of the Law No. 06/L-011 on Prevention of Conflict of Interest, the conflict of interest may result from the circumstances in which an official has a private interest which influences, might influence or seems to influence the impartial and objective performance of official duties performing his official duty impartially and objectively; (ii) the Applicant is a member of the steering body of the KOC but there is no evidence that he personally holds an executive position; and that, (iii) there is no argument that the KOC receives funding directly from the Assembly, therefore in the absence of evidence the minor offence proceedings are suspended.

16. On an unspecified date, the ACA filed an appeal with the Court of Appeals against the aforementioned decision of the Basic Court stating: (i) that there is a suspicion that the Applicant, as a senior official, has come to a situation of conflict of interest because as a Member of the Assembly of Kosovo at the same time he exercises the duty of first Vice-President of the KOC; (ii) the ACA has sent a letter of warning to the Applicant on which occasion the latter was informed that he had come to a situation of conflict of interest, as per Article 14, paragraph 1 of the Law No.06/L-011 on Prevention of Conflict of Interest; and that, (iii) the Applicant was requested to resign from one position, but he failed to take the actions requested by the ACA.

17. On 5 August 2019, the Court of Appeals by Judgment Ka.no.664/2019 approved as founded the appeal of the ACA and amended the Decision of the Basic Court K.no.2609/2018 of 5 June 2019, so that the defendant (Applicant) due to the minor offence from Article 14, paragraph 1, sanctioned according to Article 23 paragraph 1, item 1.1 of the Law No. 06/L-011 on Prevention of Conflict of Interest, was imposed a fine of 1,500 (one thousand and five hundred) euros, which he has to pay within 15 days from the day of receipt of this Judgment, otherwise the imposed fine will be collected in accordance with Article 164.3 of the LMO.

18. The Court of Appeals, among other things, reasoned that: (i) the Basic Court did not properly assess the evidence presented and deposited by the parties to the proceedings; (ii) the reasoning of the Basic Court is contradictory and confusing because the conclusion of contracts or the acquiring of funds is not a matter of adjudication; (iii) the subject matter of trial is whether the defendant (the Applicant) has come to a

situation of conflict of interest in the course of exercising his functions; (iv) it is undoubtedly ascertained that the Applicant is a Member of the Assembly of Kosovo, and at the same time is acting as the First Vice-President of the Non-Governmental Organization of KOC; (v) while, on the basis of Article 6 of the Law No. 06/L-011 on Prevention of Conflict of Interest having the main title [Executive Board] consisting of: point i) President, point ii) First Vice-President (position of the Applicant), it is undoubted that the defendant (Applicant) holds a leading position in the KOC, while being at the same time a Member of the Assembly of Kosovo, hence with his actions he has come into contradiction with Article 14.1 of the Law No. 06/L-011 on Prevention of Conflict of Interest.

19. The Court of Appeals added that *"As a result of the foregoing, the Trial Panel AMENDED the challenged decision, so that for the committed minor offence under Article 14 para.1, sanctioned according to article 23 para.1, point 1.1 of the Law on Prevention of Conflict of Interest in Exercising Public Function, in conformity with article 31 of the LMO, I hereby impose on him a fine in the amount of 1500 (one thousand five hundred) € , by taking into account all the facts and circumstances in which the minor offence act has been committed, while being convinced that even with the imposed fine would be achieved the purpose of the punishment, so that in the future the defendant does not commit the same or similar minor offences".*

20. The Court of Appeals failed to notify the Applicant regarding the appeal of the ACA filed against the Decision K.no.2608/19 of the Basic Court in Prishtina, of 5 June 2019, and consequently, the Court of Appeals had examined only the appeal claims of ACA but not the arguments of the Applicant.

21. The Court of Appeals also determined that no appeal is permitted against its Judgment.

Applicant's allegations

22. The Applicant alleges that his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR have been violated.

23. The Applicant alleges that: *"The principle of equality of arms and the adversarial principle have been widely considered in the jurisprudence of the ECHR and the Constitutional Court not only in criminal cases but also in civil and minor offence cases. Thus, the*

jurisprudence in question has emphasized that the principle of the right to fair trial has as its own element the right of each party to be present at the court hearing. The constitutional jurisprudence and case law of the ECHR have also set standards for participation in the trial in order to provide opportunities for each party to effectively defend the allegedly violated right".

24. The Applicant alleges: *"In this case, the Court of Appeals has flagrantly violated the Applicant's right to be equal in relation to the opposing party and has also violated the Applicant's right to be heard in relation to the allegations of the opposing party. In the Applicant's case, the Court of Appeals did not inform him at all that the opposing party in the minor offence proceedings (the Anti-Corruption Agency) has filed an appeal against the Decision of the first instance court, rejecting their request, and moreover the Applicants was not given the opportunity at all to respond to the appeal claims of the opposing party's (ACA)".*

25. The Applicant further adds: *"The Court of Appeals has heard only the allegations of one of the parties, while the Applicant has not been given the opportunity to defend himself before the court by presenting his evidence and arguments about the subject matter of the request as well as about the allegations of the other party at trial".*

26. The Applicant alleges: (i) that he was not notified that against the decision of the Basic Court, which was favourable to him, the opposing party (ACA) had filed an appeal with the Court of Appeals; (ii) the Court of Appeals has heard only the allegations of one party (ACA), while the Applicant has not been given the opportunity to present his evidence and arguments with regard to the subject matter of the request and the allegations of the other party at trial (ACA).; and that, (iii) the right to a fair trial also includes the notion that both parties to a proceeding are entitled to have information about the facts and arguments of the opposing party.

27. For supporting his allegations, the Applicant refers to the Judgments of the Court in cases KI103/10 and KI108/10.

28. Finally, the Applicant requests from the Court to (i) declare his Referral admissible; (ii) find that the Court of Appeals has violated Article 31 of the Constitution and Article 6 of the ECHR; (iii) declare the Judgment of the Court of Appeals invalid; (iv) order the remanding of the case for reconsideration purposes; and, (v) determine any other legal measure deemed to be legally sound and reasonable.

Relevant Legal Provisions

Law on Minor Offences No. 05/L-087

CHAPTER XVII
SUBMISSION OF WRITTEN NOTES

Article 79

Submission manner

2. Summons for investigation or questioning, i.e. for giving a written statement, as well as all decisions for which the appeal deadline commences upon submission, shall be delivered personally to the defendant. In the same way are delivered the decisions to the defendant for whom the appeal deadline commences upon submission.

Article 77

Types and communication of decisions

1. The court shall render its decisions in minor offence proceedings in the form of:

1.1. Judgment;

1.2. Ruling, and;

1.3. Orders.

Article 124

Issuing the judgment

1. Minor offence procedure ends with a judgment for conviction or acquittal, with the ruling which suspends the procedure or of the ruling in which the juvenile offender of minor offence is pronounced the educational measures.

Article 126

Ruling for the end of minor offence procedure

1. Minor offence procedure shall end with a ruling when found that:

[...]

1.8. there is no evidence that the defendant committed the minor offence;

Assessment of the admissibility of the Referral

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

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

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

[...]

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

31. In addition, the Court also refers to the admissibility criteria, as provided by the Law. In this respect, the Court refers to 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…".

32. As to the fulfillment of the admissibility criteria, as stated above, the Court assesses that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Ka.no.664/2019 of the Court of Appeals, of 5 August 2019, after having exhausted all legal remedies prescribed by the law. The Applicant has also clarified all rights and freedoms for which he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadline established in Article 49 of the Law.

33. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph (2) of Rule 39 of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

"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."

34. Having examined the Applicant's complaints and remarks, the Court considers that the Referral raises complex issues of fact and law which are of such complexity that their determination should depend on the examination of the merits. Therefore, the Referral cannot be considered as manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure, and neither has any other ground been established for declaring it inadmissible (see, for example, the case of the ECHR, *A and B v. Norway*, Judgment of 25 November 2016, paragraph 55).

35. Consequently, the Court declares the Referral admissible.

Merits of the Referral

36. The Court recalls that the Applicant alleges the violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] in conjunction with Article 6 (Right to a fair trial) of the ECHR.

37. The Applicant, in essence, alleges that the principle of "equality of arms" has been violated to his detriment because: (i) he was not notified about the decision of the Basic Court, which was favourable for him, the opposing party (ACA) has filed an appeal with the Court of Appeals; (ii) The Court of Appeals has heard only the allegations of one party (ACA), while the Applicant has not been given the opportunity to present his evidence and arguments regarding the subject matter of the request and the allegations of the other party at the trial (ACA); and that, (iii) the right to a fair trial also includes the notion that both parties to the proceedings are entitled to have information about the facts and arguments of the opposing party.

38. The Court refers to Article 31 [Right to Fair and Impartial Trial] of the Constitution, which stipulates:

> *"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."*

39. The Court also refers to Article 6.1. (Right to a fair trial) of the ECHR, which stipulates:

> *"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."*

40. The Court points out that the right to equality of arms is guaranteed by Article 31 of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR and its application has been interpreted by the European Court of Human Rights (hereinafter: the ECtHR). On the basis of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, the Court has a constitutional obligation to interpret

fundamental rights and freedoms in accordance with the case law of the ECHR.

41. Consequently, as regards the interpretation of the allegations for violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will refer to the general consolidated principles from the case law of the ECtHR.

(i) General principles of "equality of arms" as developed by the case law of the ECtHR

42. The principle of equality of arms is inherent in the broader concept of a fair and impartial trial and is closely linked to the principle of adversarial principle (see, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, para. 146). The criterion of "equality of arms", in the sense of a "fair balance" between the parties, applies in principle to civil as well as to criminal cases (sees the ECtHR case *Feldbrugge v. The Netherlands*, Judgment of 7 July 1987, paragraph 44).

43. Equality of arms implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him in a substantial disadvantage vis-à-vis the other party (see, the ECtHR case, *Dombo Beheer B.V. v. the Netherlands*, Judgment of 27 October 1993, paragraph 33).

44. In the following lines, we will present several situations where the ECtHR found violations of the principle of equality of arms:

a) The appeal of the party was not sent to the other party, which, consequently, was not able to respond (see the ECtHR case, *Beer v. Austria*, Judgment of 6 February 2001, paragraph 19);

b) The time-limit was interrupted for only one of the parties, thus placing the other party in a considerably unfavourable situation (see the ECtHR case *Platakou v. Greece*, Judgment of 11 January 2001, paragraph 48);

c) Only one of the two key witnesses was permitted to be heard (see *Dombo Beheer B.V. v. The Netherlands*, cited above, paragraph 34-35);

ç) The opposing party had enjoyed considerable favour as regards the access to relevant information; it had taken a dominant position in the proceedings and had exercised considerable

influence over the court's assessment (see the ECtHR case*, Yvon v. France*, Judgment of 24 April 2003, paragraph 37).

d) Failure to provide legal aid to one of the parties had deprived them of the opportunity to present their case effectively against a much richer opponent (see, the ECtHR case, *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005, paragraph 72).

45. The ECtHR has determined that the criteria of "fairness" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR covers the proceedings as a whole, and the question whether a person has had a "fair" trial is looked at through cumulative analysis of all stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (see, for example, *Monnell and Morris v. the United Kingdom*, cited above, paragraphs 55-70).

46. It is inadmissible for one party to submit submissions to the court without the knowledge of the other party and on which the latter has not had the opportunity to comment. It is a matter for the parties to assess whether a submission deserves a reaction (see the ECtHR case, *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 October 2005, para.42).

47. As regards the cases where prosecuting authorities deal with a private individual, prosecuting authorities may enjoy a privileged position justified by the protection of the rule of law. However, this should not result in a party to the civil proceedings being placed in an excessively disadvantaged position by the prosecuting authorities (see the ECtHR case, *Stankiewicz v. Poland*, Judgment of 6 April 2006, para.68).

(i) Application of general principles to the circumstances of the present case

48. The Court once again emphasizes the Applicant's main allegation: (i) that he was not notified that the opposing party (ACA) had filed an appeal with the Court of Appeals against the decision of the Basic Court which was favourable to him; (ii) The Court of Appeals has heard the allegations of only one party (ACA), whereas the Applicant has not been given the opportunity to present his evidence and arguments regarding the subject matter of the request and the allegations of the other party in the trial (ACA); and that, (iii) the right to a fair trial also includes the notion that both parties to a proceeding are entitled to have information about the facts and arguments of the opposing party.

49. In the present case, the Court considers that it is not its duty to assess *in abstracto* the procedural and material legal provisions valid for resolving the Applicant's case. The main task of the Court in this case is to ascertain whether the principle of "equality of arms" has been respected and whether the proceedings as a whole have been fair and in accordance with the procedural guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

50. Moreover, in this case, as a general rule, the assessment of the facts of the case and the interpretation of the law are matters that pertain only to the regular courts, whose assessments and conclusions in this respect are binding on the Court. However, when a decision of a regular court is clearly arbitrary, the Court can and should question it (see the ECtHR case, *Sisojeva and Others v. Latvia*, Judgment of 15 January 2007, para.89).

51. The Court would like to clarify that it is not its duty to consider whether the regular courts have correctly interpreted the applicable law (legality), but it will consider whether the courts in question in their decisions have infringed individual rights and freedoms protected by the Constitution (constitutionality), (see, for example, the case of the Constitutional Court no. KI72/14, *Applicant Besa Qirezi*, Judgment of 4 February 2015, paragraph 65).

52. In the present case, the Court notes that the Court of Appeals (i) has read the Applicant's complaint filed with the Basic Court against the decision of the ACA; (ii) the statement given by the Applicant in the session of the main hearing in the Basic Court; (iii) the testimony of witness B.H., President of the KOC; and (iv) the testimony of witness D.A., ACA official. The Court of Appeals amended the Decision K.no.2609/2018 of the Basic Court, of 5 June 2019, by ascertaining that on the basis of the case file it is undoubted that the Applicant is a Member of the Assembly of Kosovo, and at the same time he exercises the duty of the first Vice-President of the Non-Governmental Organization KOC, thus acting contrary to Article 14.1 of the Law on Prevention of Conflict of Interest in Discharge of a Public Function (see paragraph 5 of the Judgment of the Court of Appeals Ka.no. 664/2019, of 5 August 2019).

53. The Court also notes that on the basis of the entire case file of Referral no. KI209/19 and of the content of the challenged Judgment of the Court of Appeals, there isn't any document indicating that the Applicant was notified about the court session held in the Court of Appeals, and initiated by the appeal of the ACA.

54. The Court notes that the Applicant was not aware of the appeal of the ACA filed with the Court of Appeals and that he was not given the opportunity to attend the hearing in the Court of Appeals in order to respond to the appeal of the ACA.

55. Given that the Court of Appeals amended the decision of the Basic Court which was favorable to the Applicant, the Court considers that the Court of Appeals had a legal and constitutional obligation to notify the Applicant about the adjudication of his case, in in order to give the latter the opportunity to respond to the appeal of the ACA.

56. Failure to summon the Applicant to be present at the hearing of the Court of Appeals and his lack of opportunity to respond to the ACA's appeal has resulted in Applicant being placed in an unequal position vis-à-vis the opposing party- the ACA, which consequently resulted in violation of the principle of equality of arms to the detriment of the Applicant.

57. The Court considers that it is inadmissible for one party to submit an appeal with the Court of Appeals without the knowledge of the other party and on which the latter has not had the opportunity to comment (see, *mutatis mutandis,* the ECtHR case, *APEH Üldözötteinek Szövetsége and others v. Hungary*, Judgment of 5 October 2005, para.42).

58. The Court also considers that the Applicant had to be summoned to the court hearing by the Court of Appeals not only to have knowledge of the date and the place of the hearing, but also to have enough time to prepare his case and to attend the court hearing (see the case of the Constitutional Court no. KI108/10, *Applicant Fadil Selmanaj*, Judgment of 6 October 2011, paragraph 66 and the references mentioned therein).

59. On the basis of the foregoing, the Court considers that in the concrete case there has been a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

Request for Interim Measures

60. The Court also notes that the Applicant requests the imposition of interim measures against the Judgment Ka.no. 664/2019 of the Court of Appeals, of 5 August 2019 by reasoning: *"[...] it is requested from this Honourable Court to issue an interim measure, to assess this Referral as admissible, to ascertain violations, to declare invalid the*

Judgment of the Court of Appeals of challenged by this Referral, and remand the case for reconsideration."

61. In this respect, the Court refers to Article 27 [Interim Measures] of the Law, which provides:

> *"1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.*
>
> *2. The duration of the interim measures shall be reasonable and proportionate."*

62. The Court considers that on the basis of the content of the Referral it results that the conditions for irreparable risk or damage are not met or that we are dealing with a public interest. In addition, the Court found a violation of a procedural nature and did not decide whether the Applicant had a conflict of interest or not.

63. The Court rejects the request for imposition of interim measures.

Conclusion

64. The Court concludes that in the present case it has found a violation of the principle of equality of arms as one of the components of the general right to a fair and impartial trial guaranteeing procedural justice embodied in Article 31 of the Constitution and Article 6 of the ECHR.

65. The Court notes that the finding of a violation of Article 31 of the Constitution and Article 6 of the ECHR is without prejudice to the material resolution of this case, namely if the Applicant has come to a situation of conflict of interest or not. That issue falls within the scope of and must be resolved by the regular courts.

66. However, the finding of a violation of Article 31 of the Constitution and Article 6 of the ECHR to the detriment of the Applicant obliges the Court of Appeals to summon the Applicant to the retrial and to grant him an effective opportunity to respond to the appeal of the ACA – and thus find a fair balance between the litigants in accordance with the principle of equality of arms (see the ECtHR case, *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, para.51).

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20, 27 and 47 of the Law and Rules 59 (1) and 66 of the Rules of Procedure, in its session held on 5 November 2020, unanimously

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with paragraph 1 of Article 6 [Right to a fair trial] of the European Convention on Human Rights;

III. TO DECLARE the Judgment of the Court of Appeals, [Ka.no. 664/2019], of 5 August 2019, invalid;

IV. TO REMAND the Judgment of the Court of Appeals, [Ka.no. 664/2019], for reconsideration in conformity with this Judgment;

V. TO ORDER the Court of Appeals to inform the Court, pursuant to Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court no later than on 3 May 2021;

VI. TO REJECT the request for imposition of interim measures;

VII. TO REMAIN seized of the matter pending compliance with this order;

VIII. TO ORDER that this Judgment be notified to the Parties, and in accordance with Article 20.4 of the Law to be published in the Official Gazette;

IX. TO DECLARE that this Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Remzije Istrefi-Peci	Arta Rama-Hajrizi

KI80/19, Applicant: Radomir Dimitrijević, Constitutional review of Decision AC-I-18-0547-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters, of 21 February 2019

KI80/19, Judgment adopted on 10 November 2020, published on 9 December 2020 2020

Key words: *individual referral, civil procedure, right to a fair trial, right to property, admissible referral, violation of Article 31 of the Constitution*

The Applicant challenged before the Constitutional Court the constitutionality of Decision AC-I-18-0547-A0001 of the Appellate Panel, of 21 February 2019, which allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 54 [Judicial Protection of Rights] and Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo, Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention on Human Rights. The Applicant alleged that the Appellate Panel violated his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 6 and Article 1 of Protocol No. 1 of the Convention because: "*The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo has taken an early decision by which it considers the Applicant's appeal withdrawn, because prior to this the APSCSC had to decide on the Applicant's request by which he requested an additional deadline or postponement of payment of the court fee upon appeal*".

The Court initially assessed whether the Referral fulfilled the admissibility requirements for an examination of the merits of the Referral, as established in the Constitution and further specified in the Law on the Constitutional Court and in the Rules of Procedure of the Court. In respect of the fulfillment of the above mentioned criteria deriving from the right of access to court, the Court noted that in the circumstances of the present case we were dealing with a "dispute" and a "civil right" between the Applicant and the PAK, namely with the realization of the claimed salaries in the amount of 16,420.00 euros for the period June 1999-2007, as well as the payment of 20%, from the privatization funds of the enterprise SOE Fabrika for the production of pipes and steel profiles in Ferizaj.

Referring to the present case, the Court found that the Applicant, faced with such factual and legal circumstances, from 29 November 2018 was awaiting the review of his request and the provision of a reasoned response by the Appellate Panel. The latter, however, without taking into account his request of 29 November 2018, considered his appeal as withdrawn. Faced with such

a circumstance, the Appellate Panel was obliged to review the Applicant's request, in accordance with paragraph 5 of Article 8 of Administrative Instruction No. 01/2017 on unification of court taxes, before considering the appeal of the Applicant as withdrawn. Based on the above mentioned considerations, the Court found that the non-review of the Applicant's request by the Appellate Panel constitutes an insurmountable procedural flaw which is contrary to the right of access to justice, guaranteed to individuals by Article 31 of the Constitution and Article 6.1 of the ECHR.

In conclusion, the Court found that the challenged Decision [AC-I-0547-A0001] of the Appellate Panel, of 21 February 2019, whereby the Applicant's appeal was considered as withdrawn, did not respect the Applicant's right of "access to court". Therefore, the Court found a violation of Article 31 [Right to a Fair and Impartial Trial] of the Constitution and Article 6.1 [Right to a fair trial] of the ECHR.

JUDGMENT

in

Case No. KI80/19

Applicant

Radomir Dimitrijević

Constitutional review of Decision AC-I-18-0547-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters, of 21 February 2019

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 is submitted by Radomir Dimitrijević (hereinafter: the Applicant), from Ferizaj, who is represented by lawyers Vladimir Petrović, Vasil Arsić, Dejan Vasić and Žarko Gajić, Free Legal Aid Project, with office in Graçanica.

Challenged decision

2. The Applicant challenges the constitutionality of Decision AC-I-18-0547-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court (hereinafter: the Appellate Panel), of 21 February 2019, on Privatization Agency of Kosovo Related Matters (hereinafter: the PAK).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Decision of the Appellate Panel, which allegedly violates the Applicant's rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 54 [Judicial Protection of Rights] and Article 102 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) and Article 1 of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 22 May 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 23 May 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi (members).

7. On 19 June 2019, the Court notified the Applicant about the registration of the Referral and sent a copy of it to the Special Chamber of the Supreme Court (hereinafter: the SCSC).

8. On 19 November 2019, the Court requested additional information from the SCSC, regarding the submission of 29 November 2019 and the submission of 13 March 2019.

9. On 26 November 2019, the SCSC submitted to the Court a letter informing the Court that regarding the appeal filed by the Applicant, of 13 March 2019, the Appellate Panel of the SCSC on 28 March 2019 rendered Decision AC-I -19-0037, which rejected the Applicant's appeal as ungrounded.

10. On 16 January 2020, the Review Panel proposed that the review of the Referral be postponed for supplementation with additional information.

11. On 10 November 2020, the Review Panel considered the report of the Judge Rapporteur and recommended to the full Court to declare the Referral admissible and to find a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

Summary of facts

12. On 21 March 2013, the Applicant filed a complaint with the Specialized Panel of the SCSC (hereinafter: the Specialized Panel), against Decision No. GJI053-172, of the PAK, namely the Liquidation Authority, of 8 February 2013, whereby his request for unpaid salaries in the amount of 16,420.00 euro for the period of time, June 1999-2007 was rejected, as well as the payment of 20%, from the privatization fund of the enterprise SOE Factory for the production of pipes and steel profiles, in Ferizaj.

13. On 7 September 2016, the Specialized Panel sent a copy of the complaint to the PAK to respond to the Applicant's allegations.

14. On 16 September 2019, the PAK submitted the response to the Applicant's complaint, with the proposal that the Specialized Panel rejects the complaint as ungrounded and upholds Decision no. GJI053-172, of 8 February 2013, of the Liquidation Authority, on the grounds that the complaint was statute-barred, because the Applicant missed the deadline to address the court in time for the exercise of his rights under employment relationship.

15. On 28 September 2016, the Specialized Panel forwarded the response of the PAK to the Applicant for submission of the response, who on 27 October 2016 submitted his response to the allegations of the PAK, with the proposal that the complaint be approved as grounded.

16. On 22 October 2018, the Specialized Panel, by Judgment C-IV-13-0298 rejected the Applicant's complaint as ungrounded and upheld decision No. GJI053-017 of the Liquidation Authority, as fair and based on law. In accordance with item II of the enacting clause, the Applicant was obliged to pay the court fee in the monetary value of 30 euro, within the deadline of 15 days from the date this Judgment becomes final. On 12 November 2018, this court fee was paid by the Applicant.

17. On 2 November 2018, the Applicant filed an appeal with the Appellate Panel, against Judgment C-IV-13-0298 of the Specialized Panel, of 22 October 2018.

18. On 12 November 2018, the Appellate Panel ordered the Applicant to pay the court fee within 15 days, in the amount of 30 euro.

19. On 29 November 2018, the Applicant filed a request with the Appellate Panel for an extension of the deadline for the payment of the court fee.

20. On 21 February 2019, the Appellate Panel, by Decision AC-I-0547-A0001, considered the Applicant's appeal as withdrawn due to non-payment of the court fee, on the grounds that the fee had not been paid on time and that the Applicant had not requested the tax exemption.

21. On 13 March 2019, the Applicant again submitted an appeal to the Appellate Panel, due to the failure to consider his appeal of 28 November 2018 for the extension of the deadline of the tax payment, with the proposal that its Decision AC- I-0547-A0001 of 26 February 2019 be annulled.

22. On 28 March 2019, the Appellate Panel, by Decision AC-I-19-0037, dismissed the Applicant's appeal, on the grounds*: "The truth is that he filed a submission requesting, inter alia, the extension of the deadline for the payment of the court fee, but despite the waiting of the court in silence, from the moment of filing this submission until the date of the decision, almost three months have passed, the complainant did not pay the fee, nor did he file a request for exemption from the court fee".*

Applicant's allegations

23. The Applicant alleges that the Appellate Panel violates his rights guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 6 and Article 1 of Protocol No. 1 of the Convention because: "*The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo has taken an early decision by which it considers the Applicant's appeal withdrawn, because prior to this the APSCSC had to decide on the Applicant's request by which he requested an additional deadline or postponement of payment of the court fee upon appeal*".

24. Therefore, the Applicant states that: "*...the provisions of administrative instruction no. 01/2017 on unification of court taxes*

allow the parties to the proceedings in accordance with Article 8 par. 8.5 subpar. 8.5.1 and 8.5.2 of the Administrative Instruction No. 01/2017 on unification of court taxes, which provides that: "The judge or presiding judge to whom the case has been allocated may give additional time to the party that has REQUESTED AN EXTENSION OF TAX PAYMENT TERM at its full amount or a part thereof [...], to ask the court for an additional deadline for the payment of the court fee".

25. Furthermore the Applicant alleges that the Appellate Panel, "*...has not taken into account or reviewed the request for postponement of payment of tax, which can be ascertained from the reasoning given in Decision AC-I-18-0547-A0001 of 21.02.2019, where it is not stated at all that the claimant has filed a request with the court for postponement of tax payment and request for additional term. Thus, the Applicant considers that the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo violated Article 31 of the Constitution of Kosovo (Right to Fair and Impartial Trial) in conjunction with Articles 6 and 1 of Protocol No. 1. of the European Convention for the Protection of Human Rights and Freedoms, because it has not previously considered the claimant/applicant's additional request for a time limit for the payment of the court fee, which would in any case have substantial procedural implications for the court to not to render a decision by which the claimant's appeal is considered withdrawn, but the claimant would still remain active in the appeal procedure in two ways".*

26. The Applicant also alleges that the Appellate Panel violated his right guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution by linking these constitutional violations to Article 10 of the Law on SCSC and Article 2.8 of the Law on Contested Procedure, as well as Article 102 [General Principles of the Judicial System] of the Constitution.

27. Finally, the Applicant requests the Court: "*...to hold that there has been a violation of the abovementioned provisions with the proposal that the Constitutional Court annuls Decision AC-I-18-0547-A0001 of 22.02.2019 and order the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters to review the appeal procedure in the part related to the Applicant Radomir Dimitrijević".*

Relevant provisions

Administrative Instruction No. 01/2017 on unification of court taxes

Article 8
Exemption from tax payment

"(...)
8.5 The judge or presiding judge to whom the case has been allocated may give additional time to the party that has requested an extension of tax payment term at its full amount or a part thereof, should he/she find that:

8.5.1 the party does not qualify as a party exempt from paying taxes as per Article 8.1, and

8.5.2 he extension of the term for the payment of the tax at its full amount or a part thereof is necessary to ensure the protection of the rights of the party."

Admissibility of the Referral

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

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

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

[...]

1. 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.

[...]."

30. The Court also assesses whether the Applicant has met the admissibility criteria, as specified by Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

31. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party; has exhausted available legal remedies; has clarified the act of the public authority, which constitutionality he challenges and the constitutional rights which he claims to have been violated, and has submitted the referral in time.

32. The Court further examines whether the Referral meets the admissibility criteria set out in Rules 39 (1) (d) and 39 (2) of the Rules of Procedure, which establish:

Rule 39
[Admissibility Criteria]

(1) "Court may consider a referral as admissible if:

[...]

(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(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."

33. The Court considers that the Referral raises a *prima facie* reasoned constitutional allegation, while it is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure. Therefore, the Court finds that the Referral meets the requirements for the assessment on merits.

Merits of the Referral

34. The Court first reiterates that the requirement of Article 53 of the Constitution stipulates that the interpretation of human rights and fundamental freedoms guaranteed by this Constitution be consistent with the court decisions of the European Court of Human Rights.

35. The Court recalls that the Applicant challenges the constitutionality of the Decision [AC-I-18-0547-A0001] of the Appellate Panel of 21 February 2019, by which his appeal due to non-payment of the court tax was considered withdrawn. He alleges that this decision has resulted in a violation of his rights guaranteed by the Constitution, namely Articles 31, 54 and 102, as well as Article 6 of the ECHR, in conjunction with Article 1 of Protocol No. 1 thereof.

36. In the circumstances of the present case, the Court notes that the substance of the Applicant's allegations of violation of his constitutional rights relates to the fact that the Appellate Panel did not address his request for an extension of the time limit for the payment of court fee, which he filed on 29 November 2018.

37. Given that the Applicant's substantive allegation relates to a fair trial, namely the right of access to justice, the Court will further assess whether the challenged Decision of the Appellate Panel is in compliance with the standards required by Article 31 of the Constitution and Article 6 of the ECHR.

38. In this regard, the Court recalls that Article 31 of the Constitution and Article 6.1 of the ECHR establish:

Article 31 [Right to Fair and Impartial Trial] of the Constitution

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."

[...]

Article 6.1 [Right to a fair trial] of the Convention

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".

[...]

39. In order to determine the applicability of the guarantees set out in the provisions of Article 31 of the Constitution and Article 6 of the ECHR in the circumstances of the present case, the Court will further elaborate on the general principles deriving from the case law of the European Court of Human Rights (hereinafter: the ECtHR). The following analysis will be made in accordance with the requirements of Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

General principles regarding "the right to a court"

40. The right of access to court for the purposes of Article 6 of the ECHR is defined in case *Golder v. the United Kingdom*. (See ECtHR case, *Golder v. the United Kingdom*, Judgment of 21 February 1975, paragraphs 28-36). Referring to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR found that the "*right of access to court*" is an essential aspect of the procedural guarantees enshrined in Article 6 of the ECHR. (On the general principles of right to a court, see also ECHR Guide of 31 December 2018 to Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, Part II, Right to a court and also, *inter alia*, the case of the ECtHR, *Zubac v. Croatia*, Judgment of 5 April 2018, paragraph 76). Moreover, according to the ECtHR, this right provides everyone with the right to address respective issue related to "civil rights and obligations" before a court. (See ECtHR case, *Lupeni Greek Catholic Parish and Others v.*

Romania, Judgment of 29 November 2016, paragraph 84 and references therein).

41. The Court in this regard notes that the right to a court, as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, provides that all litigants should have an effective judicial remedy enabling them to assert their civil rights (See cases of the ECHR, *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 49; and *Naït-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

42. Therefore, based on the case law of the ECtHR, everyone has the right to file a 'lawsuit' related to their respective "civil rights and obligations" with a court. Article 31 of the Constitution in conjunction with Article 6 of the ECHR embodies the "right to a court", that is, "the right of access to a court", which implies the right to institute proceedings before the courts in civil matters (see ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference with the exercise of his/her civil rights and claims to have been denied the opportunity to challenge such a claim before a court may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, invoking the relevant right of access to a court.

43. More specifically, according to the ECtHR case law, there must first be "a civil right" and second, a "dispute" as to the legality of an interference that affects the very existence or scope of "a civil right" protected. The definition of both of these concepts should be substantial and informal. (See, *inter alia*, the cases of ECtHR *Le Compte, Van Leuvenand De Meyere v. Belgium*, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no. 2), Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, Judgment of 3 April 2012, paragraph 92). The "dispute", however, based on the ECtHR case law, must be (i) "genuine and serious" (see, in this context, the ECtHR cases *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81; and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the outcome of the proceedings before the courts must be "decisive" for the civil right in question. (See, in this context, the case of the ECtHR, *Ulyanov v. Ukraine*, Judgment of 5 October 2010). According to the ECtHR case law, the "tenuous links" or "remote consequences" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR. (see, in this context, ECHR

cases, *Lovrić v. Croatia*, Judgment of 4 April 2017, paragraph 51 and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 71 and references therein).

44. In such cases, when it is found that there is a "civil right" and a "dispute", Article 31 of the Constitution in conjunction with Article 6 of the ECHR guarantee to the affected individual the right "to have the question determined by a tribunal". (See ECtHR case, *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, paragraph 92). A court's refusal to consider the parties' claims as to the compatibility of a procedure with the basic procedural guarantees of fair and impartial trial, limits their access to the court (See the case of ECtHR *Al Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, paragraph 131).

45. Moreover, according to the ECtHR case law, the ECHR does not aim at guaranteeing the rights that are "theoretical and false", but the rights that are "practical and effective". (see, for more on "practical and effective" rights, ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, The Right to Fair and Impartial Trial, Civil Aspects, Part II. Right to Court, A. Right and Access to Court, 1. A practical and effective right; and the ECHR cases *Kutić v. Croatia*, cited above, paragraph 25 and the references cited therein; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

46. Therefore, within the meaning of these rights, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, guarantee not only the right to institute proceedings but also the right to obtain a determination of the "dispute" by a court. (See ECHR cases, *Kutić v. Croatia*, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein; *Aćimović v. Croatia*, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, Judgment of 13 July 2004, paragraph 29).

47. The abovementioned principles, however, do not imply that the right to court and the right of access to court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR case law. (See ECHR Guide of 31 December 2018, Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, and specifically with respect to limitations on the right to court, Part II. Right to Court, A. Right and Access to Court 2. Limitations). However, these limitations cannot go so far as to restrict the individual's access so as to impair the very essence of the right. (see, in this context, ECtHR case, *Baka v.*

Hungary, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant law or respective case law, the Court examines whether the limitations touches on the essence of the law and, in particular, whether that limitation has pursued a "legitimate aim" and whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved". (See ECHR cases, *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish v. Romania*, cited above, paragraph 89; *Naït-Liman v. Switzerland*, cited above, paragraph 115; *Fayed v. the United Kingdom*, Judgment of 21 September 1990, paragraph 65; and *Marković and Others v. Italy*, Judgment of 14 December 2006, paragraph 99).

Application of these general principles to the circumstances of the present case

48. In the light of the foregoing, and in so far it is relevant to the circumstances of the present case, the Court notes that the right to a court is, in principle, guaranteed in respect of "disputes" concerning a "civil right".

49. In this context, the Court notes that there are two essential issues to determine the applicability of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The former relates to "civil right" and the latter to the existence of a "dispute".

50. The Court recalls that the Applicant was an employee of the Enterprise SOE Factory for the production of pipes and steel profiles, in Ferizaj. In the meantime, the company in question was privatized. After some time, the Applicant filed a complaint with the Liquidation Authority, within the PAK, where the object of the complaint was the realization of unpaid salaries in the amount of 16,420.00 euro, for the period of time, June 1999-2007, as well as the payment of 20%, from the fund of privatization proceeds of the enterprise SOE Fabrika for the production of pipes and steel profiles, in Ferizaj. On 8 February 2013, his complaint was rejected by the PAK, due to the statute of limitations. The Applicant filed an appeal with the Specialized Panel, which on 22 October 2018, rejected the Applicant's appeal and upheld the decision of the PAK, of 8 February 2013. Against the decision of the Specialized Panel, the Applicant filed an appeal with the Appellate Panel.

51. The Appellate Panel, before examining the merits of the Applicant's appeal, on 12 November 2018, requested him to pay the court fee in the amount of 30 euro within 15 days. The Applicant in response to this order, on 29 November 2018, filed a request for extension of the deadline for payment of the court fee. The Appellate Panel, without addressing at all the request for extension of the deadline for payment of the fee, on 21 February 2019, rendered Decision AC-I-0547-A0001, by which it considered the appeal of the Applicant as withdrawn, with the reasoning that Applicant: *"did not pay the court fee as requested ..., through the notification (remark) of 22 November 2018, which was served on the complainant's representative on 27 November 2018"* and, moreover, he *"did not file a request to be exempted from the court fee"*.

52. The Court further notes that, on 13 March 2019, the Applicant again filed appeal with the Appellate Panel, requesting the annulment of the challenged Decision [AC-I-0547-A0001] of 21 February 2019, alleging a violation of procedural provisions due to failure to review the request for extension of the deadline for tax payment, which prevented him from a meritorious review of the appeal. The Appellate Panel, on 28 March 2019, rendered Decision AC-I-19-0037, which rejected the Applicant's appeal, with the same reasoning as the challenged Decision of 21 February 2019, and stated that: *"...from the moment of filing this appeal until the date of the decision, almost three months had passed, the appellant had not paid the tax, nor had he submitted a request for exemption from the court fee"*.

53. In fulfillment of the abovementioned criteria deriving from the right of access to court, the Court notes that, in the circumstances of this case we are dealing with a "dispute" and a "civil right" between the Applicant and the PAK, namely with the realization of the claimed salaries in the amount of 16,420.00 euro, for the period June 1999-2007, as well as the payment of 20%, from the privatization funds of the enterprise SOE Fabrika for the production of pipes and steel profiles in Ferizaj.

54. Having fulfilled the two abovementioned conditions, the Court further assesses the source of the Applicant's right to file a request for extension of the period for payment of the tax and whether such a request should be considered by the Appellate Panel, before finally deciding on the appeal.

55. According to the case file, the Court finds that the right of the Applicant to exercise the right to submit a request for extension of the deadline for payment of the court fee derives from Article 8, paragraph

(5) of Administrative Instruction No. 01/2017 on unification of court taxes, which provides that:

> *"8.5 The judge or presiding judge to whom the case has been allocated may give additional time to the* ***party that has requested an extension of tax payment term*** *at its full amount or a part thereof, should he/she find that:*
>
> *8.5.1 the party does not qualify as a party exempt from paying taxes as per Article 8.1, and*
>
> *8.5.2 the extension of the term for the payment of the tax at its full amount or a part thereof is necessary to ensure the protection of the rights of the party."*

56. In the Court's assessment, the Applicant's request was fully legitimate and based on Administrative Instruction No. 01/2017, cited above, which provides for the procedural steps for exercising the rights to: 1) exemption from payment of court fees, and 2) extension of the deadline for payment of court fees. The purpose of these arrangements, which are made available to the parties filing lawsuits or complaints, is to enable the parties to access the court, when the conditions set out in the above-mentioned Instruction are met. Otherwise, the inclusion of such arrangements would have no effect and in itself would make the norm meaningless.

57. The Court reiterates that it is not its role to assess whether the regular courts have correctly interpreted and applied the relevant rules of substantive and procedural law. However, in cases where a claim raises constitutional issues, namely irregularities in the judicial process, the Court is obliged to intervene and remedy the violations caused by the regular courts, in order to ensure the individual a fair trial in accordance with Article 31 of the Constitution and Article 6 of the ECHR.

58. Referring to the present case, the Court finds that the Applicant, faced with such factual and legal circumstances, from 29 November 2018 was awaiting the review of his request and the provision of a reasoned response by the Appellate Panel. However, the latter, without taking into account his request of 29 November 2018, considered his appeal as withdrawn. Faced with such a circumstance, the Appellate Panel was obliged to review the Applicant's request, in accordance with paragraph 5 of Article 8 of Administrative Instruction No. 01/2017 on unification of court taxes, before considering the appeal of the Applicant as withdrawn.

59. Only after reviewing the request for extension of the deadline for payment of the court fee and giving a reasoned response to this request, it can be said that the Appellate Panel has respected the Applicant's right of access to justice. The Court also notes that regardless of the conclusion reached by the Appellate Panel, after considering the request for extension of the deadline for payment of the fee and providing a reasoned response to this request, the Applicant's right to address the court would be considered effectively exercised. In this situation, the Appellate Panel had neither considered his request nor provided any reasoning as to why his request should not have been addressed.

60. From the abovementioned considerations, the Court finds that the non-review of the Applicant's request by the Appellate Panel constitutes an insurmountable procedural flaw which is contrary to the right of access to justice, guaranteed to individuals by Article 31 of the Constitution and Article 6.1 of the ECHR.

61. The Court, finding that the challenged Decision of the Appellate Panel of 21 February 2019 is contrary to Article 31 of the Constitution and Article 6.1 of the ECHR, considers it unnecessary to address at this stage the Applicant's allegations of violation of the rights guaranteed by Article 54 of the Constitution and Article 1 of Protocol No. 1 to the ECHR.

62. In conclusion, the Court finds that the challenged Decision [AC-I-0547-A0001] of the Appellate Panel, of 21 February 2019, by which the Applicant's appeal was considered as withdrawn, did not respect the Applicant's right of "access to court".

63. Therefore, the Court finds that in the present case there has been a violation of Article 31 [Right to a Fair and Impartial Trial] of the Constitution and Article 6.1 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 10 November 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR;

III. TO DECLARE Decision AC-I-0547-A0001 of the Appellate Panel of 21 February 2019 invalid and REMANDS the latter for reconsideration, in compliance with the Judgment of the Court;

IV. TO ORDER the Appellate Panel of the SCSC to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court, not later than 10 May 2021;

V. TO ORDER that its Judgment KI80/19 be notified to the parties and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VI. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Applicant: Et-hem Bokshi and Others; Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matters of 29 August 2019

KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19, Judgment of 10 December 2020, published on 29 December 2020

Keywords: individual referral, lack of hearing, violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights

The circumstances of the present case are related to the privatization of the Enterprise SOE "Agimi" in Gjakova and the respective rights of employees to be recognized the status of employees with legitimate rights to participate in the revenues of twenty percent (20%) from this privatization, as defined in Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to the Law on the Special Chamber of the Supreme Court and paragraph 4 of Article 10 (Employees' Rights) of Regulation No. 2003/13 and amended by Regulation No. 2004/45.

The Applicants were not included in the Provisional List of Employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of SOE "Agimi". They individually filed complaints with the Privatization Agency of Kosovo. These complaints were rejected. Consequently, the Applicants initiated a lawsuit in the Specialized Panel of the Special Chamber of the Supreme Court, challenging the Decision of the Privatization Agency of Kosovo regarding the determination of facts and interpretation of law, also claiming that they had been discriminated against. All the Applicants requested to hold a hearing before the Specialized Panel.

The Specialized Panel rejected the request for a hearing on the grounds that "*the facts and evidence submitted are quite clear*", entitling the Applicants, with the exception of two of them, and finding that they had been discriminated against, therefore they should be included in the Final List of the Privatization Agency of Kosovo. Acting on the basis of the appeal of the Privatization Agency of Kosovo against this Judgment, in August 2019, the Appellate Panel rendered the challenged Judgment, which approved the appeal of the Privatization Agency of Kosovo and modified the Judgment of the Specialized Panel, removing "*from the list of beneficiaries of 20% from the privatization process of SOE "Agimi" Gjakova*", all Applicants. The

Applicants challenge this Judgment before the Court, claiming that it was rendered in violation of Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to a fair trial) and 1 (Protection of Property) of Protocol No. 1 of the European Convention on Human Rights. With regard to the violations of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, the Applicants allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without sufficient reasoning; (iii) in an arbitrary interpretation of law; and (iv) in violation of their right to a trial within a reasonable time.

In assessing the Applicants' allegations, the Court focused on those related to the absence of a hearing before the Special Chamber of the Supreme Court, and in this context, (i) first elaborated on the general principles regarding the right to a hearing, as guaranteed by the Constitution and the European Convention on Human Rights; and subsequently, (ii) applied the latter to the circumstances of the present case. The Court, based, *inter alia,* on the Judgment of the Grand Chamber of the European Court of Human Rights, *Ramos Nunes de Carvalho and Sá v. Portugal*, clarified the key principles relating to (i) the right to a hearing in the first instance courts; (ii) the right to a hearing in the second and third instance courts; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first-instance hearing can be corrected through a higher-instance hearing and the relevant criteria for making that assessment. Furthermore, the Court specifically examined and applied the case law of the European Court of Human Rights on the basis of which it is assessed whether the absence of a request for a hearing can be considered as an implicit waiver of such a right by the parties.

Based on these principles, the Court found that the challenged Judgment, namely the Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, regarding the right to a hearing, *inter alia*, because (i) the fact that the Applicants did not request a hearing before the Appellate Panel does not imply their waiver of this right nor does it exempt the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both instances of the Special Chamber of the Supreme Court; (iii) the Appellate Panel did not address "*exclusively legal or highly technical matters*", the issues on the basis of which "*extraordinary circumstances that could justify the absence of a hearing*" could have existed; (iv) The Appellate Panel considered issues of "*fact and law*", which, in principle, require holding of a hearing; and (v) the Appellate Panel did not reason the "*waiver of oral hearing*".

Therefore, the Court found that the abovementioned Judgment of the Supreme Court should be declared invalid, and be remanded for reconsideration to the Appellate Panel of the Special Chamber of the Supreme Court. The Court also emphasized the fact that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, in the circumstances of the present case, relates exclusively to the absence of a hearing, and does not in any way correlate nor prejudice the outcome of the merits of the case.

JUDGMENT

In cases no. KI145/19, KI146/19, KI147/19, KI149/19, KI150/19, KI151/19, KI152/19, KI153/19, KI154/19, KI155/19, KI156/19, KI157/19 and KI159/19

Applicant

Et-hem Bokshi and others

Constitutional review of Judgment AC-I-13-0181-A0008 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters of 29 August 2019

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

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

Applicants

1. The Referral KI145/19 was submitted by Et-hem Bokshi; Referral KI146/19 was submitted by Agim Muhaxhiri; Referral KI147/19 was submitted by Isa Hoti; Referral KI149/19 was submitted by Gëzime Zhubi-Buza; Referral KI150/19 was submitted by Nanije Deva-Hasi; Referral KI151/19 was submitted by Valbonë Krelani-Elezi; Referral KI15219 was submitted by Rafet Zhubi; Referral KI153/19 was submitted by Fakete Thaçi-Dina; Referral KI15419 was submitted by Jakup Morina; Referral KI15519 was submitted by Burbuqe Shala; Referral KI156/19 was submitted by Shkelzen Krelani; Referral KI157/19 was submitted by Bukurije Bordoniqi; and Referral KI15919 was submitted by Agim Haxhibeqiri, all residing in the Municipality of Gjakova (hereinafter: the Applicants).

Challenged decision

2. The Applicants challenge the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of SCSC) in conjunction with Judgment [SCEL-11-0075] of 4 September 2013 of the Specialized Panel of the Special Chamber of the Supreme Court (hereinafter: the SCSC).

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment, whereby the Applicants allege a violation of their fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair Trial and Impartial Trial] and 46 [Protection of Property] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol No. 1 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 12 September 2019, the Applicants Et-hem Bokshi and Agim Muhaxhiri submitted their Referrals by mail service to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 14 September 2019, the Applicant Isa Hoti submitted the Referral to the Court by mail service.

7. On 18 September 2019, the Applicants: Gëzime Zhubi-Buza, Valobonë Krelani-Elezi, Rafet Zhubi, Fakete Thaqi-Dina, Jakup Morina, Burbuqe Shala, Shkelzen Krelani and Bukurije Bordoniqi, submitted their Referrals to the Court by mail service.

8. On 19 September 2019, the Applicants: Nanije Deva-Hasi and Agim Haxhibeqiri submitted their Referrals by mail service to the Court.

9. On 30 September 2019, the President of the Court for case KI145/19 appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Bajram Ljatifi and Safet Hoxha.

10. On 30 September 2019, in accordance with paragraph (1) of Rule 40 (Joinder and Severance of Referrals) of the Rules of Procedure, the President of the Court ordered the joinder of Referrals Kl14619, Kl147/19, Kl14919, Kl15019 and Kl151/19, Kl15219, Kl15319, Kl15419, Kl155/19, Kl156/19, Kl15719 and Kl159/19 with Referral KI145/19.

11. On 23 October 2019, the Court notified (i) the Applicants about the registration and joinder of the Referrals; and (ii) the SCSC about the registration of Referrals and their joinder.

12. On 23 November 2020, the Court requested the full case file from the SCSC.

13. On 30 November 2020, the SCSC submitted the case file to the Court.

14. On 10 December 2020, the Review Panel considered the report of the Judge Rapporteur, and by a majority, recommended to the Court the admissibility of the Referral.

15. On the same date, the Court by a majority found that (i) the Referral is admissible; and found that (ii) Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, is not in compliance with Article 31 [Right to Fair and Impartial Trial] of Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

16. On 15 September 2010, the Privatization Agency of Kosovo (hereinafter: the PAK) privatized the socially-owned enterprise SOE "Agimi" in Gjakova (hereinafter: SOE "Agimi"). On the same date, by letter [no. 1065], the Applicants were notified that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". All Applicants were employees of the respective enterprise at regular intervals.

17. Based on the case file and taking into account that the Applicants were not part of the Provisional List of employees with legitimate rights to participate in the twenty percent (20%) revenues from the privatization of SOE ”Agimi”, the latter individually filed complaints with the PAK. The latter, on 13 December 2011, rejected the relevant complaints as ungrounded. Regarding the Applicants Fakete Thaqi-Dina and Et-hem Bokshi, it stated that they did not submit sufficient evidence, while regarding the Applicants Agim Muhaxhiri, Nanije Deva-Hasi, Shkelzen Krelani, Rafet Zhubi and Isa Hoti, it emphasized that the same have submitted the work booklet, but that the latter was closed and consequently “*employees were not employed in the SOE at the time it was privatized*”.

18. On 22 December 2011, through the media: (i) the Final List of employees with legitimate rights to participate in the twenty percent (20%) of the privatization proceeds of the SOE ”Agimi” was published (hereinafter: the Final List); and (ii) 14 January 2012 was set as the deadline for submitting complaints to the SCSC against the Final List.

19. Between 28 December 2011 and 13 January 2012, the Applicants individually filed a complaint with the Specialized Panel of the SCSC, due to non-inclusion in the Final List. In principle, all had claimed that they were not treated equally with the other employees included in the Final List, and consequently were discriminated against. Furthermore, some of the Applicants submitted the following additional documents: (i) Fakete Thaqi-Dina, attached the certificate of work experience and personal income of 10 May 2010; (ii) Gëzime Zhubi-Buza, attached the work booklet with opening date 1 May 1985 and closing date 8 January 1996; (iii) Rafet Zhubi, attached the employment certificate of 2 November 2009 and the employment booklet with opening date 1 January 1970 and the closing date 31 October 1996; and (iv) Valbonë Krelani-Elezi, attached the Decision for temporary employment no. 158/1 of 01 February 1996 and the work booklet with opening date 10 December 1980 and the closing date 31 July 1994.

20. Between 1 March 2012 and 18 April 2012, the PAK responded to the Applicants’ complaints, stating that the respective Applicants do not meet the criteria set out in Section 4 (Section 10 (Employee Rights) of UNMIK Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2003/13), because (i) they have not provided evidence to prove the continuity of the employment relationship; (ii) at the time of privatization of the Enterprise, the respective Applicants were not

registered as employees of SOE "Agimi"; and (iii) they have not substantiated allegations of discrimination.

21. Between 3 April 2012 and 3 May 2012, by the response to the complaint of the PAK, some of the Applicants submitted letters with additional information regarding the status of the employee in the SOE "Agimi", as follows: (i) Jakup Morina, stressed that there is no access to the work booklet because "*their facility is burned*", noting that he worked for the SOE "Agimi" since 1969 without interruption; (ii) Isa Hoti, submitted the work booklet with the opening date of 13 September 1973 and the closing date of 30 April 1995; (iii) Burbuqe Shala, submitted the work booklet with the opening date of 1 November 1986 and the closing date of 20 March 1993; and (iv) the Applicant Fakete Thaçi-Dina filed the complaint on the right to employment of 29 August 1996, the Decision on annual leave of 15 July 1994 and the contract on deed no. 2278. All the above, including the Applicants Agim Muhaxhiri, Nanije Deva-Hasi, Gëzime Zhubi-Buza, Agim Haxhibeqiri and Rafet Zhubi, stated that (i) all "*documentation is available to company officials*"; and (ii) requested that a hearing be held.

22. On 4 September 2013, the Specialized panel of the SC SC rendered the Judgment [SCEL-11-0075] by which (i) in point II of the enacting clause approved the complaints of the Applicants, Jakup Morina, Ethem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala, and Rafet Zhubi as grounded, stipulating that the latter should be included in the Final List of employees with a legitimate right to participate in the twenty percent (20%) proceeds from the privatization of the SOE "Agimi"; while (ii) rejected as ungrounded the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi.

23. The Specialized Panel, by the abovementioned Judgment, initially determined that based on paragraph 11 of Article 68 (Complaints Related to a List of Eligible Employees) of the Annex to Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Annex to the Law on the SCSC), the hearing was not necessary because "*the facts and evidence adduced are quite clear*". Whereas, with respect to the Applicants, whose complaints were approved, the Specialized Panel noted that (i) the Applicants concerned, if they had not been discriminated against, would have met the criteria set out in paragraph 4 of Article 10 of Regulation. no. 2003/13, noting that "*to them the employment relationship was terminated during the 1990s*

and dismissed and replaced by Serb employees", and that this finding is a consequence of "*world-known events after 1990 and onwards*"; and (ii) in cases where discrimination is alleged, based on Article 8 (Burden of proof) of Anti- discrimination Law No. 2004/3 (hereinafter: the Anti-Discrimination Law), belongs to the respondent, namely PAK, prove that there has been no violation of the principle of equal treatment, evidence that has not been provided by PAK. Finally, regarding the rejection of the appeals of Shkelzen Krelani and Valbonë Krelani-Elezi, through point III of the enacting clause of the respective Judgment, the Specialized Panel stated that they had not submitted evidence to prove the fulfillment of the criteria set out in paragraph 4 of Section 10 of UNMIK Regulation no. 2004/45 on Amending Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (hereinafter: Regulation No. 2004/45).

24. On 26 September 2013, the Specialized Panel of the SCSC rendered the Decision [SCEL-11-0075] by which he corrected the abovementioned Judgment, as the submitted copy of the Judgment in English was the preliminary version and not the final one, while the Albanian language version remained unchanged.

25. On 24 and 30 September 2013, Shkelzen Krelani and Valbonë Krelani-Elezi filed individual appeals against point III of the enacting clause of the Judgment of the Specialized Panel of the SCSC, alleging erroneous determination of factual situation and erroneous application of law, namely paragraph (j) of Article 4 (Implementation Scope) of the Anti-discrimination Law and paragraph 4 of Article 10 of Regulation No. 2003/13. The same alleged that they were discriminated against by being treated unequally with other employees and who were included in the Final List. More specifically, Shkelzen Krelani through the relevant complaint had submitted the following evidence: (i) the certificate issued by the former director of the SOE "Agimi" of 25 September 2013; (ii) the statement of 8 April 2005; (iii) proof of work experience and personal income of 17 January 2009; (iv) excerpt from the personal income statement and insurance record dated 18 January 2012; and (v) the certificate on termination of employment issued by the PAK on 15 September 2012. Whereas, Valbonë Krelani-Elezi through the relevant complaint submitted the following evidence: (i) the certificate issued by the former director of the SOE "Agimi" of 27 September 2013; (ii) proof of work experience and personal income of 17 January 2009; (iii) excerpt from the personal income statement and insurance record dated 18 January 2012; and (iv) the certificate of termination of employment issued by the PAK on 15 September 2012.

The PAK did not file a response to the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi.

26. On 30 September 2013, the PAK filed an appeal against point II of the Judgment of the Specialized Panel of the SCSC, through which the complaint of the Applicants Jakup Morina, Et-hem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala and Rafet Zhubi was approved, alleging erroneous determination of the factual situation and erroneous application of substantive law, with the proposal that point II of the enacting clause of this Judgment be annulled. According to the PAK no appellant who by the challenged Judgment is included in the Final List of employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi" did not present relevant facts on the basis of which he had to prove the fact of unequal treatment and the justification for direct or indirect discrimination in accordance with paragraph 1 of Article 8 of the Anti-Discrimination Law.

27. On 29 August 2019, the Appellate Panel of the SCSC rendered Judgment [AC-I-13-0181-A0008], by which (i) referring to paragraph 1 of Article 69 (Oral Appeal Procedures) of Law no. 06/L-086 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters (hereinafter: Law no. 06/L-086 on the SCSC), the relevant Panel *"decided to give up part of the oral hearing"*; (ii) rejected as ungrounded the complaints of Shkelzen Krelani and Valbonë Krelani-Elezi; while (iii) approved the PAK complaint as grounded, regarding the other Applicants, namely Jakup Morina, Et-hem Bokshi, Agim Haxhibeqiri, Isa Hoti, Bukurije Bordoniqi, Agim Muhaxhiri, Nanije Deva-Hasi, Fakete Thaçi-Dina, Gëzime Zhubi-Buza, Burbuqe Shala and Rafet Zhubi, determining that "*the latter are removed from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi" Gjakova"*.

28. With regard to the Applicant Shkelzen Krelani, the Appellate Panel reasoned that (i) he did not submit evidence to prove his Referral; and (ii) the employment booklet shows that he was employed on 1 June 1983 and terminated on 31 July 1994, *"due to starting of work as an independent entrepreneur"*. Regarding the Applicant Valbona Krelani-Elezi, the Appellate Panel reasoned that (i) the latter did not submit evidence to prove the request; and (ii) it appears from the employment booklet that she was employed on 10 December 1980, while the termination of employment occurred on 5 January 1983 and resumed work on 15 February 1984, ending employment on 31 July 1994, *"due to starting of work as an independent entrepreneur"*. In

the case of both abovementioned Applicants, the Appellate Panel noted that the legal criteria pursuant to paragraph 4 of Article 10 of Regulation no. 2003/13 and amended by Regulation no. 2004/45, are not supplemented because "*the employee is considered legitimate if he/she is registered as an employee of the socially owned enterprise at the time of privatization and if it is found that he was on the payroll of the enterprise for not less than three (3) years*".

29. Whereas, regarding the approval as grounded of the complaint of the PAK, the Appellate Panel, *inter alia*, stated that the Applicants (i) with no evidence prove the fact that they were employed in the SOE "Agimi" or that they were on the payroll at the time of the privatization of the enterprise, the requirements that are required to be met based on paragraph 4 of Article 10 of Regulation no.2003/13, to recognize the right of inclusion in the final list of the SOE "Agimi" for obtaining twenty percent (20%) from the sale of the enterprise; and (ii) does not agree with the finding of the Specialized Panel regarding discrimination of relevant employees *"because according to the practice established by the Special Chamber regarding the interpretation of discrimination, this employee as he is of Albanian nationality could not have been discriminated against after June 1999"*.

30. With regard to allegations of discrimination, the Appellate Panel also noted that "*the case law*" of the SCSC, based on Judgments [ASC-11-0069] and [AC-I-12-0012], stipulates that discriminated against can be counted: (i) "*the employees of Albanian ethnicity, or belonging to the Ashkali, Roma, Egyptian, Gorani and Turkish minorities, who had left for reasons of discrimination in the so-called period of "interim Serbian measures" (ranging from 1989 to 1999), or who were discriminated against in different periods, due to their ethnicity, political and religious beliefs, etc.*."; and (ii) "*Serb ethnic employees who, due to lack of security after 1999, did not show up for work and were not included in the final lists of employees*".

31. Furthermore, with regard to the Applicant (i) Rafet Zhubi, he clarified that the latter submitted a copy of the work booklet as evidence, based on which the fact that "*the latter has started work at the SOE "Agimi" from 1 January 1970, while his employment was terminated on 31 October 1996. The complainant alleges that this Applicant was born on 7 December 1938 and from this the court finds the fact that the complainant at the time of privatization of the enterprise has reached retirement age and therefore the complainant does not meets the conditions of being on the payroll at the time of privatization of the enterprise*"; (ii) Gëzime Zhubi-Buza, explained that she had presented

as evidence the copy of the work booklet, "*from which the court confirms the fact that the latter has started work at the SOE "Agimi" from 1 May 1985 while she completed her work on 8 January 1996 also confirms from the employment booklet the fact that the complainant from 9 January 1996 has established a new employment relationship at the SOE "Printeks", Prizren and terminated the latter on 1 October 1998*", and that consequently, the rights claimed by the SOE "Agimi" do not belong to her (iii) Burbuqe Shala, explained that the latter had presented as evidence a copy of the work booklet, "*from which the court confirms the fact that the latter started work at the SOE "Agimi" from 1 November 1986 while she finished her work on 20 March 1993, from the employment booklet is also confirmed the fact that the complainant from 20 March 1993 has established a new employment relationship in NT "DEMOS" and completed the latter on 20 May 1993, also from the employment booklet it can be seen that the complainant has established an employment relationship in the SOE "TIKI Comerc" from 21 May 1993 and completed the latter on 31 March 1995", and that consequently, the rights claimed from the SOE "Agimi" do not belong to her*; and (iv) Fakete Thaçi-Dina, clarified that the latter presented as evidence "*a certificate issued by the Ministry of Labor and Social Welfare for work experience and personal income*", but that the latter does not constitute relevant evidence.

Applicants' allegations

32. The Applicants allege that by Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC, their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Article 6 (Right to a fair trial) and Article 1 (Protection of Property) of Protocol no. 1 of the ECHR have been violated.

33. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants initially state that all were employees of the SOE "Agimi", and that this is also confirmed by the letter of the PAK which was addressed to them on 15 September 2010, by which they were notified that as a result of the privatization of the enterprise in question, all relevant employment relationships have been terminated, and that consequently the latter, meet the criteria set out in paragraph 4 of Article 10 of Regulation 2003/03 to benefit from the twenty percent (20%) of the privatization of the respective enterprise. Furthermore, the Applicants state that they have submitted the available evidence, but that "*relevant*

evidence was available to the Personnel Office of J.S.C. "Agimi" in Gjakova and then the staff appointed by the PAK, the employees of former JSC or SOE "Agimi" Gjakova".

34. The latter, in essence, allege that the challenged Judgment was rendered contrary to the procedural guarantees established in the abovementioned articles because the latter (i) modified the Judgment of the Specialized Panel and which was in favor of the Applicants, without a hearing, not allowing them to comment on the disputed facts, emphasizing that "*it is true that the Special Chamber has the opportunity to hold a trial even without the presence of the parties, but it is also true that it has the right to schedule a public hearing and it would give the Court and the parties the opportunity to confront submissions and evidence, to make an open, fair and transparent trial that would argue the relevant facts*"; (ii) unlike the Judgment of the Specialized Panel, it contains an arbitrary interpretation regarding discrimination because the burden of proof regarding the allegations of discrimination based on Article 8 of the Anti-Discrimination Law falls on the PAK; (iii) is not justified; and (iv) has violated their rights to a trial within a reasonable time.

35. With regard to the alleged violations of Article 24 of the Constitution, the Applicants state that they have not been treated equally with other employees of the SOE "Agimi", "*legal and factual situation*" of whom is identical to the Applicants, while the challenged Judgment of the Appellate Panel has addressed their allegations in terms of ethnic discrimination, referring to it "*case law*".

36. Finally, the Applicants request the Court: (i) to declare the Referrals admissible; (ii) find that there has been a violation of Articles 24, 31 and 46 of the Constitution in conjunction with Article 6 and Article 1 of Protocol no. 1 of the ECHR; (iii) declare the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the SCSC invalid, and remand the latter for reconsideration in accordance with the Judgment of this Court.

Admissibility of the Referral

37. The Court first examines whether the Referrals have met the admissibility requirements established in the Constitution and further specified in Law and foreseen in the Rules of Procedure.

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

"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
[...]
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".

39. The Court further refers to the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

Article 47 of Law
[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...".

40. Regarding the fulfillment of these requirements, the Court notes that the Applicants are authorized parties, challenging an act of a public authority, namely the Judgment [AC-I-13-0181-A0008] of the Supreme Court of 29 August 2019, of the Appellate Panel of the SCSC after exhaustion of all legal remedies provided by law. The Applicants also clarified the rights and freedoms they claim to have been violated

in accordance with the requirements of Article 48 of the Law, and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

41. The Court also finds that the Applicants' Referral meets the admissibility criteria set out in paragraph (1) of Rule 39 (Admissibility Criteria) of the Rules of Procedure. The latter cannot be declared inadmissible on the basis of the requirements set out in paragraph (3) of Rule 39 of the Rules of Procedure. Furthermore, and finally, the Court considers that this Referral is not manifestly ill-founded as established in paragraph (2) of Rule 39 of the Rules of Procedure and, consequently, it must be declared admissible and its merits examined.

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.*

[...]

Article 24
[Equality Before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.
3. Principles of equal legal protection shall not prevent the imposition of measures necessary to protect and advance the rights of individuals and groups who are in unequal positions. Such measures shall be applied only until the purposes for which they are imposed have been fulfilled.

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.
[...]

Law No. 04/l-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

Article 10
Judgments, Decisions and Appeals

[...]
11. When the appellate panel has accepted and is deciding on an appeal, the following rules shall be strictly observed: 11.1. the appellate panel shall not modify, annul, reverse or otherwise change, in any manner, any finding of fact made by a court, specialized panel, sub-panel or single judge unless the appellate panel determines that such finding of fact is clearly erroneous. A finding of fact shall not be determined to be clearly erroneous if such finding of fact is supported by any reasonable interpretation of the record of the trial proceedings and the evidence submitted during such proceedings; and 11.2. the appellate panel shall conduct a de novo review of each issue of law raised by the appellant or a respondent in their written submissions.
[...]

Annex of the Law No.04/L-033 of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matters

Article 36
General Rules on Evidence

[…]
3. A party alleging a fact or an event shall be given a reasonable opportunity to submit or produce material evidence in support of such allegation. If such party fails to submit or produce any such evidence, the party shall be determined to have not discharged its burden of proof with respect to that allegation.

Article 68
Complaints Related to a List of Eligible Employees

1. The procedure for cases based on complaints falling within the scope of paragraph 1.6 of Article 4 of the Special Chamber Law shall, except as specifically provided in this Article 68, generally follow the other procedural rules set forth in this Annex, which the Special Chamber shall apply mutatis mutandis as the Special Chamber deems necessary and in the interest of justice.
2. Upon receiving a list of eligible employees pursuant to Section 10 UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such a list, the Agency shall publish such list together with a notice to the public of the right of any person to file a complaint with the Agency within twenty (20) days after the date of publication requesting inclusion in such list and/or challenging the inclusion of one or more other persons in such list. The person filing any such request or challenge shall include therein a statement of the facts and the legal arguments supporting such request or challenge; such person shall have the burden of proving all facts alleged in the request and/or challenge.
[…]
6. The Agency shall publish its final list of eligible employees established pursuant to paragraph 5 of this Article in conformity with Section 10.6 of UNMIK Regulation 2003/13, or any successor legislation governing the establishment of such list, together with a notice to the public of the right of any person to file a complaint with the Special Chamber within twenty (20) days after the date of publication challenging such list and/or the Agency's distribution of escrow funds to the persons identified therein. The complainant(s) filing any such complaint shall include therein a statement of the facts and the legal arguments supporting such complaint; the complainant(s) shall have the burden of proving all facts alleged in the complaint

[…]
11. The concerned Specialized Panel, acting on its own initiative or pursuant to a written request of the complainant(s) or the Agency, may decide to hold one or more oral hearings on the matter. If an oral hearing is to be held, the Specialized Panel shall cause the Registrar to serve on the parties, at least five (5) days in advance of such hearing, a written notice of the time and date of such hearing
[…]
14. The Appellate Panel shall dispose of all such appeals as a matter of urgency.

Article 64
Oral Appellate Proceedings

1. The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application must be filed prior to the closing of written appellate procedures.
[…]

Article 65
Submission of New Evidence

In exceptional circumstances and for good cause shown, the Appellate panel may permit a party to present to the Appellate Panel new evidence that was not available to the party during the evidentiary portion of the first instance proceedings. A written application for such permission must first be submitted to the Appellate Panel and served on the other parties not less than fifteen (15) days before the date of the hearing where such evidence is proposed to be presented. The Appellate Panel may authorize the presentation of such new evidence if it considers it to be in the interests of justice.

Regulation no. 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property

Article 10
Rights of employees

[…]

10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Socially-Owned Enterprise at the time of privatisation and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6.
[…]

REGULATION NO. 2004/45 AMENDING UNMIK REGULATION NO. 2003/13 ON THE TRANSFORMATION OF THE RIGHT OF USE TO SOCIALLY-OWNED IMMOVABLE PROPERTY

Section 1
Amendments

As of the date of entry into force of the present Regulation,
[…]
B. Sections 10.1, 10.2 and 10.4 of UNMIK Regulation No. 2003/13 shall be amended to read
[…]
10.4 For the purpose of this section an employee shall be considered as eligible, if such employee is registered as an employee with the Sociallyowned Enterprise at the time of privatisation or initiation of the liquidation procedure and is established to have been on the payroll of the enterprise for not less than three years. This requirement shall not preclude employees, who claim that they would have been so registered and employed, had they not been subjected to discrimination, from submitting a complaint to the Special Chamber pursuant to subsection 10.6
[…]

LAW NO. 06/L –086 ON THE SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO ON PRIVATIZATION AGENCY RELATED MATTERS

Article 69
Oral Appellate Proceedings

The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on one

or more hearing sessions on the concerned appeal. The Appellate Panel shall take into account any application for oral proceedings submitted by any of the parties setting forth its reasons for requesting oral proceedings. Such an application shall be filed prior to the closing of written appellate procedures
[…]

THE ANTI-DISCRIMINATION LAW No. 2004/3

Article 8
Burden of prof

8.1. When persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment
8.2. Paragraph 8.1 shall not prevent the introduction of rules of evidence, which are more favourable to plaintiffs. Further, a complainant may establish or defend their case of discrimination by any means, including on the basis of statistical evidence.

Merits

42. The Court recalls that the circumstances of the present case relate to the privatization of the socially-owned enterprise SOE "Agimi" in Gjakova, and the rights of the respective employees to be recognized as employees with legitimate rights to participate in the twenty percent (20%) revenues from this privatization, as defined in Article 68 of the Annex to the Law on SCSC, and paragraph 4 of Article 10 of Regulation no. 2003/13 amended by Regulation no. 2004/45. Based on the case file, it results that the abovementioned socially-owned enterprise was privatized on 15 September 2010, the date on which the Applicants were also notified through individual documents that "*the consequence of the sale of the main assets is the termination of your employment*" and that the latter "*is terminated immediately*". The Applicants subsequently challenged their non-inclusion in the PAK Provisional List of Employees with legitimate rights to participate in twenty percent (20%) of the Privatization of SOE "Agimi". These complaints were rejected. Subsequently, the Applicants initiated a lawsuit in the Specialized Panel, challenging the PAK Decision, both regarding the establishment of facts and the interpretation of the law. The latter had allegedly been discriminated against and all requested a hearing before the Specialized Panel. The latter rejected the request for a hearing on the grounds that "*the facts and evidence submitted*

are quite clear", and gave the right to the Applicants, with the exception of the Applicants Shkelzen Krelani and Valbonë Krelani-Elezi, stating that the latter were discriminated against. The Specialized Panel, among others, stated that in the absence of discrimination, the Applicants would have met the criteria set out in paragraph 4 of Article 10 of Regulation No. 2003/13, as employees with legitimate rights to participate in the revenues of twenty percent (20%) from the privatization of the SOE "Agimi".

43. Following the issuance of this Judgment, (i) Shkelzen Krelani and Valbonë Krelani-Elezi, the only Applicants whose appeal was rejected by the Specialized Panel as ungrounded, filing an appeal with the Appellate Panel, additional documents; and (ii) the PAK. Neither the first nor the second requested a hearing. In August 2019, the Appellate Panel issued the challenged Judgment, by which it approved the appeal of the PAK and rejected the appeal of Shkelzen Krelani and Valbonë Krelani Elezi, modifying the Judgment of the Specialized Panel and consequently, removing *"from the list of beneficiaries of 20% from the privatization process of the SOE "Agimi "Gjakova*", all the Applicants. The Appellate Panel initially stated that it had decided to "*waive part of the oral hearing*", referring to paragraph 1 of Article 69 (Oral Appellate Proceedings) of Law No. 06/L-086 on the SCSC. Whereas, regarding the merits of the case, (i) had found that the evidence presented by the respective parties does not prove that they meet the legal requirements set out in paragraph 4 of Article 10 of Regulation no. 2003/13 to recognize the relevant rights; and (ii) stated that the interpretation of discrimination by the Specialized Panel was contrary to the "*case law*" of the SCSC. These findings of the Appellate Panel are challenged by the Applicants before the Court, alleging a violation of their rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 46 [Protection of Property] of the Constitution and Articles 6 (Right to a fair trial) and 1 (Protection of property) of Protocol no. 1 of the ECHR. With regard to violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicants, as explained above, allege that the Appellate Panel modified the Judgment of the Specialized Panel, (i) without a hearing; (ii) without a sufficient reasoning; (iii) in an arbitrary interpretation of the law; and (iv) in violation of their right to a trial within a reasonable time.

44. These categories of allegations will be examined by the Court on the basis of the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the

Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

45. In this regard, the Court will first examine the Applicants' allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR due to the absence of a hearing at the level of the Appellate Panel. To this end, the Court will first (i) elaborate on the general principles regarding the right to a hearing as guaranteed by the aforementioned Articles of the Constitution and the ECHR; and then, (ii) apply the latter to the circumstances of the case.

(i) General principles regarding the right to a hearing

46. The public nature of proceedings before judicial bodies referred to in Article 31 of the Constitution in conjunction with paragraph 1 of Article 6 of the ECHR, protects litigants from the administration of justice in secret, in the absence of a public hearing. Publicity of court proceedings is also one of the main mechanisms through which trust in justice is maintained. Such a principle, moreover, contributes to the achievement of the goals of Article 31 of the Constitution and Article 6 of the ECHR, for a fair trial, the guarantee of which is one of the fundamental principles of any democratic society embodied in Constitution and ECHR. (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 381 to 404 and references used therein).

47. In principle, litigants are entitled to a public hearing, but such an obligation is not absolute. As relevant to the present circumstances, the case law of the ECtHR has developed key principles concerning (i) the right to a hearing in the courts of first instance; (ii) the right to a hearing in the courts of second and third instance; (iii) the principles on the basis of which it should be determined whether a hearing is necessary; and (iv) whether the absence of the first instance hearing can be corrected through a higher instance hearing and the relevant criteria for making that assessment. However, in all circumstances, the absence of a hearing must be justified by the relevant court.

48. With regard to the first issue, namely the obligation to hold a hearing in the courts of first instance, the ECtHR has emphasized that in the proceedings before a sole and first instance court, the right to a hearing is guaranteed by paragraph 1 of Article 6 of the ECHR (See, *inter alia,* the ECtHR cases *Fredin v. Sweden* (no. 2), Judgment of 23 February 1994, paragraphs 21-22; *Allan Jacobsson v. Sweden* (no. 2), Judgment of 19 February 1998, paragraph 46 *Göç v. Turkey*,

Judgment of 11 July 2002, paragraph 47; and *Selmani and Others v. the former Yugoslav Republic of Macedonia*, Judgment of 9 February 2017, paragraphs 37-39). Exceptions to this general principle are cases in which "*there are extraordinary circumstances that would justify the absence of a hearing*" in the first and only instance. (See, in this regard, the cases of the ECtHR, *Hesse-Anger and Anger v. Germany*, Decision of 17 May 2001; and the *Mirovni Institute v. Slovenia*, Judgment of 13 March 2018, paragraph 36; see also the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 382 and references used therein). The character of such extraordinary circumstances stems from the nature of the cases involved in a case, for example, the cases dealing exclusively with legal matters or are of a very technical nature (See the case of the ECtHR, *Koottummel v. Austria*, Judgment of 10 December 2009, paragraphs 19 and 20).

49. With regard to the second case, namely the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified on the basis of the specific characteristics of the the relevant case, provided that a hearing has been held in the first instance. (See, in this context, the case of the ECtHR, *Salomonsson v. Sweden*, Judgment of 12 November 2002, paragraph 36). Therefore, proceedings before the courts of appeal, which involve only matters of law and not matters of fact, may be considered to be in accordance with the guarantees embodied in Article 6 of the ECHR, even if in the second instance there has not been a hearing. (See the case of the ECtHR, *Miller v. Sweden*, Judgment of 8 February 2005, paragraph 30; and see also ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural requirements; B. Public hearing, paragraphs 383 and references used therein). Having said that, and in principle, the absence of a hearing can only be justified through the "*existence of exceptional circumstances*", as defined through the case law of the ECtHR, otherwise one is guaranteed to the parties in at least one level of jurisdiction, based on Article 31 of the Constitution in conjunction with Article 6 of the ECHR (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural Requirements; B. Public Hearing, paragraph 386 and references used therein).

50. With regard to the third issue, namely the principles on the basis of which it must be determined whether a hearing is necessary, the Court refers to the Judgment of 6 November 2018 of the ECtHR: *Ramos Nunes de Carvalho and Sá v. Portugal*, in which the Grand Chamber of the ECtHR established the principles on the basis of which the

necessity of a hearing should be assessed. According to this Judgment, a hearing is not necessary if the relevant case (i) involves merely legal matters of a limited nature (see ECtHR cases *Allan Jacobsson v. Sweden* (no. 2), cited above, para 49; and *Valová, Slezák and Slezák v. Slovakia*, Judgment of June 2004, paragraphs 65-68) or does not involve any special complexity (see the case of the ECtHR, *Varela Assalino v. Portugal*, Decision of 25 April 2002); involves highly technical matters , which are better addressed in writing than through oral arguments in a hearing; and (iii) does not involve issues of credibility of the parties or disputed facts and the courts may decide fairly and reasonably on the basis of the parties' submissions and other written materials. (See the cases of the ECtHR, *Döry v. Sweden*, Judgment of 12 November 2002, paragraph 37; and *Saccoccia v. Austria*, Judgment of 18 December 2008, paragraph 73).

51. On the contrary, based on the aforementioned Judgment, a hearing is necessary if the relevant case (i) involves the need to consider issues of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly (see, *inter alia*, the cases of the ECtHR, *Malhous v. Czech Republic*, Judgment of 12 July 2001, paragraph 60; and *Fischer v. Austria*, Judgment of 26 April 1995, paragraph 44); and (ii) requires the relevant court to gain a personal impression of the parties concerned, and to allow them the opportunity to clarify their personal situation, in person or through the relevant representative. Examples of this situation are cases where the court must hear evidence from the parties concerning personal suffering in order to determine the appropriate level of compensation (see ECtHR cases, *Göç v. Turkey*, cited above, paragraph 51; and *Lorenzetti v. Italy*, Judgment of 10 April 2012, paragraph 33) or must provide information about the character, conduct and dangerousness of a party (See the case of the ECtHR, *De Tommaso v. Italy*, Judgment of 23 February 2017, paragraph 167).

52. With regard to the fourth case, namely the possibility of a second-instance correction of the absence of a first-instance hearing and the respective criteria, the ECtHR through its case law has determined that in principle, such a correction depends on powers of the highest court. If the latter has full jurisdiction to examine the comptencies of the case at hand, including the assessment of the facts, then the correction of the absence of a hearing in the first instance may be made in the second instance (See the case of the ECtHR, *Ramos Nunes de Carvalho v. Portugal*, cited above, paragraph 192 and references used therein; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural

requirements; B. Public hearing, paragraphs 384 and references used therein).

53. Finally, according to the case-law of the ECtHR, the fact that the parties did not request to hold a hearing does not mean that they waived their right to hold one. (For more on the waiver of the right to a hearing, see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, Civil limb, IV. Procedural Criteria B. Public Hearing, paragraphs 401 and 402 and references used therein). Based on the case law of the ECtHR, such a case depends on the characteristics of domestic law and the circumstances of each case separately (See the case of the ECtHR, *Göç v. Turkey*, cited above, paragraph 48; and also see the ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a fair trial, civil limb, IV. Procedural Requirements B. Public Hearing, paragraph 403 and references used therein).

(i) Application of the principles elaborated above to the circumstances of the present case

54. The Court first recalls that based on the case law of the ECtHR, Article 6 of the ECHR, in principle, guarantees that a hearing be held at at least one level of decision-making. Such is, in principle, mandatory (i) if the court of first instance has sole jurisdiction to decide matters of fact and law; (ii) not mandatory in the second instance if a hearing is held in the first instance, despite the fact that such a determination depends on the characteristics of the case at hand, for example, if the second instance decides on both fact and law; and (iii) mandatory in the second instance if one has not been held in the first instance, in cases where the second instance has full competence to assess the decision of the first instance, also with regard to the issues of fact and law. Exceptions to these cases, in principle, are made only if "*there are exceptional circumstances that would justify the absence of a hearing*", and which the ECtHR, as explained above, through its case law has defined as cases that deal exclusively with legal issues or are of a highly technical nature.

55. Based on the principles set out above, in the following the Court must first assess, in the circumstances of the present case, the fact that the Applicants did not request a hearing before the Appellate Panel may result in their finding that they have waived the right implicitly from a hearing. If the answer to this question turns out to be negative, then the Court, based on the case law of the ECtHR, must assess whether in the circumstances of the present case "*there are exceptional circumstances that would justify the absence of a hearing*" in the two

instances of decision-making, before the Specialized Panel and the Appellate Panel. The Court will also make this assessment based on the principles established by the Judgment of the Grand Chamber *Ramos Nunes de Carvalho and Sá v. Portugal*.

a) If the Applicants have waived the right to a hearing

56. In this regard, the Court first recalls that through individual complaints filed with the Specialized Panel, all Applicants requested a hearing. The Specialized Panel rejected to hold the latter, stating that based on paragraph 11 of Article 68 of the Annex to the Law on the SCSC, a hearing was not necessary because "*the facts and evidence submitted are quite clear*". As has already been clarified, the Specialized Panel, based on these "*facts and evidence*", had decided that the Applicants, with the exception of Applicants Valbonë Krelani-Elezi and Shkelzen Krelani, were also discriminated against by deciding that they should be included in the Final List of PAK as employees with legitimate rights to participate in the twenty percent (20%) proceeds of the privatization of the SOE "Agimi".

57. Only the PAK and Valbonë Krelani-Elezi and Shkelzen Krelani filed appeals with the Appellate Panel because their appeal was rejected by the Judgment of the Specialized Panel. The Appellate Panel decided in favor of the PAK, modifying the Judgment of the Specialized Panel and rejecting the appeals of all Applicants regarding non-inclusion in the PAK Final List as a result of discrimination. As explained above, the Appellate Panel decided to "*waive the right of the oral hearing*", referring to paragraph 1 of Article 69 of Law no. 06/L-086 on the SCSC. The Applicants, namely Valbonë Krelani-Elezi and Shkelzen Krelani, the only Applicants who had appealed to the Appellate Panel due to the rejecting Judgment in the first instance, did not request to hold a hearing. The Applicants, who had submitted additional documents in response to the PAK appeal against the Judgment of the Specialized Panel, also did not request a hearing.

58. However, as explained above, the fact that the Applicants did not request a hearing does not necessarily mean that they implicitly waived such a request, and also the lack of such a request does not necessarily exempt the relevant court from the obligation to hold such a hearing.

59. More specifically, based on the case law of the ECtHR, in the circumstances of cases in which the parties have not requested a hearing, the ECtHR, *inter alia*, assesses whether the absence of such a request can be considered as an implicit waiver of an applicant from

the right to a hearing. Having said that, the lack of a request for a hearing, based on the case law of the ECtHR, is never the only factor that determines the necessity of holding a hearing. In all cases, whether the absence of a request for a hearing exempts a court of the obligation to hold a hearing depends on (i) the specifics of the applicable law; and (ii) the circumstances of a case (See ECHR Guide of 30 April 2020 on Article 6 of the ECHR, Right to a Fair Trial, Civil limb, IV. Procedural Criteria; B. Public Hearing, paragraphs 401 to 404 and references used therein) . In the following, the Court will assess these two categories of issues.

60. First, with regard to the specifics of the applicable law, namely the Law and the Annex to the Law on the SCSC, the Court recalls that pursuant to Article 64 (Oral Appellate Proceedings) of the same law, "*The Appellate Panel shall decide to whether or not to hold on or more oral hearings on the concerned appeal*", based on its initiative or even a written request from a party. Article 69 (Oral Appellate Proceedings) of Law no. 06/L-086 on the SCSC, has the same content. Based on these provisions, consequently, the holding of a hearing at the instance of appeal, does not necessarily depend on the request of the party. It is also the task of the respective Panel, based on its initiative, to assess whether the circumstances of a case require a hearing to be held. Furthermore, based on Article 60 (Content of appeal) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the Appellate Panel has the comptence to assess both issues of law and fact, and consequently, is equipped with full competence to assess how the lower authority, namely the Specialized Panel, has assessed the facts. In the circumstances of the present case, the Appellate Panel assessed the facts and allegations of the Applicants and modified the Judgment of the Specialized Panel regarding the assessment of the facts and the interpretation of the law, to the detriment of the Applicants. In such circumstances, taking into account the legal provisions, the Court cannot find that the absence of a hearing in the Appellate Panel is justified only as a result of the absence of a request by the parties to the proceedings, especially given the fact that the Applicants did not file appeal against the Judgment of the Specialized Panel, which was in their favor. As explained above, based on Article 64 of the Annex to the Law on SCSC and Article 69 of Law no. 06/L-086 on the SCSC, it is the obligation of the Appellate Panel, even on its own initiative, to assess whether the holding of a hearing is mandatory, and if not, to justify the non-holding of the latter.

61. Secondly, with regard to the circumstances of a case, the Court recalls that the case law of the ECtHR states that the absence of a request for a hearing, and the assessment of whether this fact may result in the

finding that the party concerned implicitly waived the right to a hearing, it should be assessed in the entirety of the specifics of a procedure, and not as a single argument, to determine whether or not the absence of a hearing has resulted in a violation of Article 6 of the ECHR.

62. More specifically, in cases where a party concerned has not made a request for a hearing, the ECtHR assessed whether the absence of such a request can be considered as an implied waiver of a hearing, always in the light of applicable law and circumstances. of a case. For example (i) in the case of *Miller v. Sweden* (Judgment of 6 May 2005), in which the Applicant did not request the holding of a hearing at the appellate level, but she requested a hearing at the first instance, resulted in the finding of the ECtHR that the request for a hearing was made at the "*most appropriate stage of proceedings*" and consequently, the ECtHR stated that it could not be concluded that the party has implicitly waived the request for a hearing. Furthermore, in combination with the finding that at the appeal level both fact and law issues had been examined, and consequently the nature of the issues under review was neither exclusively legal nor technical, the ECtHR found that there were no exceptional circumstances that would justify the absence of a hearing, finding a violation of Article 6 of the ECHR (see the case of the ECtHR: *Miller v. Sweden*, cited above, paragraphs 28-37); also (ii) in the case *Salomonsson v. Switzerland* (Judgment of 12 February 2003), in which the Applicant did not request a hearing in either of the instances, although the ECtHR found that the Applicant could be considered to have implicitly waived the right to a hearing (see paragraph 35 of the case of *Salomonsson v. Switzerland*), nevertheless found a violation of Article 6 of the ECHR due to the absence of a hearing, because it concluded that in the circumstances of the present case, there were no exceptional circumstances that would justify the absence of a hearing, especially given the fact that the appellate level also considered factual issues and not just the law. (See ECtHR case *Salomonsson v. Switzerland*, cited above, paragraphs 36-40).

63. On the other hand, in the case of *Goc v. Turkey*, the ECtHR also found a violation of Article 6 of the ECHR due to the absence of a hearing, rejecting the Turkish Government's allegations that (i) the case was simple and that it could to be dealt with promptly only on the basis of the case file, in particular because the respective complainant did not request the submission of any new evidence through the complaint; and that (ii) the Applicant did not request the holding of a hearing. (For the facts of the case, see paragraphs 11 to 26 of ECtHR case *Goç v. Turkey*). In its examination of the respective case, and after

assessing whether there were any exceptional circumstances that would justify the absence of a hearing, the ECtHR found a violation of paragraph 1 of Article 6 of the ECHR, stating, *inter alia*, that (i) despite the fact that the Applicant concerned did not request a hearing, it does not appear from the circumstances of the case that such a request would have any prospect of success; furthermore that (ii) it cannot be considered that the Applicant concerned has waived his right to a hearing by not seeking one before the Court of Appeals as the latter did not have full jurisdiction to determine the amount of compensation; (iii) the Applicant was not given the opportunity to be heard even before the lower instance and which had jurisdiction to assess both the facts and the law; and (iv) the substantive issue, in the circumstances of this case, was whether the Applicants concerned should be offered a hearing before a court which was responsible for establishing the facts of the case (for the reasoning of the case, see paragraphs 43 to 52 of case *Goç v. Turkey*).

64. In contrast, in other cases, the ECtHR found that the fact that an Applicant did not request a hearing could be considered as an implied waiver of this right, but always together with the assessment of whether, in the circumstances of a case, there are exceptional circumstances which would justify the absence of a hearing. For example, in the cases of *Schuler-Zgraggen v. Switzerland* (Judgment of 24 June 1993) and *Dory v. Sweden* (Judgment of 12 February 2003), in which the Applicants did not request a hearing, the ECtHR found that the latter had implicitly waived the right to a hearing. However, this finding was reached by the ECtHR, only in connection with the finding that the circumstances of the case were of a "*technical nature*", and consequently there were extraordinary circumstances justifying the absence of a hearing, not finding a violation of Article 6 of the ECHR. (See the case of the ECtHR, *Miller v. Sweden*, cited above, paragraphs 28-37; *Dory v. Sweden*, cited above, paragraphs 36-45). Similarly, the ECtHR acted in the case of *Vilho Eskelinen and Others v. Finland* (Judgment of 19 April 2007), in which it found no violation of Article 6 of the ECHR. (For reasons concerning the hearing, see paragraphs 73 to 75 in the case of *Vilho Eskelinen and Others v. Finland*).

65. The Court also notes, based on the case law of the ECtHR, that the fact that the practice of conducting a written procedure without hearings prevailed before the respective courts was not considered by the ECtHR as the only fact on which a hearing could be skipped, regardless of the specific circumstances of a case. For example, in case *Madamus v. Germany* (Judgment of 9 June 2016), the ECtHR had also examined allegations based on which the applicable law provided for the holding

of hearings as an exception and not as a rule, moreover based on the relevant practice, the court which decision was challenged before the ECtHR had never held a hearing. Despite this fact, the ECtHR found a violation of Article 6 of the ECHR, as it assessed and found that in the circumstances of this case there were no extraordinary circumstances which would justify the absence of a hearing. (See paragraphs 25 to 33 of the case *Madamus v. Germany*).

66. The Court recalls that in the circumstances of the present case, (i) the Applicants were not given the opportunity to be heard before a Specialized Panel with jurisdiction to assess the facts and the law, despite their request; (ii) the Applicants had not appealed to the Appellate Panel because the decision of the Specialized Panel was in their favor; (iii) the proceedings before the Appellate Panel were initiated through a complaint from the PAK; (iv) The Appellate Panel had "*waived the right from the hearing*", referring to Article 69 of Law 06/L-086 on the SCSC, an article identical to Article 64 of the Annex to the Law on the SCSC, which simply determine that "*The Appellate Panel shall, on its own initiative or the written application of a party, decide to whether or not to hold on or more oral hearings on the concerned appeal*"; and (v) the Appellate Panel considered all the facts of the case, including the Applicants' appeals submitted to the first instance, and stated that it disagreed neither with the assessment of the facts nor with the interpretation of the law by the lower instance court modified in entirety the Judgment of the Specialized Panel, removing all Applicants from the List of Employees with legitimate rights to benefit from the twenty percent (20%) of the privatization of the enterprise SOE "Agimi".

67. In such circumstances, the Court cannot find that the Applicants' absence of a request to hold a hearing at the level of the Appellate Panel can be considered as their implied waiver of the right to a hearing. The Court recalls that in all cases in which the ECtHR had reached such a finding, it made it in connection with the fact that the circumstances of the cases were related to the issues of an exclusively legal or technical nature, and consequently "*there were exceptional circumstances which would justify the absence of a hearing* ". Consequently and in the following, the Court must assess whether in the circumstances of the present case, "*there are exceptional circumstances that would justify the absence of a hearing*", namely whether the nature of the cases before the Appellate Panel can be classified as "*exclusively legal or of a highly technical nature*".

a) Whether in the circumstances of the present case there are extraordinary circumstances which would justify the absence of a hearing

68. The Court recalls once again that based on the case law of the ECtHR, the parties are entitled to a hearing in at least one instance. This instance is mainly the first instance, and the one which has the jurisdiction to decide on both factual and legal issues. In this context, regarding the obligation to hold a hearing in the courts of second or third instance, the case law of the ECtHR states that the absence of a hearing can be justified based on the specific characteristics of the case, provided that a hearing be held in the first instance. In principle, if a hearing is held in the first instance, the proceedings before the courts of appeal, and which involve only matters of law, and not matters of fact, may be considered to be in accordance with the guarantees enshrined in Article 6 of the ECHR , even if in the second instance no hearing was held. Having said that, the exception to the right to a hearing are only those cases in which it is determined that "*there are extraordinary circumstances that would justify the absence of a hearing*". These circumstances, as explained above, the case law of the ECtHR has classified as cases which relate to "*exclusively legal or highly technical issues*".

69. For example, the issues related to social security, the ECtHR has mainly classified them as issues of a technical nature, in which a hearing is not necessarily indispensable. Of course, there are exceptions to this rule. In each case, the concrete circumstances of a case are examined. For example, the ECtHR found no violations in case *Schuler-Zgraggen v. Switzerland* and *Dory v. Sweden*, but found violations in case *Miller v. Sweden* and *Salomonsson v. Switzerland*, all of which related to social security issues.

70. Similarly, the ECtHR operates also in those cases in which the issues before the relevant Court are exclusively legal, and do not involve an assessment of the disputed facts. For example, in the case of *Saccoccia v. Austria* (Judgment of 18 December 2008), the ECtHR did not find a violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the Applicant did not contain issues of fact, but only limited issues of a legal nature (*Saccoccia v. Austria*, cited above, paragraph 78), whereas in the case of *Allan Jacobsson v. Sweden* (no. 2) (Judgment of 19 February 1998), the ECtHR also found no violation of Article 6 of the ECHR due to the absence of a hearing, as it found that the issues complained of by the respective Applicant did not involve either issues of law or fact (See

ECtHR case *Allan Jacobsson v. Sweden*, no. 2), cited above, paragraph 49).

71. On the contrary, in other cases in which the ECtHR found that the cases before the relevant courts involved both issues of fact and law, it did not find that there were exceptional circumstances that would justify the absence of a hearing. For example, in the cases of *Malhous v. the Czech Republic* (Judgment of 12 July 2001), the ECtHR found a violation of Article 6 of the ECHR due to the absence of a hearing, as it determined that the cases complained of by the Applicant were not limited to the issues of law but also the fact, namely the assessment of whether the lower authority had assessed the facts correctly. (See the case of the ECtHR *Malhous v. Czech Republic*, cited above, paragraph 60). Similarly, in the case of *Koottummel v. Austria* (Judgment of 10 December 2009), the ECHR found a violation of Article 6 of the ECHR for absence of a hearing because it found that the cases before it could not qualify as matters of an exclusively legal nature, or of a technical nature, which could consist of exceptional circumstances which would justify the absence of a hearing. (See the case of the ECtHR, *Koottummel v. Austria*, cited above, paragraphs 20 and 21).

72. In the circumstances of the present case, the Court first recalls that the Appellate Panel has jurisdiction over both fact and law issues. Based on paragraph 11 of Article 10 (Judgments, Decisions and Appeals) of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the Law on the SCSC) and paragraph 4 of Article 64 (Oral Appellate Proceedings) and Article 65 (Submission of New Evidence) of the Annex to the Law on the SCSC, the parties have, *inter alia*, the opportunity to raise complaints before the Appellate Panel regarding both matters of law and facts, including the opportuinity of presenting new evidence.

73. Furthermore, in the circumstances of the present case, the Appellate Panel considered all the facts presented through (i) the Applicants' initial complaint to the Specialized Panel and responses to the PAK appeal; and (ii) the complaint of the PAK and of Shkelzen Krelani and Valbonë Krelani-Elezi to the Appellate Panel and the relevant responses to the Applicants' appeal. Despite the fact that the Specialized Panel had assessed that the evidence "*is clear*" recognizing the right to the Applicants, the Appellate Panel found the opposite based on the same evidence.

74. The Court also recalls that pursuant to paragraph 11 of Article 10 of the Law on the SCSC, the Appellate Panel is limited to changing the

assessment of the factual situation made by the Specialized Panel, unless it determines that the factual findings of the court are "*clearly erroneous*", a rule that according to the same article must be "*strictly observed*". Such a reasoning is not found in the Judgment of the Appellate Panel. The latter simply disagreed with the assessment of the evidence by the Specialized Panel, and also found that the interpretation which the Specialized Panel had made of the allegations of discrimination was inconsistent with the *"case law"*.

75. The Court further notes that in accordance with Article 68 of the Annex to the Law on the SCSC, in the event of complaints concerning the list of employees with legitimate rights, the burden of proof falls on the Applicants before the Specialized Panel. Also, the burden of proof for the opponent of such a request falls on the responding party, namely the PAK, in the circumstances of the present case. Before the Appellate Panel, the burden of proof also falls on the appellant concerned. But the circumstances of the present case are also, in essence, related to allegations of discrimination. In case of such allegations, the burden of proof, based on Article 8 (Burden of proof) of the Anti- Discrimination Law, falls on the respondent, namely the PAK, and not the Applicants.

76. In such circumstances, in which (i) the Appellate Panel has considered issues both of fact and law; (ii) in which with regard to the facts, the burden of proof that they meet the criteria of paragraph 4 of Article 10 of Regulation no. 2003/13, in principle falls on the Applicants, while the burden of proof regarding discrimination falls on the PAK; and (iii) the Appellate Panel interprets the same facts presented by the parties differently from how the Specialized Panel has interpreted them, modifying the Judgment to the detriment of the parties, despite the fact that such a possibility based on paragraph 11 of Article 10 of Law no. 04/L-033 on the SCSC was recognized only as an exception, provided that it argued that the lower authority, namely the Specialized Panel, had made a "*clearly erroneous*" interpretation, the Court considers that it is indisputable that the issue under consideration before the Appellate Panel, is not (i) either an exclusively legal matter; and (ii) nor of a technical nature. On the contrary, the case before the Appellate Panel contained important factual and legal issues. Consequently, the Court must find that in the circumstances of the present case, there are no circumstances which would justify the absence of a hearing.

77. In support of this finding, the Court recalls that the ECtHR Judgment *Ramos Nunes de Carvalho v. Portugal* specifically stated that a hearing was necessary in circumstances involving the need to consider

matters of law and fact, including cases in which it is necessary to assess whether the lower authorities have assessed the facts correctly. This is especially true in circumstances in which a hearing has not been held even before the lower instance, as is the case in the circumstances of the present case.

78. In fact, in some cases the ECtHR found a violation of Article 6 of the ECHR when a hearing was not held in a court of appellate jurisdiction, even when a hearing was held in the lower instance, despite the fact that the assessment of the necessity of the hearing at the appellate level is less rigorous when a hearing is held in the first instance. For example, in Judgment *Helmers v. Sweden*, the ECtHR examined a case in which the relevant applicant was allowed a hearing in the first instance, but not at the appellate level, which had the jurisdiction to assess both the law and the facts in the circumstances of the case. In this case, the ECtHR reiterated that (i) the guarantees embodied in Article 6 of the ECHR do not necessarily guarantee a hearing at the appellate level, if one was held in the first instance; and (ii) in rendering this decision, the relevant court must also take into account the need for expeditious handling of cases as well as the right to a trial within a reasonable time. However, emphasizing that such a determination depends on the nature of the case and the need for exceptional circumstances to justify the absence of a hearing, the ECtHR found a violation of Article 6 of the ECHR (For the relevant reasoning of the case, see paragraphs 31 to 39 of the case of case *Helmers v. Sweden*).

79. Finally, the Court also notes the fact that the Appellate Panel did not justify its "*waiver of the hearing*", but merely referred to Article 69 of Law 06/L-086 on the SCSC. The latter, as explained above, merely determines the competence of the Appellate Panel to decide on holding of a hearing on its own initiative or at the request of a party. The relevant judgment does not contain any additional explanation regarding the decision of the Appellate Panel to "*waive the hearing*". In this context, the Court notes that based on the case law of the ECtHR, in assessing allegations relating to the absence of a hearing, it should also be considered whether the refusal to hold such a hearing is justified. For example, in the case of the ECtHR *Pönkä v. Estonia* (Judgment of 8 November 2016), which was related to the development of a simplified procedure (reserved for small claims), the ECtHR found a violation of Article 6 of the ECHR, because the relevant court had not justified the absence of a hearing. (See the case of the ECtHR, *Pönkä v. Estonia*, cited above, paragraphs 37-40). Also, in the

case of the ECtHR, *Mirovni Inštitut v. Slovenia*, cited above, the ECtHR found a violation of Article 6 of the ECHR, *inter alia,* even though the relevant court had not given an explanation for not holding a hearing. (See the case of the ECtHR, *Mirovni Inštitut v. Slovenia*, cited above, paragraph 44). In the context of the lack of reasoning for not holding a hearing, the ECtHR, through its case law, has consistently, *inter alia*, emphasized that the lack of reasoning about the necessity of holding a hearing makes it impossible for the highest court to assess whether such a possibility has simply been neglected, or what are the arguments on the basis of which the court has ignored such a possibility in relation to the circumstances raised by a particular case. (See the case of *Mirovni Inštitut v. Slovenia*, paragraph 44, and references used therein).

80. Therefore, and in conclusion, the Court, considering that (i) the fact that the Applicants did not expressly request a hearing at the level of the Appellate Panel, does not imply that they implicitly waived this right, especially considering that the latter have not filed an appeal before the Appellate Panel and also that the absence of this request does not release the Appellate Panel from the obligation to assess the necessity of a hearing; (ii) despite the Applicants' specific request for a hearing before the Specialized Panel, such a hearing was not held and, consequently, the standards applicable to the necessity of holding a hearing before the Appellate Panel are more stringent because, in principle, the parties are entitled to a hearing at least before a court instance; (iii) the cases before the Appellate Panel cannot be qualified either as exclusively legal matters or as matters of a technical nature, but rather as matters of fact and law; (iv) the Appellate Panel assessed how the lower instance , namely the Specialized Panel made the assessment of the facts, modifying its Judgment to the detriment of the Applicants; and (v) the Appellate Panel did not justify the "*waiver of the hearing*", finds that in the present case there were no "*extraordinary circumstances to justify the absence of a hearing*", and consequently, the challenged Judgment of the Appellate Panel , namely Judgment [AC-I-13-0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

81. The Court also notes at the end that, given that it has already found that the challenged Judgment of the Appellate Panel is not in compliance with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a hearing, considers that it is not necessary to consider the Applicants' other allegations. The respective allegations of the Applicants should be examined by the Appellate Panel, in accordance with the findings of this Judgment.

Furthermore, given that the Appellate Panel has full jurisdiction to review the challenged decisions of the Specialized Panel based on the applicable laws of the SCSC, it has the possibility to correct at the second instance the absence of a hearing in the first instance.

82. The Court's finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case, relates exclusively to the absence of a hearing, as explained in this Judgment, and does not in any way relate to nor does it prejudice the outcome of the merits of the case.

Conclusion

83. In the circumstances of this case, the Court assessed the Applicants' allegations regarding the absence of a hearing, a right guaranteed, according to the clarifications of this Judgment, by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

84. In assessing the relevant allegations, the Court has initially elaborated on the general principles deriving from its case-law and that of the ECtHR, regarding the right to a hearing, clarifying the circumstances in which such is necessary, based, *inter alia,* on the Judgment of the Grand Chamber of the ECtHR, *Ramos Nunes de Carvalho and Sá v. Portugal*. The Court has clarified, *inter alia*, that (i) the absence of a party's request for a hearing does not necessarily imply the waiver of such a right and that the assessment of the impact of the absence of such a request depends on the specifics of the law and the particular circumstances of a case; and (ii) in principle, the parties are entitled to a hearing at least at one level of jurisdiction, unless "*there are exceptional circumstances that would justify the absence of a hearing*", which based on the case law of the ECtHR in principle relate to cases in which "*exclusively legal or highly technical issues are examined*".

85. In the circumstances of the present case, the Court finds that (i) the fact that the Applicants have not requested a hearing before the Appellate Panel does not imply their waiver of this right nor does it absolve the Appellate Panel of the obligation to address on its own initiative the necessity of holding a hearing; (ii) the Applicants have been denied the right to a hearing at both levels of the SCSC; (iii) the Appellate Panel did not deal with "*exclusively legal or highly technical matters*", matters on the basis of which "*exceptional circumstances that would justify the absence of a hearing*" could have existed; (iv) the Appellate Panel considered issues of "*fact and law*" in addition to modifying the Judgment of the Specialized Panel to the detriment of

the Applicants; and (v) the Appellate Panel did not reason the "*waiver of the oral hearing*". Taking into account these circumstances and other reasons given in this Judgment, the Court found that the challenged Judgment, namely Judgment [AC-I-13- 0181-A0008] of 29 August 2019, was rendered contrary to the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, regarding the right to a hearing.

86. Finally, the Court also notes that (i) based on the applicable law on the SCSC, the Appellate Panel has full jurisdiction to review the decisions of the Specialized Panel and, consequently, based on the case law of the ECtHR, has the possibility of correcting the absence of a hearing at the level of the lower court, namely, the Specialized Panel; and (ii) it is not necessary to deal with the Applicants' other allegations because they must be considered by the Appellate Panel in accordance with the findings of this Judgment; and (iii) the finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the present case relates only to the procedural guarantees for a hearing and in no way prejudices the outcome of the merits of the case.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in the session held on 10 December 2020, by majority of votes:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD THAT there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [AC-I-13-0181-A0008] of 29 August 2019 of the Appellate Panel of the Special Chamber of the Supreme Court invalid;

IV. TO REMAND the case to the Appellate Panel of the Special Chamber of the Supreme Court for retrial, in accordance with the findings of this Judgment;

V. TO ORDER the Appellate Panel of the Special Chamber of the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court by 14 June 2021;

VI. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI224/19, Applicant: Islam Krasniqi, Constitutional review of Decision AC-I-19-0114 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 19 September 2019#

KI224/18, Judgment rendered on 10 December 2020 and published on 29 December 2020

Keywords: *individual referral, civil procedure, right to a fair trial, right to property, admissible referral, violation of Article 31 of the Constitution*

The Applicant challenged before the Constitutional Court the constitutionality of Decision AC-I-19-0114of the Appellate Panel of the Special Chamber of the Supreme Court of 19 September 2019, alleging a violation of his rights guaranteed by Articles 24 [Equality Before Law], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution). The Applicant alleged that by their decisions, the SCSC instances violated his rights guaranteed by abovementioned articles of the Constitution, because: i) the first Decision (order) of the SCSC, as he calls it, of 18 July 2017 has never reached his address, due to the irresponsibility of the Post of Kosovo; and ii) that the Appellate Panel of the SCSC did not review and administer the submissions submitted by him, which were attached to the appeal filed with this panel on 26 July 2019, such as: 1) decision of the Agency for Free Legal Aid, and 2) request for exemption from payment of court fees. As a result, he alleges that he was denied the right to a fair trial.

Referring to the present case, the Court considered that the burden of responsibility for non-administration of the Applicant's submissions falls on the Appellate Panel of the SCSC, because the Applicant has taken every action required by the applicable legal provisions, to ensure that his appeal against the Decision [C-III-14-0151] of the Specialized Panel is duly considered. However, this did not happen, due to the irresponsibility of the Appellate Panel of the SCSC in administering the Applicant's two submissions, which were relevant to the decision of the merits of the complaint of 26 July 2019. The Court added that only after a proper review of the Applicant's submissions, the Court would be able to find that the Appellate Panel of the SCSC has respected his right of access to justice, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

In conclusion, the Court found that the challenged Decision of the Appellate Panel [AC-I-19-0114], of 19 September 2019, by which the Applicant's appeal was considered withdrawn, did not respect the Applicant's right of access to

court. Therefore, the Court found that in the present case there has been a violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] and Article 6.1 [Right to a fair trial] of the ECHR.

JUDGMENT

in

Case No. KI224/19

Applicant

Islam Krasniqi

Constitutional review of Decision AC-I-19-0114 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 19 September 2019

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 is submitted by Islam Krasniqi, residing in the village of Grashtica, Municipality of Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Decision AC-I-19-0114 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters, of 19 September 2019 (hereinafter: the Appellate Panel of the SCSC).

Subject matter

3. The subject matter is the constitutional review of the challenged Decision AC-I-19-0114, of the Appellate Panel of the SCSC, which allegedly violates the Applicant's rights guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

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

Proceedings before the Constitutional Court

5. On 13 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 December 2019, the President of the Court appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi (members).

7. On 20 January 2020, the Court notified the Applicant about the registration of the Referral KI224/19. On the same date, a copy of the Referral was submitted to the Appellate Panel of the SCSC.

8. On 21 October 2020, the Court requested additional information from the Appellate Panel of the SCSC regarding the Applicant's allegations.

9. On 23 October 2020, the SCSC submitted its response to the Court, stating that: *"...after checking the file of the first instance C-III-14-0151, it was found that the complainant on 08 August 2019, submitted to the SCSC a request form for exemption from payment of court fees, the request for exemption from court fees dated*

11.07.2019, together with the decision of the Agency for Free Legal Aid, A. No. 133/19-01 of 11.05.2019, but that these documents from the registration office were incorrectly entered in the file of first instance, C-III-14-0151, and these documents were not noticed by the Appellate Panel when reviewing the complainant's complaint".

10. On 10 December 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously/with majority recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 16 June 2017, the Applicant submitted a proposal to the SCSC for the issuance of the preliminary injunction against SOE "Urata" requesting a ban on the sale or alienation, by the Privatization Agency of Kosovo (hereinafter: the PAK), of the superstructure (residential building) located above the business premises no. 98, with a surface area of 111 m2 (square meters), "Edmond Hoxha"Street -Prishtina, claiming that the latter is his private property, which was used for the residential building by the person Sh.R.P, and was subsequently purchased from him in 2002 in the amount of 15,000 (fifteen thousand) euro.

12. On 18 July 2019, the judge of the Specialized Panel of the SCSC forwarded the Applicant's submission of 16 June 2017 to the Privatization Agency of Kosovo. On the same day, the Applicant was sent the order to file a lawsuit with this panel.

13. On 25 July 2017, the PAK, in the Specialized Panel of the SCSC, submitted its response, proposing that the proposal for the issuance of the order be rejected as ungrounded, within the meaning of Article 399.2 of the LCP, because the latter is contrary to Article 27.2.4 of the Annex to the SCSC Law.

14. On 4 July 2019, the Specialized Panel of the SCSC, by Decision C-III-17-0151, rejected as inadmissible the Applicant's submission for the issuance of a preliminary injunction (interim measure), reasoning that the document regarding a preliminary injunction should be submitted together with the lawsuit, or if such a request is submitted after the submission of a request, then it should refer to the same request, concluding that in this case no lawsuit was filed.

15. On 26 July 2019, the Applicant filed an appeal with the Appellate Panel of the SCSC against the Decision of the Specialized Panel of the

SCSC of 4 July 2019, proposing that the Decision be quashed and the case be remanded for retrial, or return his right to file lawsuit, as the postal service and the court couriers are responsible for failing to deliver the order of the SCSC Specialized Panel of 18 July 2017 to his address. Further, the Applicant by the complaint reasoned that the panel in question had wrong approach when rendering decision on his request, because he did not request the prohibition of the sale of premises no. 98 with a surface area of 111 m2, which is owned by the SOE "Urata" in Prishtina, located on "Edmond Hoxha"Street but requested the ban on the sale of the superstructure built before the war above the premise no. 98.

16. On 29 July 2019, the Appellate Panel of the SCSC, by a letter/order requested the Applicant to pay the court fee in the amount of 100 euro within 15 days, or to submit a request for tax exemption, if he met the legal requirements.

17. On 8 August 2019, the Applicant submitted again to the SCSC, the request for exemption from the court fees and Decision A. No. 133/19-01 of the Agency for Free Legal Aid, as evidence that he meets the requirements for exemption from court fees.

18. On 19 September 2019, the SCSC Appellate Panel considered the Applicant's appeal withdrawn, arguing that the Applicant had not paid the court fee, according to the order of 29 July 2019, nor had he filed a request for tax exemption. Furthermore, in a relevant part of the reasoning of the Decision of the Appellate Panel it is emphasized:

> *"After the appellant has not paid the court fee as requested by him by the notice (remark) of 29 July 2019, which was submitted to the appellant on 13 August 2019, and has not submitted a request for exemption from court fees, the Appellate Panel considers that the appeal has been withdrawn. According to Article 12 of the SCSC Law, the unsuccessful party pays the procedural costs, including the court fees of the other party. The appellant is an unsuccessful party in this case therefore the court costs are his burden."*

Relevant provisions

ADMINISTRATIVE INSTRUCTION NO. 01/2017 ON UNIFICATION OF COURT TAXES, entered into force on 1 May 2017

Article 8
Exemption from tax payment

8.1 The following categories of persons are exempt from tax payment
[...]
8.1.2 A person in difficult economic situation, if the payment of tax directly affects the endangerment of his/her existence, namely, his/her family members or other dependents;
[...]
8.3 The categories of persons referred to in Article 8.1, to be exemptfrom taxes, must provide the following evidence:
[...]
8.3.2 Proof that he/she is receiving legal assistancefrom the Officefor Free Legal Aid;
[...]

Applicant's allegations

19. The Applicant alleges that by their decisions, the SCSC instances violated his rights guaranteed by Articles 24, 31, 46 and 54 of the Constitution, because: i) the first Decision (order) of the SCSC, as he calls it, of 18 July 2017 has never reached his address, due to the irresponsibility of the Post of Kosovo; and ii) that the Appellate Panel of the SCSC did not review and administer the submissions submitted by him, which were attached to the appeal filed with this panel on 26 July 2019, such as: 1) decision of the Agency for Free Legal Aid, and 2) request for exemption from payment of court fees. As a result, he alleges that he was denied the right to a fair trial.

20. The Applicant further adds that: *"We consider the decision of the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo to be a violation of the Law and the Constitution of the Republic of Kosovo and a scandalous decision by which no evidence has been administered that proves the opposite of my request and appeal with legal protection and-constitutional protection for the exercise of my right by this Judicial institution. Referring to the case file, the responsibility for the violation lies with the Administration of*

the SCSC, which has not submitted the Decision of the Agency for Legal Aid, which proves that I am exempt from court fees".

21. Finally, the Applicant requests the Court: 1) to find violation of the Constitution by the SCSC, namely the above-mentioned articles; 2) to prohibit the PAK from usurping the superstructure which was purchased from Sh.R.P .; and 3) to oblige the Basic Court in Prishtina for the verification of ownership in relation to the superstructure (residential building) above the premise no. 98, owned by the SOE "Urata" in the street "Edmond Hoxha" in Prishtina.

Admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

24. In addition, the Court also refers to the admissibility requirements as provided by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

25. With regard to the fulfillment of the admissibility criteria, as mentioned above, the Court finds that the Applicant is an authorized party and challenges an act of public authority, namely Judgment AC-I-19-0114, of 19 September, after having exhausted the legal remedies in the formal sense. The Applicant also clarified the fundamental rights and freedoms that he claims to have been violated, in accordance with Article 48 of the Law, and submitted the Referral within the time limit set out in Article 49 of the Law.

26. However, the Court shall consider whether the Referral meets the admissibility criteria set out in Rule 39 (1) (d) and (2) of the Rules of Procedure, which establishes:

Rule 39
[Admissibility Criteria]

(3) "The Court may consider a referral as admissible if:

[…]
(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions.

(4) 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."

27. The Court considers that the Referral raises a *prima facie* reasoned constitutional allegation, while it is not manifestly ill-founded within the meaning of Rule 39 (2) of the Rules of Procedure.

28. Therefore, the Court considers that the Referral meets the requirements for review on merits.

Merits of the Referral

29. The Court recalls that the Applicant challenges the constitutionality of the Decision [AC.-I-19-0114, of 19 September 2019] of the Appellate Panel of the SCSC, by which his appeal was considered withdrawn due to non-payment of the court fee. He alleges that this decision has resulted in a violation of his rights guaranteed by the Constitution, namely Articles 24, 31, 46 and 54 of the Constitution.

30. Related to this case, the Court notes that the substance of the Applicant's allegations of violation of his constitutional rights relates to the fact that the Appellate Panel of the SCSC did not administer and address at all the following submissions: 1) The decision of the Agency for Free Legal Aid; and 2) His request for exemption from court fees, which he had attached to his appeal submitted to this panel, on 26 July 2019.

31. As the Applicant's substantive allegation relates to a fair trial, namely the right of access to justice, the Court will further assess whether the challenged Decision of the Appellate Panel of the SCSC is in accordance with standards required by Article 31 of the Constitution and Article 6 of the ECHR.

32. In this regard, the Court recalls that Article 31 of the Constitution and Article 6.1 of the ECHR establish:

Article 31 [Right to Fair and Impartial Trial] of the Constitution

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."
[...]

Article 6.1 [Right to a fair trial] of the Convention

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."
[...]

33. In order to determine the applicability of the guarantees set out in the provisions of Article 31 of the Constitution and Article 6 of the ECHR in the circumstances of the present case, the Court will further elaborate on the general principles deriving from the case law of the European Court of Human Rights (hereinafter: the ECtHR). The following analysis will be made in accordance with the requirements of Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

General principles regarding the right of "access to justice"

34. The right of access to court for the purposes of Article 6 of the ECHR is defined in case *Golder v. the United Kingdom*. Judgment of 21 February 1975, paragraphs 28-36. Referring to the principle of the rule of law and the avoidance of arbitrary power, the ECtHR found that the "*right of access to court*" is an essential aspect of the procedural guarantees enshrined in Article 6 of the ECHR (on the general principles of right to a court, see also ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, Part II, Right to a court and also, the case of the ECtHR, *Zubac v. Croatia*, Judgment of 5 April 2018, paragraph 76). According to the ECtHR, this right provides everyone with the right to address respective issue related to "civil rights and obligations" before a court. (See ECtHR case, *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 84 and references therein).

35. The Court in this regard notes that "the right to a court", as an integral part of the right to a fair and impartial trial, as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, provides that all litigants should have an effective judicial remedy

enabling them to assert their civil rights (See cases of the ECHR, *Běleš and Others v. the Czech Republic*, Judgment of 12 November 2002, paragraph 49; and *Naït-Liman v. Switzerland*, Judgment of 15 March 2018, paragraph 112).

36. Therefore, based on the case law of the ECtHR, everyone has the right to file a 'lawsuit' related to their respective "civil rights and obligations" with a court. Article 31 of the Constitution in conjunction with Article 6 of the ECHR embody the "right to a court", that is, "the right of access to a court", which implies the right to institute proceedings before the courts in civil matters (see ECtHR case *Golder v. the United Kingdom*, cited above, paragraph 36). Therefore, anyone who considers that there has been unlawful interference with the exercise of his/her civil rights and claims to have been denied the opportunity to challenge such a claim before a court may refer to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, invoking the relevant right of access to a court.

37. More specifically, according to the ECtHR case law, there must first be "a civil right" and second, a "dispute" as to the legality of an interference that affects the very existence or scope of "a civil right" protected. The definition of both of these concepts should be substantial and informal (See, in this regard, the cases of ECtHR *Le Compte, Van Leuvenand De Meyere v. Belgium*, Judgment of 23 June 1981, paragraph 45; *Moreira de Azevedo v. Portugal*, Judgment of 23 October 1990, paragraph 66; *Gorou v. Greece* (no. 2), Judgment of 20 March 2009, paragraph 29; and *Boulois v. Luxembourg*, Judgment of 3 April 2012, paragraph 92). The "dispute", however, based on the ECtHR case law, must be (i) "genuine and serious" (see, in this context, the ECtHR cases *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, paragraph 81; and *Cipolletta v. Italy*, Judgment of 11 January 2018, paragraph 31); and (ii) the outcome of the proceedings before the courts must be "decisive" for the civil right in question. (See, in this context, the case of the ECtHR, *Ulyanov v. Ukraine*, Judgment of 5 October 2010). According to the ECtHR case law, the "tenuous links" or "remote consequences" between the civil right in question and the outcome of these proceedings are not sufficient to fall within the scope of Article 6 of the ECHR (see, in this context, ECtHR cases, *Lovrić v. Croatia*, Judgment of 4 April 2017, paragraph 51 and *Lupeni Greek Catholic Parish and Others v. Romania*, cited above, paragraph 71 and references therein).

38. In such cases, when it is found that there is a "civil right" and a "dispute", Article 31 of the Constitution in conjunction with Article 6

of the ECHR guarantee to the affected individual the right "to have the question determined by a tribunal, namely the court" (See ECtHR case, *Z and Others v. the United Kingdom*, Judgment of 10 May 2001, paragraph 92). A court's refusal to consider the parties' claims as to the compatibility of a procedure with the basic procedural guarantees of fair and impartial trial, limits their access to the court (See the case of ECtHR *Al Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June 2016, paragraph 131).

39. Moreover, according to the ECtHR case law, the ECHR does not aim at guaranteeing the rights that are "*theoretical and false*", but the rights that are "*practical and effective*" (see, for more on "practical and effective" rights, ECtHR Guide of 31 December 2018 to Article 6 of the ECHR, The Right to Fair and Impartial Trial, Civil Aspects, Part II. Right to Court, A. Right and Access to Court, 1. A practical and effective right; and the ECHR cases *Kutić v. Croatia*, cited above, paragraph 25 and the references cited therein; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein).

40. Therefore, within the meaning of these rights, Article 31 of the Constitution in conjunction with Article 6 of the ECHR, guarantee not only the right to institute proceedings but also the right to obtain a determination of the "dispute" by a court. (See ECHR cases, *Kutić v. Croatia*, Judgment of 1 March 2002, paragraphs 25-32; *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 86 and references therein; *Ećimović v. Croatia*, Judgment of 9 October 2003, paragraph 41; and *Beneficio Cappella Paolini v. San Marino*, Judgment of 13 July 2004, paragraph 29).

41. The abovementioned principles, however, do not imply that the right to court and the right of access to court are absolute rights. They may be subject to limitations, which are clearly defined by the ECtHR case law. (See ECHR Guide of 31 December 2018, Article 6 of the ECHR, Right to Fair and Impartial Trial, Civil Aspects, and specifically with respect to limitations on the right to court, Part II. Right to Court, A. Right and Access to Court 2. Limitations). However, these limitations cannot go so far as to restrict the individual's access so as to impair the very essence of the right. (see, in this context, ECtHR case, *Baka v. Hungary*, Judgment of 23 June 2016, paragraph 120; and *Lupeni Greek Catholic Parish and Others v. Romania*, Judgment of 29 November 2016, paragraph 89 and references therein). Whenever access to the court is limited by the relevant law or respective case law, the Court examines whether the limitations touches on the essence of

the law and, in particular, whether that limitation has pursued a "legitimate aim" and whether there is "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (see ECHR cases, *Ashingdane v. the United Kingdom*, Judgment of 28 May 1985, paragraph 57; *Lupeni Greek Catholic Parish v. Romania*, cited above, paragraph 89; *Naït-Liman v. Switzerland*, cited above, paragraph 115; *Fayed v. the United Kingdom*, Judgment of 21 September 1990, paragraph 65; and *Marković and Others v. Italy*, Judgment of 14 December 2006, paragraph 99).

Application of these general principles to the circumstances of the present case

42. The Court recalls that the Applicant initially filed a request with the SCSC for a "preliminary injunction" to prevent the sale or alienation by the PAK of the immovable property located on "Edmond Hoxha"Street. On 18 July 2019, the Specialized Panel of the SCSC sent an order to the Applicant to file a lawsuit with this Panel. Further, the Specialized Panel of the SCSC, on 4 July 2019, by Decision C-III-17-0151, rejected as inadmissible the Applicant's request for a "preliminary injunction" (interim measure), on the grounds that a request relating to a "preliminary injunction" must be filed together with a "lawsuit", or if it is filed after the filing of a request, then it must refer to the same request, finding that in this case no lawsuit was filed by the Applicant.

43. As a result, the Court notes that the Applicant, on 26 July 2019, filed an appeal with the Appellate Panel of the SCSC against the Decision of the Specialized Panel of the SCSC of 4 July 2019, proposing that the Decision be quashed and the case be remanded for retrial, or to return his right to file a lawsuit, since according to him, the postal service and the court senders are responsible for not having brought the order of the Specialized Panel of the SCSC, of 18 July 2017, at his address.

44. Subsequently on 29 July 2019, the Appellate Panel of the SCSC, deciding on the Applicant's appeal of 26 July 2019, issued an order, by which it requested the Applicant, to pay within 15 days the court fee in the amount of 100 euro, or to apply for tax exemption, if he did not have sufficient financial means to pay the court fee. On 8 August 2019, the Applicant again made available to the SCSC Appellate Panel the submissions submitted together with the appeal of 26 July 2019. Finally, on 19 September 2019, the Appellate Panel of the SCSC considered the Applicant's appeal withdrawn, on the grounds that the

Applicant had not paid the court fee, according to the order of 29 July 2019, nor had he applied for tax exemption.

45. In addition, the Court, based on the general principles regarding the right of access to justice, as established by the ECtHR, recalls that everyone has the right to file a "lawsuit" concerning "civil rights and obligations", if he/she considers that there has been an unlawful interference with the exercise of his/her civil rights and claims that he/she has been deprived of the opportunity to challenge such a claim before a court, and in this regard refers to Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR.

46. In this context, as mentioned above, the right of access to justice is guaranteed in relation to a "*dispute*" over a "*civil right*". In this regard, the Court considers that in the circumstances of the present case, both of the abovementioned components have been met, as we are dealing with a "civil right" and the existence of a "dispute" of a civil-property nature, between the Applicant and PAK regarding the disputed immovable property, the residential building, built on the business premises no. 98, in the street "Edmond Hoxha" -Prishtina and with the allegation that regarding the disputed immovable property a considerable amount of money was paid by the Applicant. Therefore, the requested right of the Applicant falls under the right guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR, namely the right of access to justice.

47. As the Applicant's allegation relates to the "fair trial" respectively to the failure to review and administer the Applicant's submissions submitted to the Appellate Panel of the SCSC on 26 July 2019 and 8 August 2019, the Court on 21 October 2020, requested additional information from the Appellate Panel of the SCSC regarding the Applicant's allegations. On 23 October 2020, the SCSC informed the Court as follows:

> *"Consequently, since in the file AC-I-19-0114, there was no request for exemption from the payment of court fee, the Appellate Panel did not administer decision A. No. 133/19-01 of the Agency for Free Legal Aid, of 11.05.2019. However, after checking the file of the first instance C-III-14-0151, it was found that the complainant on 08 August 2019, submitted to the SCSC a request form for exemption from payment of court fees, the request for exemption from court fees dated 11.07.2019, together with the decision of the Agency for Free Legal Aid, A. No. 133/19-01 of 11.05.2019, but that these documents from the registration office were incorrectly*

entered in the file of first instance, C-III-14-0151, and these documents were not noticed by the Appellate Panel when reviewing the complainant's complaint"

48. Based on the relevant provisions in force, the Court finds that the right of the Applicant to exercise the right to file a "Request for exemption from payment of court fees" derives from Article 8 of Administrative Instruction no. unification of court fee, where it is established:

Article 8
Exemption from tax payment

8.1 The following categories of persons are exempt from tax payment
[...]
8.1.2 A person in difficult economic situation, if the payment of tax directly affects the endangerment of his/her existence, namely, his/her family members or other dependents.;
[...]
8.3 The categories of persons referred to in Article 8.1, to be exempt from taxes, must provide the following evidence:
[...]
8.3.2 Proof that he/she is receiving legal assistance from the Office for Free Legal Aid;
[...]

49. In the Court's assessment, the provisions of Article 8 of Administrative Instruction No. 01/2017, clearly stipulate the procedural steps that the party must take to exercise the right to "exemption from the payment of court fees", if he/she considers that he/she meets the criteria according to the above-mentioned provisions. Meeting the criteria required above is a precondition for the submissions submitted by the parties to be considered in substance by the courts in accordance with the right of "access to court". Otherwise, the inclusion of such legal arrangements would have no effect and would in itself make the norm meaningless. (see, in this connection, the Constitutional Court, case KI80/19 Applicant: *Radomir Dimitrijević*, Judgment of 10 November 2020, paragraph 56)

50. The Court reiterates that it is not its role to assess whether the regular courts have correctly interpreted and applied the relevant rules of substantive and procedural law. However, in cases where a claim raises constitutional issues, namely irregularities in the judicial process, the Court is obliged to intervene and remedy the violations caused by the regular courts, in order to ensure the individual a fair

trial in accordance with Article 31 of the Constitution and Article 6 of the ECHR.

51. Referring to the present case, the Court finds that the Applicant, faced with such factual and legal circumstances, from 26 July 2019 was awaiting the review of merits of his appeal, to which he had attached as evidence: 1) The decision of the Agency for the benefit of free legal aid, as required by Article 8.3.2 of the above Administrative Instruction; and 2) the request for exemption from the payment of court fee.

52. However, the Court found that the Appellate Panel of the SCSC, in its response submitted to the Court, acknowledges that the Applicant, on 8 August 2019, submitted to the SCSC: 1) the request for exemption from court fees and 2) Decision A . No. 133/19-01 of the Agency for Free Legal Aid, which means that the submissions were submitted before the issuance of the order of the Appellate Panel of the SCSC, to pay the court fee, and after this order. Furthermore, the panel in question acknowledges that the request for exemption from the payment of the court fee was erroneously entered, by the registry office, in the file of the first instance [C-III-14-0151] and this fact was not noticed by the Appellate Panel of the SCSC, when it considered the Applicant's appeal.

53. Setting from such a situation, the Court considers that the burden of responsibility for non-administration of the Applicant's submissions falls on the Appellate Panel of the SCSC, because the Applicant has taken every action required by the applicable legal provisions, to ensure that his appeal against the Decision [C-III-14-0151] of the Specialized Panel is duly considered. However, this did not happen, due to the irresponsibility of the Appellate Panel of the SCSC in administering the Applicant's two submissions, which were relevant to the determination of the merits of the complaint of 26 July 2019. Only after a proper review of the Applicant's submissions, the Court would be able find that the Appellate Panel of the SCSC has respected his right of access to justice, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

Conclusion

54. From the abovementioned considerations, the Court finds that the non-review of the Applicant's submissions by the Appellate Panel of the SCSC constitutes an insurmountable procedural flaw which is

contrary to the right of access to justice, guaranteed to individuals by Article 31 of the Constitution and Article 6.1 of the ECHR.

55. The Court, finding that the challenged Decision of the Appellate Panel of 21 February 2019 is contrary to Article 31 of the Constitution and Article 6.1 of the ECHR, considers it unnecessary to address at this stage the Applicant's allegations of violation of the rights guaranteed by Article 24, 46 and 54 of the Constitution.

56. In conclusion, the Court finds that the challenged Decision [AC-I-19-0114], of the Appellate Panel, of 19 September 2019, by which the Applicant's appeal was considered as withdrawn, did not respect the Applicant's right of access to court.

57. Therefore, the Court finds that in the present case there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6.1 [Right to a fair trial] of the ECHR.

FOR THESE REASONS

The Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 10 December 2020, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR;

III. TO DECLARE Decision AC-I-19-0114 of the Appellate Panel of 19 September 2019 invalid and REMANDS the latter for reconsideration, in compliance with the Judgment of the Court;

IV. TO ORDER the Appellate Panel of the SCSC to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, about the measures taken to implement the Judgment of the Court, not later than 15 June 2021;

V. TO ORDER that its Judgment KI224/19 be notified to the parties and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VI. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

KI227/19, Applicant: N.T. "Spahia Petrol", Constitutional review of Judgment ARJ. UZVP. No. 94/2019 of the Supreme Court of Kosovo, of 1 August 2019

KI227/19, Judgment of 10 December 2020, published on 29 December 2020

Keywords: *Individual referral, administrative procedure, tax revaluation, unreasoned decision*

The circumstances of the present case are related to a business, which in 2014, as a result of criminal investigations, had its financial documentation seized by the Kosovo Police. Subsequently, there was an audit by the Tax Administration of Kosovo, which by the Notice of Reassessments, among other things, determined the additional tax and value added tax for the respective periods. The Applicant challenged this Reassessment Notice to the Tax Administration of Kosovo, and the latter assessed the Applicant's complaint as partially grounded. The rejecting part of the TAX Decision was mainly related to the transactions which the Applicant had concluded with the company "S", and which the Applicant did not manage to prove. The Applicant addressed the State Prosecutor's Office and the Basic Court in Mitrovica with a request for the return of financial documentation, in order to be able to prove his transactions in the appeal procedure in the Tax Administration and in the regular courts. Based on the case file, the latter had never received a response to this request. In the meantime, the proceedings before the regular courts resulted in the rejection of the lawsuit, the appeal and the request for extraordinary review of the Applicant's court decision submitted to the Basic Court, the Court of Appeals and the Supreme Court, respectively. Prior to the latter, the Applicant repeatedly stated, *inter alia*, that the lack of financial documentation made it impossible to prove the disputed transactions, alleging a violation of (i) Article 9 (Publication of acts) of Law No. 02/L-28 on Administrative Procedure, according to which, among other things, the public body must guarantee the right of the party to access the file and its documents; (ii) paragraph 6 of Article 14 (Access to books, records, computers and similar record storage devices) of Law No. 03/L-222 on the Tax Administration, according to which, *inter alia,* the Director General or an authorized officer who removes and retains records under this Article shall make a copy of the record and return the original in the shortest time practicable; and (iii) a violation of his right to fair and impartial trial and of the right to an effective legal remedy guaranteed by Article 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution.

The Supreme Court, deciding as the highest court instance in this case, by the challenged Judgment, rejected the Applicant's allegations, upholding the

Judgments of the Basic Court and of the Court of Appeals. The Supreme Court reasoned its position, based on (i) Article 22 (Transactions Over Five-Hundred Euros) of Administrative Instruction No. 15/2010 on the Implementation of Law no. 03/L-222 on Tax Administration and Procedures, according to which, *"all persons, who make transactions in the course of their economic activity in respect of the supply of goods or services between persons in excess of 500 (Five Hundred) Euro must make payment in respect of such transactions through a bank transfer",* consequently stating that all necessary evidence could be obtained through the relevant bank from the Applicant; and (ii) in Article 23 (Cancellation of Tax Documents) of the Law on Tax Administration and Articles 13 (De-Activation of a Business), 14 (Cancellation of Documents Including Fiscal Number) and 16 (Publication of Taxpayers Names and Numbers) of Administrative Instruction No. 15/2010.

Before the Court, the Applicant challenged the findings of the Supreme Court, raising allegations related to (i) Article 31 of the Constitution, with regard to the lack of a reasoned court decision and violation of the principle of equality of arms; and (ii) Article 32 of the Constitution, in respect of the impossibility of exercising his right to an effective legal remedy, because in the absence of financial documentation, the Applicant could not effectively challenge either the Decision of the KTA, and subsequently, neither the decisions of the regular courts. The Court first examined the Applicant's allegations regarding the lack of a reasoned court decision, a review in which the Court initially (i) elaborated on the general principles; and subsequently, (ii) applied the latter to the circumstances of the present case.

During this assessment, the Court found that the Judgment of the Supreme Court, namely the Judgment [ARJ. UZVP. No. 94/2019] of 1 August 2019, was rendered in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights, because the Supreme Court failed to address the Applicant's substantive allegations with regard to (i) the violation of the applicable law, namely Article 9 of the LAP- and paragraph 6 of Article 14 of the Law on Tax Administration; and (ii) the violation of the Constitution, namely Articles 31 and 32 thereof, as a result of the alleged violation of the equality of arms in the procedure and the inability to effectively exercise the available legal remedies. Furthermore, the Supreme Court based its final finding regarding the unfounded announcement of the request for extraordinary review of the court decision, on the provisions of the Law on Tax Administration and Administrative Instruction No. 15/2010, and which, were not related in any way to the circumstances of the present case.

In this context, the Court also clarified that despite the fact that when the courts with appellate jurisdiction uphold the decisions of lower courts, they are not obliged to reason every argument, they are nevertheless obliged to show sufficient consideration in reviewing the decision of the lowest instance, even in light of the allegations raised before it. In the circumstances of the present case, the Court, based on all the explanations given in this Judgment, considered that this is not the case, because, not only the Supreme Court did not address the substantive allegations of the Applicant, but it also based its final finding, on the provisions, which had nothing to do with the circumstances of the present case, taking the latter from the decisions of the lower courts, without sufficient review and consideration in the case before it.

Therefore, the Court found that the abovementioned Judgment of the Supreme Court is not compatible with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, due to the lack of a reasoned court decision, and consequently must be declared invalid, and remanded for retrial to the Supreme Court. The Court also emphasized the fact that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, in the circumstances of the present case, relates exclusively to the lack of reasoning for the court decision, and does not in any way correlate with nor prejudice the outcome of the case merits. #

JUDGMENT

in

Case no. KI227/19

Applicant

N.T. "Spahia Petrol"

Constitutional review of Judgment ARJ.UZVP.no. 94/2019 of the Supreme Court of Kosovo, of 1 August 2019

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 the company N.T. "Spahia Petrol", represented by Florin Lata, lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with Judgment [AA.no.501/2018] of 16 April 2019 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [A.no.548/16] of 29 May 2018 of the Department of Administrative Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

Subject Matter

3. The subject matter is the constitutional review of the challenged Judgment which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

4. The Referral is based on paragraph 4 of Article 21 [General Principles] and paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 (Processing Referrals) and 47 (Individual Requests) of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 (Filing of Referrals and Replies) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 16 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 December 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges Arta Rama-Hajrizi (Presiding), Safet Hoxha and Remzije Istrefi-Peci.

7. On 10 January 2020, the Court notified the Applicant and the Supreme Court of the registration of the Referral. On the same date, the Court requested from the Basic Court the receipt proving the date when the Applicant had received the challenged Judgment.

8. On 14 January 2020, the Court received from the Basic Court the requested receipt, based on which, the Applicant had received the challenged Judgment on 22 August 2019.

9. On 24 November 2020, the Court requested from the Basic Court the complete case file.

10. On 25 November 2020, the Basic Court submitted the complete case file to the Court.

11. On 10 December 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the admissibility of the Referral.

12. On the same date, the Court unanimously found that (i) the Referral is admissible; and found that (ii) Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019 of the Supreme Court, is not in conformity with Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

Summary of facts

13. Based on the case file, the Applicant is an individual business which since 2000 carries out the primary activity of trade in fuel and secondary activity of the restaurant.

14. On 10 December 2014, the Kosovo Police, after checks related to criminal investigations, had sequestered a number of financial accounting documents from the Applicant.

15. On an unspecified date, the Tax Administration of the Republic of Kosovo (hereinafter: TAK) had conducted a tax audit in the Applicant's business, where it identified a number of irregularities which it reflected in the Audit Report of 26 October 2015. Pursuant to point 7 of this report, (i) a copy of it was submitted to the Applicant; while (ii) the obligation to provide evidence to challenge the same, was on the side of the taxpayer, respectively the Applicant.

16. On 17 November 2015, TAK submitted to the Applicant the Decision on the Reassessment Notice for the payment of additional tax on (i) Personal Income Tax for the periods 2011, 2012, 2013; and (ii) Value Added Tax for the periods 06/2012 and 03/2013 (hereinafter: the Reassessment Notice).

17. On 26 November 2015, the Applicant submitted to the Special Prosecution Office of the Republic of Kosovo, "*request for permission for temporary return of documents or copies thereof*", emphasizing that (i) *"after the checks by the Kosovo Police, our financial documents were also temporarily taken away*"; (ii) in the meantime, by TAK inspectors, "*for lack of financial documentation which was taken during the check, the entity is charged with tax liabilities even though the entity has delivery notes and invoices but which are held*

by the Police and the Prosecution"; and (iii) *"against the notice of the Inspectors of Tax Administration we have the right to complain until 09.12.2015, [and] for filing a complaint we have to be based on evidence, therefore we address you with a request to allow us copies of financial documents or eventually the original documents, for the purposes of the complaint"*. This request for notification was also addressed to Kosovo Police and TAK. According to the Applicant's allegations and the case file, he has never received any response in regard to his request.

18. On 16 December 2015, the Applicant filed a complaint against the Reassessment Notice in the Complaints Department of TAK challenging, inter alia, the findings of TAK regarding (i) the manner of estimating the additional turnover in the amount of 178,368.43 euros, not taking into account the delivery notes of supplies with goods; (ii) non-acceptance of operating expenses for the period 2011/2012, despite evidence proving these expenses; and (iii) non-recognition of invoices by TAK for sales and purchases with company "S".

19. On 10 March 2016, the Complaints Department of TAK by Decision [455/2015] (i) partially approved the Applicant's complaint and amended the Reassessment Notice, recognizing a part of the operating expenses for the period 2011 as well as a part of the additional turnover related to the entities "N.B." and "G.B."; while (ii) rejected the invoices related to the transactions with the company "S.", qualifying them as fictitious. Regarding the rejection of the above Decision, TAK reasoned, inter alia, that (i) based on paragraph 7 of Article 13 (Creating and Retaining Records) of Law no. 03/L-222 on Tax Administration and Procedures (hereinafter: the Law on Tax Administration) and Section 22 (Transactions Over Five Hundred Euros) of Administrative Instruction no. 15/2010 on the Implementation of Law no. 03/l-222 on Tax Administration and Procedures (hereinafter: Administrative Instruction no. 15/2010), economic entities are obliged that transactions with a value greater than five hundred (500) Euros be made through bank accounts, evidence which regarding the contested invoices the Applicant had not provided; and (ii) based on paragraph 6 of Article 19 (Director General's Assessment of Tax) of the Law on Tax Administration, the burden of proof that the tax assessment is incorrect falls on the taxpayer, respectively on the Applicant, while the latter had not proven that the findings of the Reassessment Notice regarding invoices for company "S" were inaccurate, moreover *"transactions between the two entities have been fictitious, because the party has also given a statement that they have not performed any service or sale-purchase of goods, but have only issued fictitious invoices."*

20. On 13 April 2016, the Applicant filed a lawsuit in the Basic Court against the above mentioned Decision of TAK, alleging essential violation of the provisions of the administrative procedure, erroneous determination of the factual situation and erroneous application of the substantive law, with the proposal to annul the Decision [455/2015] of 10 March 2016 of the Complaints Department of TAK.

21. On 13 April 2018, and while his case was still pending in the Basic Court, the Applicant filed a request with the Basic Court in Mitrovica, for "*return of confiscated documentation during the raid*". According to the Applicant and the case file, he has never received any response to his request.

22. On 29 May 2018, in the hearing held in the Basic Court, based on the minutes of the latter, the Applicant alleged that it had been made impossible for him to verify the transactions, including those with the entity "S." The Applicant stated that (i) "*on 10.12.2014, the Kosovo Police had sequestered all of the financial documentation of the claimant, computers, for which we present to the court as evidence the proof of sequestration by the Kosovo Police. After the sequestration of the documentation, TAK submits the draft report of the check where the claimant cannot submit concrete objections in the absence of documents.*"; (ii) *"on 26 November 2015, he had requested from the Prosecution, TAK and the Police to provide him with financial documents",* but they were not provided to him; (iii) due to lack of documentation, "*with a lot of difficulty he has managed to obtain some evidence from the entities with which he had collaborated*"; and (iv) as a result of making impossible his access to this documentation, Article 9 (The principle of publicity) of the Law no. 02/L-28 on Administrative Procedure (hereinafter: LAP) and his constitutional rights guaranteed by Articles 31 and 32 of the Constitution have been violated.

23. On 29 May 2018, the Basic Court by Judgment [A.no.548/16] rejected the claimant's claim as ungrounded, upholding the Decision [455/2015] of TAK. The Basic Court (i) regarding the allegations of sequestration and consequently the lack of financial documentation, stated that *"the claimant was able to provide evidence from the bank or the entity that issued the disputed invoices, that payments of these invoices were made";* and (ii) with respect to disputed invoices with company "S" stated that *"the claimant has not managed to verify the payments or the statement of purchases over five hundred (500) euros, as provided in the provision of Section 22 [Transactions Over Five Hundred Euros] par. 2 of the Administrative Instruction*

15/2010". Finally, the Basic Court found that the legal conditions for recognizing the relevant invoices based on Article 23 (Cancellation of Tax Documents) of the Law on Tax Administration and Sections 13 (De-Activation of a Business), 14 (Cancellation of Documents Including Fiscal Number) and 16 (Publication of Taxpayer Names and Numbers) of Administrative Instruction no. 15/2010 had not been fulfilled.

24. On 9 August 2018, the Applicant filed an appeal with the Court of Appeals against the above Judgment of the Basic Court, alleging violation of the provisions of the contested procedure, erroneous or incomplete determination of the factual situation, as well as erroneous application of the substantive law. Through his appeal, the Applicant alleged a violation of his rights guaranteed by (i) Article 31 of the Constitution in conjunction with Article 6 of the ECHR, with an emphasis on the fact that the Basic Court had not considered Article 9 (The principle of publicity) of the LAP and paragraph 6 of Article 14 (Access to books, records, computers and similar record storage devices) of the Law on Tax Administration; and (ii) Article 32 of the Constitution, emphasizing the fact that, as a result of the lack of financial documentation, he had been made impossible the effective exercise of the legal remedy against the Reassessment Notice of TAK.

25. On 16 April 2019, the Court of Appeals by Judgment [AA.no.501/2018], rejected as ungrounded the Applicant's appeal and upheld the Judgment of the Basic Court.

26. On 7 July 2019, against the above Judgment of the Court of Appeals, the Applicant filed a request for extraordinary review of the court decision with the Supreme Court, alleging violation of the provisions of the contested procedure and erroneous application of the substantive law. The Applicant challenged the Judgment of the Court of Appeals, inter alia, in the context of the lack of a reasoned court decision, regarding the allegations he had raised before the Court of Appeals for (i) violation of Article 9 of the LAP and paragraph 6 of Article 14 of the Law on Tax Administration; and (ii) violation of Articles 31 and 32 of the Constitution.

27. On 1 August 2019, the Supreme Court, by Judgment [ARJ.UZVP.no.94/2019], rejected as unfounded the Applicant's request for extraordinary review of the Judgment of the Court of Appeals, upholding the latter. The Supreme Court (i) with regard to the sequestration allegations and, consequently, the lack of financial documentation, stated that *"the claimant was able to provide evidence from the bank or at the entity that issued the contested*

invoices that the same had paid these invoices"; (ii) with respect to contested invoices with company "S" it stated that *"the claimant has not managed to verify the payments or the declaration of purchases over five hundred (500) euros, as provided in the provision of Section 22 par. 2 of Administrative Instruction 15/2010 "* ; whereas (iii) it finally, approved the findings of the lower courts, that in the circumstances of the concrete case, the legal conditions to recognize the relevant invoices were not fulfilled based on Article 23 of the Law on Tax Administration and Sections 13, 14 and 16 of the Administrative Instruction no. 15/2010.

Applicant's allegations

28. The Applicant alleges that the challenged Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019 of the Supreme Court, has been issued in violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial] and 32 [Right to Legal Remedies] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

29. With regard to the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges (i) a lack of a reasoned court decision; and (ii) violation of the principle of equality of arms.

30. Regarding the first, namely the lack of a reasoned court decision, the Applicant alleges that the regular courts have failed to substantiate his fundamental allegations regarding the violation of his constitutional rights as a result of the inability to access his financial documentation. The Applicant specifically states that the Court of Appeals and the Supreme Court failed to address his allegations raised through the appeal and the request for extraordinary review of the court decision, respectively regarding (i) violation of Article 9 of the LAP. and paragraph 6 of Article 14 of the Law on Tax Administration, based on which the latter "*will return the original in the shortest practical time*"; and (ii) the violation of his constitutional rights, and in particular those guaranteed by Article 31 of the Constitution because "*the principle of equality of arms has been violated"* and Article 32 because he *"has not been able to exercise legal remedies effectively in the absence of financial documentation*". In support of his allegations in this regard, the Applicant refers to the case law of the Court in cases KI72/12, with Applicant *Veton Berisha and Ilfete Haziri*, Judgment of 7 December 2012; KI135/14, Applicant *IKK Classic*, Judgment of 8 February 2016; and KI18/16, with Applicant *Bedri Salihu*, Judgment of 15 July 2016.

31. As for the second, namely the principle of equality of arms, the Applicant alleges that in the court proceedings against him "*he has never been equal to the opposing party*", emphasizing that the principle of equality of arms, which *"means that each party should be given a reasonable opportunity to present its case - including its evidence - in conditions that do not place it at a considerable disadvantage vis-a-vis the other party"*, in the circumstances of his case was not respected. The Applicant reiterates that (i) pursuant to paragraph 6 of Article 14 of the Law on Tax Administration, TAK was obliged to return the original in possession to the Applicant; (ii) pursuant to Article 9 of the LAP, the right of the parties to have possession of all documentation held by the other party is guaranteed; and (iii) in the absence of this documentation, he has been unable to present his evidence and effective appeal against the TAK Decision of 10 March 2016 and the claim, appeal and request for extraordinary review of the court decision in the Basic Court, the Court of Appeals and the Supreme Court, respectively. In this context, the Applicant also alleges a violation of Article 24 of the Constitution because "*he has never been equal against the opposing party during the course of the proceedings*". In support of his allegations in this regard, the Applicant refers to the case law of the Court in case KI31/17, with Applicant *Shefqet Berisha*, Judgment of 14 June 2017.

32. Finally, emphasizing that the trial in its entirety *"was unjust and was conducted in violation of the Constitution",* the Applicant states that *"the whole proceedings must be declared unconstitutional ab initio (from the beginning)"*. Consequently, he requests the Court (i) to declare his Referral admissible; (ii) to conclude a violation of Articles 24, 31 and 32 of the Constitution; (iii) to declare invalid the Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019 of the Supreme Court in conjunction with Judgment [AA.no.501/2018] of 16 April 2019 of the Court of Appeals and Judgment [A.no.548/16] of 29 May 2018 of the Basic Court and Decision [no. 455/2015] of 10 March 2016 of TAK; and (iv) remand the matter back to TAK for reconsideration.

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.
[...]

Article 32
[Right to Legal Remedies]

Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by 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.
[...]

Article 13
(Right to an effective remedy)

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Law no. 02/L-28 on Administrative Procedure

Article 9

(The principle of publicity)

9.1. The public administration bodies shall exercise their activity in a transparent manner and in close cooperation with concerned natural and legal persons.
9.2. Any natural and legal persons, without disclosing his specific interest vis-à-vis public administration bodies, shall have the following procedural rights:
a) to obtain information available to public administration bodies,
b) to obtain such information in a timely fashion,
c) to obtain it in the same manner as any other person,
d) to obtain it in a convenient and effective means or format.
9.3. Excluded from paragraph 2 information may be limited only for purposes of protection on legitimate public interests, private life or other legitimate private interests determined by relevant laws.
9.4. To refuse the access in information, the public administration body takes the decision in written a decision as such shall contain the reasons of issuing and instructions for appeal.

Law 03/L-222 on Tax Administration and Procedures

Article 13
(Creating and Retaining Records)

[...]
7. Any transaction in excess of five hundred (500) euro, made between persons involved in economic activity, after 1 January 2009 is required to be made through bank account.
[...]

Article 14
(Access to books, records, computers and similar record storage devices)

[...]
6. Subject to the right to retain a document as evidence of a criminal offence, the Director General or an authorized officer who removes and retains records under this Article shall make a copy of the record and return the original in the shortest time practicable.
[...]

Article 19
(Director General's Assessment of Tax)

[…]
6. The burden of proving that the making of any assessment by the Director General is erroneous and the burden of proving that the amount of any such assessment is incorrect shall be on the taxpayer.
[…]"

Administrative Instruction no. 15/2010 on the Implementation of Law no. 03/l-222 on Tax Administration and Procedures

Section 22
(Transactions Over Five-Hundred Euros)

1. Paragraph 7 of Article 13 of The Law provides that all persons, who make transactions in the course of their economic activity in respect of the supply of goods or services between persons in excess of 500 (Five Hundred) Euro must make payment in respect of such transactions through a bank transfer.
2. For transactions made from 1 January 2009 up to 17 August 2010, paragraph 1 of this Section shall be applied only to VAT-registered persons (taxable persons). On, and after, 18 August 2010, transactions described in paragraph 1 of this Section apply to all persons.

Assessment of the admissibility of the Referral

33. The Court initially examines whether the admissibility criteria established by the Constitution and further specified by the Law and the Rules of Procedure have been fulfilled.

34. In this regard, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which stipulate:

"*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."

35. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which stipulates:

> *"4. Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable."*

36. In addition, the Court also examines whether the Applicant has fulfilled the admissibility criteria as set out in the Law. In this regard, the Court refers to Articles 47 (Individual Requests), 48 (Accuracy of the Referral) and 49 (Deadlines) of the Law, which stipulate:

> Article 47
> (Individual Requests)
>
> *"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
>
> *2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."*
>
> Article 48
> (Accuracy of the Referral)
>
> *"In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge."*
>
> Article 49
> (Deadlines)
>
> *"The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision…".*

37. In this regard, the Court first notes that the Applicant has the right to file a constitutional complaint, invoking on the alleged violations of his fundamental rights and freedoms, which apply to individuals and legal entities (see the Court case KI41/09, with Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14; and KI35/18, with Applicant "*Bayerische Versicherungsverbrand",* Judgment of 11 December 2019, paragraph 40).

38. Whereas, regarding the fulfilment of other admissibility criteria defined by the Constitution and Law and elaborated above, the Court states that the Applicant is an authorized party who challenges an act of a public authority, namely the Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019 of the Supreme Court, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms that he alleges to have been violated, in accordance with the requirements of Article 48 of the Law and has submitted the Referral in accordance with the deadlines set out in Article 49 of the Law.

39. The Court also finds that the Applicant's Referral fulfils the admissibility criteria set out in paragraph (1) of Rule 39 of the Rules of Procedure and that it cannot be declared inadmissible on the basis of the conditions set out in paragraph (3) or Rule 39 of the Rules of Procedure. The Court also notes that the Referral is not manifestly ill-founded on constitutional grounds, as set out in paragraph (2) of Rule 39 of the Rules of Procedure, and must therefore be declared admissible and its merits must be reviewed.

Merits

40. The Court recalls that in the circumstances of the concrete case, the financial documentation of the Applicant was sequestered in 2014 by the Kosovo Police. This was followed by an audit by TAK, which through the Reassessment Notice, among other things, resulted in the setting of additional personal income tax and value added tax for the respective periods. The Applicant challenged this Reassessment Notice to TAK, and the latter assessed the Applicant's complaint as partially grounded. The rejecting part of the TAK Decision is mainly related to the transactions which the Applicant had realized with the company "S". TAK stated that the Applicant, who according to Article 19 of the Law on TAK bears the burden of proving that the tax assessment is incorrect, did not prove the validity of these transactions, moreover he also considered that the same are fictitious. In the meantime, the Applicant addressed (i) the Special Prosecution Office of the Republic of Kosovo; and later (ii) the Basic Court in Mitrovica, requesting the return of at least copies of the sequestered documentation for the purposes of complaints to the TAK and the regular courts regarding Decision [455/2015] of 10 March 2016 of TAK. Based on the case file and the allegations of the Applicant, it does not appear that he has ever received any response.

41. Proceedings before the regular courts had resulted in the rejection of the claim, the appeal and the request for extraordinary review of the

Applicant's court decision submitted to the Basic Court, the Court of Appeals and the Supreme Court, respectively. Prior to the same, the Applicant repeatedly stated, inter alia, that the lack of financial documentation made it impossible for him to prove the disputed transactions, alleging violations of (i) Article 9 of the LAP, according to which, inter alia, the public body must guarantee the right of the party to access his file and documents; (ii) paragraph 6 of Article 14 of the Law on Tax Administration, according to which, inter alia, the Director General or an authorized officer who removes and retains records under this Article shall make a copy of the record and return the original in the shortest time practicable; and (iii) violation of his right to a fair and impartial trial and of the right to an effective legal remedy guaranteed by Articles 31 and 32 of the Constitution, respectively.

42. The Supreme Court, through the challenged Judgment, had rejected the Applicant's allegations, confirming the Judgments of the Basic Court and the Court of Appeals, respectively. The Supreme Court had reasoned its position, based on (i) Section 22 of Administrative Instruction no. 15/2010, according to which, *"all persons, who make transactions in the course of their economic activity in respect of the supply of goods or services between persons in excess of 500 (Five Hundred) Euro must make payment in respect of such transactions through a bank transfer",* consequently stating that all necessary evidence could be obtained through the relevant bank by the Applicant; and (ii) on Sections 13, 14 and 16 of Administrative Instruction no. 15/2010.

43. Before the Court, the Applicant challenges the findings of the Supreme Court, raising allegations related to (i) Article 31 of the Constitution, in the sense of lack of a reasoned court decision and violation of the principle of equality of arms; and (ii) Article 32 of the Constitution, in the sense of the impossibility of exercising his right to an effective legal remedy, because in the absence of financial documentation, the Applicant could not effectively challenge either the Decision of TAK, and subsequently, neither the decisions of the regular courts.

44. These allegations of the Applicant will be examined by the Court based on the case law of the European Court of Human Rights (hereinafter: the ECtHR), in accordance with which, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution. Consequently, and subsequently, the Court will first examine the Applicant's allegations regarding the lack of a reasoned court decision, a review in which the Court will first (i)

elaborate on the general principles; and thereafter, (ii) will apply the same to the circumstances of the concrete case.

(i) General principles regarding the right to a reasoned court decision

45. With regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court first notes that it already has a consolidated case law. This practice is built on the case law of the ECtHR, including but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, Judgment of 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania,* Judgment of 24 May 2005; *Pronina v. Ukraine,* Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Furthermore, the basic principles regarding the right to a reasoned court decision have also been elaborated in the cases of this Court, including but not limited to KI22/16, with Applicant *Naser Husaj*, Judgment of 9 June 2017; KI97/16, with Applicant "*IKK Classic",* Judgment of January 9, 2018; KI143/16, with Applicant *Muharrem Blaku and others,* Resolution on Inadmissibility of 13 June 2018; KI24/17, with Applicant *Bedri Salihu,* Judgment of 27 May 2019; and KI35/18, with Applicant "*Bayerische Versicherungsverbrand",* quoted above.

46. In principle, based on the case law of the ECtHR, the guarantees embodied in Article 6 of the ECHR include the obligation for the courts to provide sufficient reasons for their decisions (see the ECtHR case, *H. v. Belgium*, Judgment of 30 November 1987, paragraph 53; also for more details on the right to a reasoned court decision, see the ECtHR Guide to Article 6 of the ECHR of 30 April 2020, The right to a fair trial (civil aspect), IV. Procedural Requirements, 7. Reasons for Judgments, paragraphs 369 to 380 and references used therein). A reasoned decision shows the parties that their case has indeed been heard, and consequently contributes to a greater admissibility of the decisions. (See the ECtHR *case Magnin v. France*, Decision of 10 May 2012, paragraph 29). This case law also stipulates that despite the fact that a court has a certain discretion regarding the selection of arguments and evidence, it is obliged to justify its activities and decision-making by giving the relevant reasons (see the ECtHR cases: *Suominen v. Finland*, cited above, paragraph 36; and *Carmel Saliba v. Malta*, Judgment of 24 April 2017, paragraph 73). Furthermore, the decisions must be reasoned in such a way as to enable the parties to

exercise effectively any existing right of appeal (see the ECtHR case *Hirvisaari v. Finland*, cited above, paragraph 30).

47. Having said that, Article 6 of the ECHR obliges courts to give reasons for their decisions, but this does not mean that a detailed response is required for each argument (see the ECtHR cases *Van de Hurk v. The Netherlands*, cited above, paragraph 61; *García Ruiz v. Spain*, cited above, paragraph 26; *Jahnke and Lenoble v. France*, Decision of 29 August 2000; and *Perez v. France*, Judgment of 12 February 2004, paragraph 81). The extent to which this obligation applies may vary depending on the nature of the decision and should be determined in the light of the circumstances of each case (see the ECtHR cases: *Ruiz Torija v. Spain*, Judgment of 9 December 1994, paragraph 29; and *Hiro Balani v. Spain*, cited above, paragraph 27). An appellate court, for example, may, in principle, reject an appeal by upholding the reasons for the lower court's decision, however even such a decision must contain sufficient reasoning to show that the relevant court has not upheld the findings reached by a lower court without sufficient consideration (see the ECtHR case, *Tatishvili v. Russia*, cited above, paragraph 62).

48. Based on the case law of the ECtHR, courts are required to consider and provide specific and clear responses regarding (i) the substantive allegations and arguments of the party (see the ECtHR cases, *Buzescu v. Romania*, cited above, paragraph 67; and *Donadze v. Georgia*, Judgment of 3 March 2006, paragraph 35); (ii) allegations and arguments that are decisive for the outcome of the proceedings (see the ECtHR cases: *Ruiz Torija v. Spain*, cited above, paragraph 30; and *Hiro Balani v. Spain*, cited above, paragraph 28); or (iii) allegations concerning the rights and freedoms guaranteed by the ECHR and its Protocols (see the ECtHR case, *Wagner and JMWL v. Luxembourg*, Judgment of 28 June 2007, paragraph 96 and references therein).

(ii) Application of these principles in the circumstances of the concrete case

49. The Court recalls that in the circumstances of the concrete case, the Applicant's allegations of lack of reasoning in relation to the challenged Judgment of the Supreme Court consist of (i) violation of applicable law, namely Article 9 of the LAP and paragraph 6 of Article 14 of the Law on Tax Administration, which according to the Applicant enable him to have access to his financial documentation; and (ii) the violation of the Constitution, respectively Articles 31 and 32 thereof, where according to the Applicant the absence of this documentation

has violated his right to equality of arms in the procedure and has prevented the effective exercise of available legal remedies.

50. To determine whether the reasoning given by the Supreme Court fulfils the standards of a reasoned court decision, the Court recalls the reasoning of the Supreme Court in the challenged Judgment [ARJ.UZVP.no. 94/2019], which states the following:

> *"From the evidence administered in this administrative conflict, this court finds that the respondent has acted correctly when it partially approved the claimant's complaint and partially amended the decision for Reassessment Notice for the payment of additional tax on Personal Income Tax for period 2011, 2012, 2013 and Value Added Tax periods 06/2012 and 03/2013, and the claimant has remained obligatory regarding the increase of COGS and the increase of additional turnover for VAT (12/2011) and PIT (2011) and the non-acceptance of invoices by the entity NTP ["S"]. In the opinion of this court, in the reasoning of the challenged decision, the respondent rightly states that the additional turnover derives from undeclared and unsigned delivery notes between the parties and that the declared invoices do not correspond to the delivery receipts, while it did not accept the contested invoices from the entity NTP ["S"] because the claimant failed to prove the payments or the declaration of purchases over 500 euros, as provided by the provision of Section 22. paragraph 2 of Administrative Instruction 15/2010.*
>
> *This court has concluded that in the audit report are given concrete and clear reasons that argue the increase of sales for the period 2011, as a result of the material difference and the fact that in the sales books the delivery notes are undeclared. Despite the findings of the audit that the contact with the entity NTP [S] was attempted, but was not achieved, and that the same entity was included in the list of entities that deal with suspicious transactions, the claimant did not try to prove to the court with any argument how payment was made for these contested purchase invoices. Although the competent investigative body checked the claimant, which resulted in the sequestration of financial documentation, the claimant was able to obtain evidence from the bank or the entity that issued the contested invoices which he had paid. Also, the claimant did not try to secure the delivery notes of the undeclared goods from the entities that signed the same deliveries from which the additional turnover is derived because they do not correspond to the invoices. This court accepts the findings mentioned in the*

reasoning of the challenged decision that, in the absence of transactions, the legal conditions to accept invoices according to Article 23 of Law no. 03/L-222 on Tax Administration and Procedures, as well as Sections 13, 14 and 16 of Administrative Instruction 15/2010 have not been fulfilled."

51. Based on the above reasoning of the Supreme Court, the Court notes that the same regarding the allegations in conjunction to the lack of financial documentation has approved the position of lower courts that (i) despite the fact that the competent investigative body checked the claimant, respectively the Applicant and which resulted in the sequestration of the financial documentation, the same could provide evidence from the bank or from the entity that issued the contested invoices; and (ii) contested invoices, including those with entity "S", could be reasoned by bank certificates, as defined in paragraph 2 of Section 22 of Administrative Instruction no. 15/2010. Moreover, the Supreme Court has approved the position of the lower courts, which in the circumstances of the concrete case, "*in the absence of transactions, the legal conditions to accept invoices according to Article 23 of Law no. 03/L-222 on Tax Administration and Procedures, as well as Sections 13, 14 and 16 of Administrative Instruction 15/2010* have not been fulfilled".

52. In this context, the Court notes that the Supreme Court seems to reason that the lack of financial documents of the Applicant, as a result of their sequestration, does not affect the alternative decision-making in the circumstances of the concrete case, because based on Section 22 of the Administrative Instruction no. 15/2010, the Applicant was obliged to make all transactions over five hundred (500) euros through the bank, and consequently, would have been able to provide the necessary evidence through banking transactions. However, the Court notes that the Applicant's specific allegations regarding (i) violation of applicable law, namely Article 9 of the LAP and paragraph 6 of Article 14 of the Law on Tax Administration; and (ii) the violation of the Constitution, respectively Articles 31 and 32 thereof, which according to the Applicant, in the absence of this documentation, has violated his right to equality of arms in the procedure and has prevented the effective exercise of available legal remedies, have not been addressed or reasoned by the Supreme Court.

53. Furthermore, the Court also notes that the Supreme Court agreed and upheld the decision of the Court of Appeals, on the basis of which, "*in the absence of transactions, the legal conditions to accept invoices according to Article 23 of Law no. 03/L-222 on Tax Administration and Procedures, as well as Sections 13, 14 and 16 of Administrative*

Instruction 15/2010 have not been fulfilled". However, the Court notes that Article 23 of the Law on Tax Administration and Sections 13, 14 and 16 of Administrative Instruction no. 15/2010, are not related to "*legal conditions for accepting invoices"*. More specifically, Article 23 (Cancellation of Tax Documents) of the Law on Tax Administration is related to the cancellation of tax documents and the procedure to be followed, while Sections 13 (De-Activation of a Business), 14 (Cancellation of Documents Including Fiscal Number) and 16 (Publication of Taxpayer Names and Numbers) of Administrative Instruction no. 15/2010, are mainly related to the implementation of Article 23 of the Law on Tax Administration, namely the de-activation of businesses as a result of their economic or non-economic activity, cancellation of documents including fiscal number and publication of names and numbers of taxpayers, but in in no way relate to the dispute and the specifics in the circumstances of the concrete case.

54. In this regard, the Court first recalls that based on the case law of the ECtHR, courts with appellate jurisdiction are obliged to give reasons for their decisions, but this does not mean that a detailed response is required regarding each argument. They may, in principle, reject an appeal by upholding the reasons for the lower court's decision. The Court notes that in the circumstances of the concrete case, the Supreme Court rejected the request for extraordinary review of the Applicant's court decision, approving the position and reasoning of the Court of Appeals. Having said that, based on the same case law, even such decisions must contain sufficient reasoning to show that the relevant court, in this case the Supreme Court, did not approve the findings reached by a lower court, namely the Court of Appeals., without sufficient consideration.

55. With regard to the sufficient consideration to be shown by the courts of appellate jurisdiction when approving the decisions of the lower courts and the necessary measure of reasoning for the judicial decision in such circumstances, the Court recalls the case of the ECtHR. *Tatishvili v. Russia* (Judgment of 22 February 2007), in which the ECtHR had reviewed a case related to an applicant's application for registration of residence. All the administrative instances and the respective courts had rejected the applicant's allegations (for the facts of the case, see paragraphs 7 to 19 of the ECtHR case *Tatishvili v. Russia,* cited above). The ECtHR found, inter alia, a violation of Article 6 of the ECHR due to the lack of a reasoned court decision and the violation of the right to a fair trial, because the relevant court which was responsible for review the lower court decision, simply, summarily and without sufficient consideration, had upheld the reasoning of the lower court, without addressing the relevant allegations of the Applicant, thus failing to correct the shortcomings of

the previous decision (for the relevant reasoning, see paragraphs 55 to 63 of the ECtHR case *Tatishvili v. Russia,* cited above).

56. In the circumstances of the concrete case, the Applicant before the Supreme Court specifically alleged that the Court of Appeals had failed to provide a reasoning regarding the alleged violations related to applicable law, namely Article 9 of the LAP and paragraph 6 of Article 14 of the Law on Tax Administration; and violation of the Constitution, Articles 31 and 32, respectively. Despite these allegations, the Supreme Court had simply approved the reasoning of the Court of Appeals on two main points. With regard to the above allegations of the Applicant, it had reasoned that "*the claimant has not managed to verify the payments or declaration of purchases over 500 euros, as provided by the provision of Section 22. paragraph 2 of Administrative Instruction 15/2010"*, while, it had also based the conclusion that the request for extraordinary review of the decision was unfounded, because in the circumstances of the concrete case "*the legal conditions for accepting invoices according to Article 23 of Law no. 03/L-222 on the Tax Administration Sections 13, 14 and 16 of Administrative Instruction 15/2010 have not been fulfilled"*. The Court will further consider whether these two arguments of the Supreme Court reflect a reasoned court decision in the circumstances of the concrete case, respectively sufficient consideration by the Supreme Court in rejecting the Applicant's request and approving the Judgment of the Court of Appeal, which was contested before it.

57. Initially, and regarding the references in Section 22 of the Administrative Instruction no. 15/2010, according to which all persons, who make transactions in the course of their economic activity in excess of five hundred (500) euro must make payment through a bank transfer, as stated above, the reasoning of the Supreme Court indirectly implies that the Applicant's allegations of inability to provide the necessary evidence as a result of the lack of financial documentation cannot affect the decision of the court. The Court will not assess the validity or accuracy of such a finding, but nevertheless emphasizes that such reasoning does not replace the need to address the Applicant's allegations regarding the violation of the LAP, the Law on Tax Administration and Articles 31 and 32 of the Constitution, which he had raised throughout all regular courts, without prejudice to whether they are relevant or not. These are essential allegations of the Applicant and as such, oblige the relevant court to treat and justify them, whether or not approving them as founded.

58. The silence of the courts regarding the relevant allegations of the respective applicants has been specifically examined by the case law of

the ECtHR. For example, in cases, *Ruiz Torija v. Spain,* quoted above and *Hiro Balani v. Spain*, cited above, the ECtHR, beyond the general principles regarding the right to a reasoned judicial decision, also addressed the circumstances in which the relevant courts had remained silent on the arguments, which the ECtHR deemed essential. In both cases, the ECtHR considered whether the silence of the relevant court could reasonably be interpreted as an implied rejection of the parties' arguments (see the ECtHR case *Hiro Balani v. Spain*, cited above, paragraph 28). However, in the absence of proper reasoning, the ECtHR stated that it was impossible to ascertain whether the respective courts had simply neglected to deal with the respective claims or implied their rejection and, if that was its purpose, what were its reasons for such an approach (see the ECtHR cases: *Hiro Balani v. Spain,* cited above, paragraph 28; and *Ruiz Torija v. Spain,* cited above, paragraphs 29 and 30). In both cases, the ECtHR found a violation of Article 6 of the ECHR.

59. Furthermore, as clarified throughout the elaboration of the general principles, the ECtHR has specifically held that allegations relating to violations of the ECHR and its Protocols should be addressed by the courts through specific and clear responses. The same goes for allegations of constitutional violations.

60. For example, in the ECtHR case *Wagner and JMWL v. Luxembourg*, quoted above, the ECtHR considered a case involving a family court decision in Peru confirming the adoption of a child of the respective applicant. Subsequent proceedings in Luxembourg concerned the applicant's request to declare this decision applicable in the State of Luxembourg. Proceedings within the latter courts ended in favour of the position of the Prosecutor General's Office and against the respective applicant (for the facts of the case, see the ECtHR case *Wagner and JMWL v. Luxembourg*, cited above, paragraphs 5 to 40). Throughout the proceedings in the regular courts, the Applicant, inter alia, alleged a violation of Article 8 of the ECHR. The respective court in Luxembourg, in relation to this claim, had stated that "*its dubious, unclear and inaccurate nature, did not constitute a basis for a complaint seeking a response*". The applicant complained to the ECtHR, alleging, inter alia, a violation of Article 6 of the ECHR as a result of an unreasonable court decision, specifically stating that the regular courts had not addressed her allegations of a violation of Article 8 of the ECHR. Despite the fact that the domestic courts had qualified this claim as *"unclear and inaccurate",* The ECtHR found a violation of Article 6 of the ECHR due to an unreasonable court decision, stressing that allegations related to violations of the ECHR should receive an accurate and precise response (for the reasoning of

the case, see case of the ECHR *Wagner and JMWL v. Luxembourg*, cited above, paragraphs 117-136). More specifically, the ECtHR emphasized, inter alia, that (i) the effect of Article 6 of the ECHR is, inter alia, to place the relevant court under an obligation to properly consider the submissions, arguments and evidence presented by the parties, without prejudice to whether they are relevant or not (see the ECtHR case, *Wagner and JMWL v. Luxembourg*, cited above, paragraph 89 and references therein); and (ii) where the claims relate to the "rights and freedoms" guaranteed through the ECHR and its Protocols, the relevant domestic courts are required to review them with rigor and due diligence (see the ECtHR case*, Wagner and JMWL v. Luxembourg*, cited above, paragraph 96 and references therein).

61. In the circumstances of the concrete case, the Applicant alleges a violation of Article 31 of the Constitution, as a result of violation of the equality of arms and a violation of Article 32 of the Constitution, as a result of the inability to exercise legal remedy effectively, and both the Court of Appeals and the Supreme Court have not addressed these allegations in a single sentence. The Court recalls that in the context of a reasoned court decision, substantive allegations, and in particular those relating to violations of the Constitution and the ECHR, must be reasoned regardless of their relevance to the respective decision-making. The silence of a court regarding such allegations, as defined through the ECtHR case law, makes it impossible to ascertain whether the respective courts merely neglected to deal with these allegations or implied their rejection and, if that was the purpose, what were its reasons for such an approach.

62. Whereas, regarding the finding of the Supreme Court that "*the legal conditions for accepting the invoices have not been fulfilled",* based on Article 23 of the Law on Tax Administration and Sections 13, 14 and 16 of Administrative Instruction no. 15/2010, the Court emphasizes that these provisions on which the Supreme Court has based its final finding on the rejection of the Applicant's request for extraordinary review of the court decision, are not related to the circumstances of the concrete case. As explained above, Article 23 of the Law on Tax Administration and Sections 13, 14 and 16 of Administrative Instruction no. 15/2010, relate, inter alia, to the cancellation of tax documents, de-activation of a businesses as a result of their economic or non-economic activity, cancellation of documents including fiscal number and publication of names and numbers of taxpayers. The Court may not prejudice whether the finding of the Supreme Court that the request for extraordinary review of the court decision is unfounded, referring to these provisions, is simply a technical error or not. However, such a finding, which has been carried over from the

decisions of the lower courts, reflects the lack of sufficient consideration of the Supreme Court in reviewing the Judgment of the Court of Appeals, without properly examining the Applicant's allegations and relevant findings of the Court of Appeals.

63. The Court recalls that it has repeatedly stated that court decisions will violate the constitutional principle of prohibition of arbitrariness in decision-making, if the reasoning given does not contain established facts, relevant legal provisions and the logical relationship between them (see, inter alia, the Court cases: KI135/14, Applicant *IKK Classic*, cited above, paragraph 58; KI96/16 Applicant *IKK Classic*, cited above, paragraph 52; KI87/18 Applicant *"IF Skadeforsikring"*, Judgment of 27 February 2019, paragraph 49; and KI35/18, with Applicant "*Bayerische Versicherungsverbrand",* cited above, paragraph 52).

64. Therefore, taking into account the above remarks and the procedure as a whole, the Court considers that the Judgment of the Supreme Court, respectively Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019, was issued in violation of the Applicant's right to a reasoned court decision, as an integral part of the right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR because it failed to address the Applicant's substantive allegations regarding (i) violation of applicable law, namely Article 9 of the LAP and paragraph 6 of Article 14 of the Law on Tax Administration; and (ii) the violation of the Constitution, respectively Articles 31 and 32 thereof, as a result of the alleged violation of the equality of arms in the procedure and the inability to effectively exercise the available legal remedies.

65. The Court also notes that, having considered that it has already found that the challenged Judgment of the Supreme Court is not in conformity with Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a reasoned decision the court considers that it is not necessary to examine the Applicant's other allegations. The respective allegations of the Applicant should be reviewed by the Supreme Court, during the review of its Judgment, (i) in relation to the request of the Applicant for extraordinary review of the court decision, respectively the Judgment [AA.no.501/2018] of 16 April 2019 of the Court of Appeals; and (ii) the findings of this Judgment.

66. In this regard, the Court also emphasizes the fact that its finding of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in the circumstances of the concrete case, relates

exclusively to the lack of reasoning of the court decision, as explained in this Judgment, and in no way relates to or prejudices the outcome of the merits of the case.

Conclusions

67. In the circumstances of this case, the Court treated the Applicant's allegations, applying on this review, the case law of the Court and the ECtHR regarding the lack of a reasoned court decision, the guarantee, defined by Article 31 of the Constitution and Article 6 of the ECHR.

68. Throughout this review, the Court has found that in the issuance of the Judgment [ARJ.UZVP.no. 94/2019] of 1 August 2019, The Supreme Court has failed to substantiate the Applicant's substantive allegations related to the violation of the applicable law, namely the LAP and the Law on Tax Administration and the violation of Articles 31 and 32 of the Constitution. With regard to the latter two, the Applicant had repeatedly alleged that the lack, respectively the inability to access his financial documentation, had resulted in a violation of the equality of arms before the regular courts and the inability to exercise legal remedies effectively. The Court, based on the case law of the ECtHR, noted, inter alia, that the courts are obliged to substantiate the Applicants' substantive allegations, including those related to violations of constitutional rights and those guaranteed through the ECHR. In this context, the Court also clarified that despite the fact that when courts with appellate jurisdiction uphold the decisions of lower courts, they are not obliged to reason every argument, they are nevertheless obliged to show sufficient consideration in reviewing the decision of the lower degree, even in light of the allegations raised before it. In the circumstances of the concrete case, the Court, based on all the explanations given in this Judgment, considers that this is not the case. Consequently, the Court found that the above Judgment of the Supreme Court is not in conformity with the guarantees embodied in Article 31 of the Constitution in conjunction with Article 6 of the ECHR, due to the lack of a reasoned court decision, and consequently should be declared invalid, and remanded for retrial to the Supreme Court.

FOR THESE REASONS

The Constitutional Court, in accordance with Articles 21.4 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 59 (1) (a) of the Rules of Procedure, in its session held on 10 December 2020, unanimously:

DECIDES

I. TO DECLARE, the Referral admissible;

II. TO CONCLUDE that there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE the Judgment [ARJ.UZVP.no. 94/2019] of the Supreme Court of 1 August 2019 invalid;

IV. TO REMAND the Judgment [ARJ.UZVP.no. 94/2019] of the Supreme Court of 1 August 2019 for retrial in accordance with the Judgment of this Court;

V. TO ORDER the Supreme Court to notify the Court, in accordance with Rule 66 (5) of the Rules of Procedure, by 14 June 2020, on the measures taken to implement the Judgment of the Court;

VI. TO REMAIN committed to this matter in accordance with this order;

VII. TO NOTIFY this Judgment to the parties and, in accordance with Article 20.4 of the Law, to publish it in the Official Gazette;

VIII. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI193/19, Applicant: Salih Mekaj, Constitutional review of Judgment Pml.no.36 / 2019 of the Supreme Court, of 5 June 2019

KI193/18, Judgment of 17 December 2020, published on 31 December 2020

Keywords: *individual referral, criminal proceedings, right to a fair trial, admissible referral, violation of Article 31 of the Constitution*

The Applicant challenged before the Constitutional Court the constitutionality of Judgment Pml.no.36/2019 of the Supreme Court, of 5 June 2019, alleging a violation of his rights guaranteed by Articles 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo, and Article 6 [Right to a fair trial] of the European Convention on Human Rights. The Applicant alleged before the Court that the Supreme Court violated his rights guaranteed by Article 31 [Right to a Fair Trial] of the Constitution, Article 6.1 of the Convention, because: "[...]*when deciding on the Request for protection of legality, filed by the State Prosecutor, the Supreme Court was obliged to [...] in addition to the Request of the State Prosecutor review my Response as an opposing party in the proceedings, as well as I, as a defendant, was entitled to present my arguments against the Request for protection of legality and the court was obliged to examine them with the same attention as the arguments of the other party, which in this case is the Prosecution of State, but my Response not only has not been reviewed at all but it is not even mentioned in the entire challenged Judgment that I have submitted a response to the Request of the State Prosecution and this not only violates the principle of equality of the parties to the proceedings, but also constitutes an arbitrary conduct on the part of the Court. "*

The Court first examined whether the Referral fulfills the admissibility requirements for a meritorious review of the Referral, as set out in the Constitution and further specified in the Law on the Constitutional Court and the Rules of Procedure of the Court. The Court, after having considered the merits of the Referral, concluded that the obligation of the courts to notify the opposing party, about the exercise of legal remedies against them, is not an aim in itself. This obligation is a necessary procedural step to enable the parties to be treated equally, to have the opportunity to challenge the opposing party's allegations and arguments, and to present their case effectively. The Court further added that the regular courts should not be satisfied with the mere fact that the parties have received the notification about the exercise of a legal remedy against them, but they (the regular courts) should assure the parties that their views and arguments have been duly reviewed and assessed so that they are guaranted the most effective protection against the allegations rasied against them. On the contrary,

failure to review their objections and arguments automatically places them at a considerable disadvantage *vis-à-vis* the opponent (see, ECtHR, in the cases *Ofrer and Hopfinger*, nos. 524/59 and 617/59, 19.12. 60, Yearbook 6, pg. 680, which states that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent).

In this sense, the Court considered that the Supreme Court has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a significant disadvantage *vis-à-vis* the State Prosecutor, after having been deprived of the opportunity to have a real and substantive confrontation with the arguments and allegations presented by the State Prosecutor, as an opposing party in the proceedings. Accordingly, the Court finds that the challenged Judgment of the Supreme Court was taken contrary to the principle of equality of arms and the principle of adversarial proceedings, and as a result of this found that both the principle of having the party heard and the right to a reasonable judicial decision were also violated..

JUDGMENT

in

Case No. KI193/19

Applicant

Salih Mekaj

Constitutional review of Judgment Pml.no.36/2019 of the Supreme Court, of 5 June 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 Salih Mekaj, residing in Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment Pml.no.36/2019 of the Supreme Court, of 5 June 2019, which was served on him on 28 June 2019.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment [Pml.no.36/2019] of the Supreme Court, of 5 June 2019, which as alleged by the Applicant has violated his 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 6.1 [Right to a fair trial], of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 28 October 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 31 October 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (presiding), Gresa Caka-Nimani and Safet Hoxha (members).

7. On 14 November 2019, the Court notified the Applicant about the registration of the Referral KI193/19. On the same date, the Court requested from the Basic Court in Prishtina to submit the original case file of the Applicant's case, and a copy of the Referral was submitted to the Supreme Court.

8. On 18 November 2019, the Court received the original case file (PKR. No.338/ 2016) from the Basic Court in Prishtina .

9. On 22 November 2019, the Court requested additional information from the Supreme Court. More specifically, the Court requested from the Supreme Court to inform the Constitutional Court whether the Supreme Court had received the Applicant's response to the request for protection of the legality of the State Prosecutor? If so, was the request submitted in legal manner and within the procedural deadlines?

10. On 21 January 2020, the original case file was returned to the Basic Court in Prishtina (after its analysis).

11. On 29 September 2020, the Court repeated once again its request, sent to the Supreme Court, through the letter of 22 November 2020.

12. On 2 October 2020, the Supreme Court submitted to the Court as evidence the Applicant's response to the request for protection of the legality of the State Prosecutor. The Supreme Court confirmed that the Applicant's response was sent to the Supreme Court by mail (registered mail no. R 6806967), on 21 February 2019 and was received and recorded in the protocol by this court on 26 February 2019.

13. On 25 November 2020, the Court being in its full composition reviewed the case and decided to postpone the decision-making in this case for another hearing session.

14. On 17 December 2020, the Review Panel considered the report of the Judge Rapporteur and, by majority vote, recommended to the Court, being in full composition, to declare the Referral admissible and to find a violation of Article 31 [Right to Fair and Impartial Trial.] of the Constitution.

Summary of facts

15. On 30 May 2016, the Special Prosecution Office of the Republic of Kosovo (hereinafter: the Special Prosecution), filed the indictment PPS no. 38/2015 against the Applicant and persons V.G., M.S., and A.S. The Applicant in this case was accused of having committed the criminal offence of "Trading in influence", under Article 431, paragraph 1 of the CCRK; the accused V.G., for committing the criminal offence of "Incitement to commit a criminal offence" and "Trading in influence", under Article 431 paragraph 1 in conjunction with Article 32 of the CCRK, V.G., M.S. and A.S. for committing the criminal offence of "Attempted bribery", in co-perpetration, under Article 429, paragraph 3, in conjunction with paragraph 1, and as read by Articles 28 and 31 of the CCRK.

16. The Special Prosecution Office, during the main trial, had modified the indictment against the Applicant, by requalifying the criminal offence of "Trading in influence" to the criminal offence of "Abusing official position".

17. On 28 May 2018, the Basic Court in Prishtina, by Judgment PKR.no.338/16, decided to acquit the Applicant and the other accused, VG, MS , and AS of all the charges in the indictment, because it was not confirmed that they had committed the criminal offences which they were charged of. The Basic Court in Prishtina also ordered that the confiscated amount of 15,500.00 euros be returned to the defendant V.G.

18. On 13 August 2018, the Special Prosecution Office filed an appeal with the Court of Appeals against the Judgment of the Basic Court, PKR.no.338 / 16, of 28 May 2018, alleging that there have been essential violations of the provisions of the criminal procedure, violations of the criminal law and erroneous and incomplete determination of the factual situation.

19. On 8 October 2018, the Appellate Prosecutor requested from the Court of Appeals to approve the appeal of the Special Prosecution, annul the judgment of the first instance and remand the case for retrial.

20. On 23 October 2018, the Court of Appeals, byJudgment PAKR.no.476/2018, rejected as unfounded the appeal filed by the Special Prosecution Office and confirmed the Judgment of the Basic Court in Prishtina, of 28 May 2018 in its entirety, by reasoning: "*The Court of Appeals considres that the challenged judgment does not contain essential violations of the provisions of the criminal procedure, as alleged in the Prosecution's appeal, nor essential violations of the provisions of the criminal procedure for which this court takes care ex officio.*"

21. On 28 December 2018, the State Prosecutor filed a request for protection of legality with the Supreme Court, against the judgments of the court of first instance and the court of second instance, due to essential violation of the provisions of criminal procedure and violation of the criminal law, by proposing to ascertain the alleged violations or alternatively the case to be remanded for reconsideration.

22. On an unspecified date, acting ex officio, the Supreme Court sent a copy of the Referral to the Applicant and the persons V.G., M.S. and the A.S. in order to enable them to respond to the allegations of the State Prosecutor.

23. On 26 February 2019, the Applicant's response against the allegations of the State Prosecutor (which he had sent by mail on 21 February 2019) was submitted to the Supreme Court, with the proposal that the request for protection of legality of the State Prosecutor be rejected as

unfounded, while the Judgment of the Court of Appeals, PAKR.no.476 2018 and that of the Basic Court in Prishtina, PKR.no.338/16, dated 28 May 2018, be confirmed.

24. On 5 June 2019, the Supreme Court, through Judgment Pml.36/2019, decided as follows: I. It partially approved the request for protection of legality, submitted by the State Prosecutor, by finding violations of the criminal law under Article 385, item 4, of the CPCRK, in the part that pertained to the Applicant, for the criminal offence of "Trading in influence", under Article 431, paragraph 1, of the CPCRK and the defendant V.G., for the criminal offence of "Incitement to trading in influence", under Article 431, paragraph 1, in conjunction with Article 32 of the CCRK; and II. Rejected as unfounded the remainder of the request for protection of legality relating to defendants V.G., M.S. and A.S., for the criminal offence of "Attempted bribery", under Article 429, paragraph 3, in conjunction with paragraph 1, as read by Articles 28 and 31 of the CCRK.

25. In the Judgment Pml.36/2019, the Supreme court, inter alia, stated:

> *"(...)*
> *"A request for protection of legality was submitted by the State Prosecutor of Kosovo against these judgments [of the courts of first and second instance], due to the essential violation of the provisions of the criminal procedure and the violation of the criminal law, with a proposal to have the violations ascertained or alternatively the case to be remanded for reconsideration.*
>
> ***Lawyer Besnik Berisha from Prishtina, the defense counsel of the defendant V.G. submitted a response to the request for protection of legality**, wherein he explained that the request is not founded and proposed that as such it be rejected on the grounds that the request was submitted due to the erroneous and incomplete determination of the factual situation, which is the basis of the request that is not allowed by law.*
>
> *The Supreme Court of Kosovo in the session of the trial panel reviewed the case file within the meaning of Article 435. para.1 in conjunction with Article 436. para. 1 of the CPCK, and assessed the allegations contained in the request for protection of legality as well as the one in the submitted response and found that: - the request is partially founded.*
> *(...)*
> *The Supreme Court found that these allegations are not founded as to the essential violations of the provisions of criminal*

procedure, because the judgments contain legal reasons for their findings, and are founded in terms of violation of the criminal law. Despite the fact that, as stated in the response to the request for protection of legality, this legal remedy in accordance with the provision of Article 432. para.2. of the CPCK is not allowed for erroneous or incomplete determination of the factual situation, this court considered the same because it related to the alleged violation of the criminal law. As it will be described below, it was found that in the correctly established facts, the criminal law was erroneously applied in favour of the defendants Salih Mekaj and V.G, because there were drawn wrong conclusions about the existence of criminal offences."

Applicant's allegations

26. The Applicant's fundamental allegation is that the challenged Judgment of the Supreme Court has violated the principle of equality of arms and, consequently, violated his right to fair and impartial trial, guaranteed by Article 31 of the Constitution; and Article 6 of the ECHR.

27. In this respect, the Applicant alleges that:

"[...]when deciding on the Request for protection of legality, filed by the State Prosecutor, the Supreme Court was obliged to [...] in addition to the Request of the State Prosecutor review my Response as an opposing party in the proceedings, as well as I, as a defendant, was entitled to present my arguments against the Request for protection of legality and the court was obliged to examine them with the same attention as the arguments of the other party, which in this case is the Prosecution of State, but my Response not only has not been reviewed at all but it is not even mentioned in the entire challenged Judgment that I have submitted a response to the Request of the State Prosecution and this not only violates the principle of equality of the parties to the proceedings, but also constitutes an arbitrary conduct on the part of the Court."

28. The Applicant further alleges that:

"...the Judgment of the Supreme Court of Kosovo Pml.no.36/2019, of 05.06.2019, violates the principle of 'equality of arms' guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 31 para.1 of the Constitution of the Republic of Kosovo, which

guarantees equal protection of rights of the parties to the proceedings before the court, because there has been reviewed and decided only in relation to the Request of the State Prosecutor, while my Response as a party to the proceedings filed against the request for protection of legality has not been reviewed at al, even though it has been submitted to the Court within the legal deadline."

29. Finally, the Applicant requests from the Court to find that the Referral for constitutional review is grounded and annul the Judgment Pml.no.36 / 2019 of the Supreme Court of Kosovo, of 5 June 2019.

Relevant legal provisions

Criminal Procedure Code No.04/L-123, which came into effect on 1 January 2013

Article 395
Reformatio in Peius

Where only an appeal in favour of the accused has been filed, the judgment may not be modified to the detriment of the accused with respect to the legal classification of the offence and the criminal sanction imposed.

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.

[...]

Article 436
Benefits of the defendant regarding the request for protection of legality

1. When deciding on a request for protection of legality the Supreme Court of Kosovo shall confine itself to examining those violations of law which the requesting party alleges in his or her request.

2. If the Supreme Court of Kosovo finds that reasons for deciding in favour of the defendant also exist in respect of another co-accused for whom a request for protection of legality has not been filed, it shall proceed ex officio as if such request has also been filed by that person.

3. In deciding on a request for protection of legality filed in favour of the defendant, the Supreme Court of Kosovo shall be bound by the prohibition under Article 395 of the present Code.

Article 438
Judgment on Request for Protection of Legality

1. If the Supreme Court of Kosovo determines that a request for protection of legality is well-founded it shall render a judgment by which, depending on the nature of the violation, it shall:

1.1. modify the final;
1.2. annul in whole or in part the decision of both the Basic Court and the higher court of the decision of the higher court only, and return the case for a new decision or retrial to the Basic Court or the higher court;or
1.3. confined itself only to establishing the existence of a violation of law.

2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it shall only determine that the law was violated but shall not interfere in the final decision.
[...]

Admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*
> *[...]*

32. In addition, the Court also refers to the admissibility criteria, as provided by Law. In this respect, the Court refers to 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..."*

33. As to the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment Pml. no.36/2019 of the Supreme Court, of 5 June 2019, after having exhausted all legal remedies prescribed by law. The Applicant has also clarified all rights and freedoms which he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral in accordance with the deadline established in Article 49 of the Law.

34. The Court further examines whether the Referral meets the admissibility criteria set out in Rules 39 (1) (d) and 39 (2) of the Rules of Procedure, which provide:

Rule 39
[Admissibility Criteria]

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

[...]

(d) the referral accurately clarifies and adequately sets forth the facts and allegations for violation of constitutional rights or provisions

(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".

35. In the light of the facts and arguments set forth in this Referral, the Court considers that the Referral raises serious constitutional issues, which require their addressing to depend on the examination of the merits of the Referral. Moreover, the Referral cannot be regarded as manifestly ill-founded within the meaning of Rule 39 of the Rules of Procedure and there is no other basis for declaring it inadmissible.

36. Consequently, the Court declares that the Referral is admissible for review on its merits.

Merits of the Referral

37. The Court first notes that pursuant to Article 53 of the Constitution [Interpretation of Human Rights Provisions]: *"Human rights and*

fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

38. In this regard, the Court will address the Applicant's allegations concerning the alleged violations of Article 31 of the Constitution, in conjunction with Article 6.1 of the ECHR, based on its case-law and the case law of the European Court of Human Rights (hereinafter: the ECtHR).

39. In this connection, the Court recalls the contents of Article 31 of the Constitution and Article 6 of the ECHR, which stipulate:

Article 31 of the Constitution
[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."

Article 6 of the Convention
[Right to a fair trial]

1." In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

40. On the basis of the Referral and the case file, the Court notes that the Applicant argues the violation of his rights to a fair and impartial trial, by the failure of the Supreme Court to take into consideration his response – submitted against the allegations and arguments raised by the State Prosecutor in the request for protection of legality. In this respect, the Applicant alleges that in this case "*... has been reviewed and decided only in relation to the Request of the State Prosecutor, while my Response as a party to the proceedings filed against the request for protection of legality has not been reviewed at all, even though it has been submitted to the Court within the legal deadline. This does not only constitute a violation of the principle of equality*

of the parties to the proceedings, but also an arbitrary conduct on the part of the Court."

41. In view of the foregoing, the Court considers that the essence of the Applicant's allegations relates to the principle of equality of arms and adversarial proceedings. The Court emphasizes that these two interconnected principles are key elements of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR.

As regards the principle of equality of arms and the principle of adversarial proceedings pursuant to the ECtHR case law

42. The Court first notes that, pursuant to the ECtHR case-law, Article 6 of the ECHR obliges the courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993, Series A No. 254-B, pg. 49, paragraph 30).

43. Such an obligation for the courts is implemented, inter alia, through the application of the principle of equality of arms and the principle of adversarial proceedings during the main trial. In this context, the ECtHR has underlined that the principle of equality of arms is a key element of the wider concept of fair and impartial trial and is closely linked to the principle of adversarial proceedings (see, the ECtHR case *Regner v. Czech Republic*, Judgment of 19 September 2017, paragraph 146).

44. In the case law of the ECtHR, which has consistently been followed by the Constitutional Court, it has been continuosly emphasized that the principle of equality of arms requires a "fair balance between the parties", where each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage vis-à-vis the opponent (see the ECtHR cases *Yvon v. France*, Application No. 44962/98, Judgment of 24 July 2003, para.31 and *Dombo Beheer B.V. v. the Netherlands,* Application no. 14448/88, Judgment of 27 October 1993, paragraph 33; *Feldbrugge v. The Netherlands*, Judgment of 7 July 1987, paragraph 44; cases *Ofrer and Hopfinger v. Austria*, nos. 524/59 and 617/59, 19.12.60, Yearbook 6, pgs.680 and 696; see also other references in this Judgment, *Öcalan v. Turkey* [DHM], paragraph 140; see also the cases of the Constitutional Court, KI52/12, Applicant *Adije Iliri*,

Judgment of 5 July 2013; KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40).

45. Relying on the ECtHR case law, the principle of equality of arms is particularly important in criminal cases and this principle applies at all stages of the trial, including proceedings under an extraordinary remedy, such as the "request for protection of legality". In this respect, the Court refers to the ECtHR decision *Grozdanoski v. the former Yugoslav Republic of Macedonia*, no. 21510/03, of 31 May 2007. In this case, a company that was the Applicant's oppponent in the proceedings, and also the Public Prosecutor, had filed an appeal, namely a "request for protection of legality" at the Supreme Court, against a decision of lower instance court. The other party (the Applicant) was not notified about that request. According to the ECtHR, the appeal and the request for protection of legality led to a decision of the Supreme Court which was completely unfavourable to the other party (the Applicant). Consequently, the ECtHR considered that the procedural failure to notify the other party (the Applicant) had prevented him from effectively participating in the proceedings before the Supreme Court. The ECtHR further stated that the "respect for the right to a fair trial, guaranteed by Article 6.1 of the Convention, requires the Applicant to have knowledge of and ***the opportunity to comment on the company's appeal and request [for protection of legality] of the public prosecutor".***

46. The ECtHR has consistently stated that it is up to that court to decide whether the challenged proceedings as a whole have been conducted in accordance with the Convention-including Article 6 thereof. In this regard, according to the ECHR, Article 6.1. of the Convention the courts are obliged to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice of whether they are relevant to its decision (see, analogically, the ECtHR case, *Kraska v. Switzerland*, Judgment of 19 April 1993; *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988).

47. While the principle of adversarial proceedings implies that the parties to the proceedings should be aware of and have the opportunity to comment on and challenge the allegations and evidence presented during the main trial (see, inter alia, the ECtHR cases, *Brandstetter v. Austria*, no. 11170/84, Judgment of 29 August 1991; *Vermeulen v. Belgium*, no. 19075/91, Judgment of 20 February 1996).

48. Referring to the ECtHR case law, the Court emphasizes that the principle of equality of arms and the principle of adversarial

proceedings are closely linked and in many cases the ECtHR has dealt with them altogether(see, inter alia, the ECtHR cases, *Rowe and Dawis v. the United Kingdom*, no. 18990/91; Judgment of 2000, *Jasper v. the United Kingdom*, no. 27052/95, Judgment of 2000; *Zahirović v. Croatia*, no. 58590/ , Judgment of 25 July 2013).

49. The ECtHR has further emphasized that, particularly in criminal cases, equality of arms and adversarial proceedings constitute an important and essential elements of a fair trial. Therefore their observance requires the rigorous fulfillment of a series of obligations, among which of special importance is the notifying of the defendant or his defence counsel about the conduct of a procedure, the charge, appeal or extraordinary remedy exercised by the opposing party. In this regard, in the case *Zahirović v. Croatia* (no. 58590/11; Judgment 23 April 2012), the ECtHR determined as follows: "*The Court reiterates that the principle of equality of arms is one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party."*

50. The main purpose of respecting these principles is to have conducted a real and substantial confrontation between the accusing party and the defence, which directly infleuences to shed light on the truth and the administration of objective justice by the courts. Such constitutional and legal requirements are in function of the most effective protection of the defendant, since in front of him stands the state itself, represented by the prosecutor who represents and defends the charge filed against the defendant. The ECtHR has stated several times that the above requirements must be respected not only in the first instance, but also in other instances of the trial (see, inter alia, the ECtHR case, *Alimena v. Italy*, judgment of 19 February 1991).

Application of the above principles in the present case

51. What is essential for the Court in the present case is whether the Applicant has had a real opportunity to present his views and arguments against the allegations of the State Prosecutor and whether those allegations have been reviewed and given a reasoned response by the Supreme Court.

52. The Court first recalls that the role of the Supreme Court, as the last instance in the regular judicial system, is in principle the control of the

application of substantive and procedural law by the lower courts. In criminal cases, as in the present case, the realization of the effective defence of the accused person in the first place is in the interest of the defendant, but also in service of justice in general.

53. The Court recalls that, according to the law in force, the parties have the right to exercise extraordinary remedies against the judgments of the lower courts, whereby it has been decided on their guilt or innocence. In the present case, the Court recalls that the judgments (of the court of first instance and of the court of second instance) were favorable to the Applicant, as they found him not guilty of the criminal offences which he was charged of. However, the Court noted that the State Prosecutor, dissatisfied with the decision-making of the first instance court and the second instance court, had filed a request for protection of legality with the Supreme Court, against the Applicant and the other defendants, VG , M.S. and A.S., seeking modification of judgments or reconsideration of the case, due to the violations of criminal law.

54. On the basis of the case file, the Court notes that the Supreme Court, pursuant to the provisions of the CPCRK, had notified the Applicant and the other defendants about the filing of the request for protection of legality by the State Prosecutor, by making available to them a copy of the said request.

55. It is noted from the case file that the Applicant has submitted a response to the Supreme Court (by Kosovo Post Office mail and within the legal deadline), against the allegations of the State Prosecutor, presented in the request for protection of legality. As the Applicant's only allegation related to the violation of the principle of equality of arms, in conjunction with the principle ofadversarial proceedings, because in the challenged Judgment the Supreme Court does not address at all the fact that the Applicant has filed a response against the allegations of the State Prosecutor. The Court initially on 22 November 2019 and then on 29 September 2020, requested a written response from the Supreme Court indicating whether the Applicant's submission (response) had been received by this court. The Supreme Court, through its letter submitted to the Constitutional Court, on 2 October 2020, confirmed that the Applicant's response was received by mail on 26 February 2019.

56. In the light of these facts and circumstances, the Court notes that Article 433 of the CPCRK is in harmony with the requirements of Article 31 of the Constitution, as regards the observance of the standards of a fair and impartial trial, where one of the key elements

of a fair trial is the application of the principle of equality of arms and the principle of adversarial proceedings. The observance of the requirements and standards stemming from these two principles is in the function of the most effective protection of the defendant, since in front of him stands the state itself, represented by the prosecutor who represents and defends the charge filed against the defendant (as stated in paragraph 48 cited above).

57. The purpose of Article 31 of the Constitution and Article 433, paragraph (2) of the CPCRK requires not only the fulfillment of the formal-procedural aspects, but also the fulfillment of the substantial aspects, of the standard of fair and impartial trial. This implies giving of the opportunity to the parties, in this case the defendant in the criminal proceedings, not only to submit to the court a written response to the allegations of the State Prosecutor, but also to have that submission reviewed and the possibility of a confrontation of arguments and counter-arguments, in accordance with the principle of equality of arms and the principle adversarial proceedings, in such a way that the parties to the proceedings are placed on an equal footing with each other (see the ECtHR case, *Dombo Beheer BV v. the Netherlands*, judgment of 27 October 1993, Series A, no. 274, which stipulates that "equality of arms" means that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent").

58. From this point of view, it is clear that the Supreme Court was satisfied only with the fulfillment of the formal-procedural aspects, namely only with the sending of the notification to the Applicant for the exercise of the legal remedy against him, by not addresing at all, namely by not making as a part of the procedure the Applicant's response submitted to the "request for protection of legality" of the State Prosecutor. Moreover, the Supreme Court in its Judgment did not provide any reasoning as to why the Applicant's response was not reviewed. In addition, the Court notes that the Supreme Court has acted differently against the other defendant in this case (V.G.), whose response was reviewed by the Supreme Court and referred to as a procedural fact in the challenged decision.

59. The Court considers that the obligation of the courts to notify the opposing party about the exercise of legal remedies against them is not an aim in itself. This obligation is a necessary procedural step to enable the parties to be treated equally, to have the opportunity to challenge the allegations and arguments of the opponent, and to present their case effectively. Therefore, the courts should not be satisfied only by

the fact that the parties have received the notification about the exercise of a legal remedy against them, but the courts should assure the parties that their views and arguments have been duly reviewed and assessed, so that they are guaranteed the most effective protection against the allegations made against them. On the contrary, failure to review their objections and arguments automatically places them at a considerable disadvantage *vis-à-vis* the opponent (see, ECtHR, in the cases of *Ofrer and Hopfinger*, nos. 524/59 and 617/59, 19.12. 60, Yearbook 6, pg. 680, which states that each party must be given a reasonable opportunity to present his/her case under conditions that do not place him/her at a substantial disadvantage *vis-à-vis* the opponent).

60. In this sense, the Court considers that the Supreme Court has failed to guarantee the application of the principle of equality of arms and the principle of adversarial proceedings, because the Applicant has been placed at a significant disadvantage *vis-à-vis* the State Prosecutor, after having been deprived of the opportunity to have a real and substantial confrontation with the arguments and allegations presented by the State Prosecutor, as an opposing party in the proceedings.

61. Consequently, the Court finds that the challenged Judgment of the Supreme Court was rendered contrary to the principle of equality of arms and the principle of adversarial proceedings.

62. The Court further clarifies that when it examines the proceedings as a whole - in conjunction with Article 31 of the Constitution - it first assesses: 1) whether the Applicant has had the opportunity to present arguments and evidence, which he considers relevant to his case during the various stages of the proceedings; 2) if he has been given the opportunity to effectively challenge the arguments and evidence presented by the opposing party, and if all the arguments which were relevant to the resolution of his case, viewed objectively, were duly heard and examined by the courts; 3) whether the factual and legal reasons against the challenged decisions were examined in detail; 4) if according to the circumstances of the case, the proceedings, viewed in their entirety, were fair (see, *mutatis mutandis*, the case of the Constitutional Court no. KI118/17, Applicant *Sani Kervan and others*, Resolution on Inadmissibility, of 16 February 2018, paragraph 35; see also *Garcia Ruiz v. Spain*, ECtHR, Application no. 30544/96, Judgment of 21 January 1999, paragraph 29).

63. In light of this, the Court wishes to emphasize that the violation of the two aforementioned principles also causes the violation of other

features of a fair and impartial trial, namely the principle of having the party heard and the right to a reasoned and reasonable judicial decision.

Conclusion

64. In sum, the Court reiterates that the principle of equality of arms and the principle of adversarial proceedings - as key elements of the right to a fair and impartial trial - require the courts to strike a fair balance between the parties to the proceedings, as well as to enable them to have a substantial confrontation of allegations and arguments.

65. By having not reviewed the Applicant's response filed against the State Prosecutor's request for protection of legality, the Supreme Court has violated the principle of equality of arms and the principle of adversarial proceedings, and consequently the principle of having the party heard, and of a reasoned and reasonable judicial decision.

66. Therefore, the Constitutional Court considers that this omission of the Supreme Court constitutes an insurmountable procedural shortcoming, as the Applicant has been deprived of his right to a fair trial, which is guaranteed by Article 31 of the Constitution and Article 6.1 of the ECHR.

67. Accordingly, the Court concludes that the Judgment of the Supreme Court, Pml.no. 36/2019, of 5 June 2019, has violated the Applicant's right to fair and impartial trial, guaranteed by Article 31 of the Constitution and Article 6 of the ECHR.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 20 the Law and Rule 59 (1) of the Rules of Procedure, in its session held on 17 December 2020, by majority vote:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that there has been a violation of Article 31.1 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6.1 [Right to a fair trial] of the ECHR;

III. TO DECLARE invalid the Judgment of the Supreme Court Pml.no. 36/2019, of 5 June 2019, and REMAND the same for reconsideration, in conformity with the Court's Judgment;

IV. TO ORDER the Supreme Court to inform the Court, pursuant to Rule 66 (5) of the Rules of Procedure, about the measures taken to enforce the Judgment of the Court no later than on 21 June 2021.

V. TO ORDER that its Judgment KI193/19 be notified to the Parties, and in accordance with Article 20.4 of the Law, be published in the Official Gazette;

VI. This Judgment is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI 131/19, Applicant: Sylë Hoxha, Constitutional review of Judgment AML No. 1/2019 of the Supreme Court of 16 April 2019#

KI 131/19, Resolution adopted on 12 March 2020, published on 22 April 2020

Keywords: *individual referral, right to a reasoned decision, benefits of former senior officials, acting, inadmissible referral*

The circumstances of the present case are related to the right to benefit from the status of former senior official, as established in Law No. 03/L-001 on Benefits to Former High Officials and Law No. 04/L-038 on Amending the No. 03/L-001 on Benefits to Former High Officials (hereinafter: the Law on Benefit to Former High Officials), of those officials who have exercised one of the functions defined by the abovementioned law, namely the function of the former President of the Assembly, the former Prime Minister, the former President of the Constitutional Court, the former Chief State Prosecutor and the former President of the Supreme Court. The present case is related to the right or not of the former acting State Prosecutor to benefit from the status of former senior public official, exercising the right to a monthly salary in the amount of seventy percent (70%) of the salary. of the respective function. Former Acting State Prosecutor, namely the Applicant, and who exercised this function by decision of the Kosovo Prosecutorial Council from 5 August 2014 until 21 April 2015, namely after the retirement of the previous Chief Prosecutor and until the election of the new Chief Prosecutor of the Kosovo Prosecutorial Council and his decree by the President of the Republic, claims that he is entitled to such a right. Initially, he requested to exercise the latter through a request to the Kosovo Prosecutorial Council, which rejected his request. The decision of the Kosovo Prosecutorial Council was subsequently upheld by all regular courts, including the Supreme Court, which reviewed the case, following a request for the protection of legality submitted by the State Prosecutor.

All courts, in essence, emphasized the difference between "*exercising*" a function and "*election*" or "decreeing" in a function based on the relevant constitutional and legal provisions, thus rejecting the Applicant's allegations, and clarifying that (i) he has exercised this function on the basis of the relevant decision of the Kosovo Prosecutorial Council, and has not been elected/appointed to this position based on the procedure set out in paragraph 7 of Article 109 [State Prosecutor] of the Constitution; and (ii) consequently, he cannot gain the status of the former senior official based on the Law on Benefits to Former High Officials.

The Applicant challenges the findings of the regular courts before the Court, alleging violations of his fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution and Article 6 of the European Convention on Human Rights.

In assessing the allegations of the Applicant regarding the violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in terms of the right to a reasoned court decision, the absence of which is claimed by the Applicant before the Court, the latter applied the general principles of its case law and of the European Court of Human Rights, and found that the challenged decisions of the regular courts were sufficiently reasoned in the circumstances of the present case. Furthermore, the Court clarified that the regular courts had the right to apply the Law on Benefits to Former High Officials, emphasizing that (i) the latter recognized the right to acquire the status of former senior official and consequently the right to the relevant benefits, only to former senior state officials appointed through the procedures set out in the Constitution and applicable laws, provided that they have exercised the relevant function for at least six (6) months; (ii) the benefits established in this law do not belong to other officials and who may have "*exercised*" this function, but have not been "*appointed*" in the manner prescribed by the Constitution and the relevant applicable laws, regardless of whether they have exercised the function for the period of six (6) months referred to in this law, and have exercised the full competencies of the respective function; (iii) that the specific counting of five (5) categories of functions in the abovementioned law, read together with other provisions of this law, implies the intention of the legislator to condition the benefit of these rights in the election/appointment of a senior official in accordance with the relevant constitutional and legal provisions, and the exercise of this function for at least six (6) months. The Court also clarified that the distinction between "*election*" and "*exercise*" of a function of senior official was made in case KO97/10, with the Applicant *Jakup Krasniqi*, Judgment of 28 December 2010.

Finally, the Court found that the substantive allegations of the Applicant before the regular courts regarding the erroneous interpretation of Article 3 of the Law on Benefits to Former High Officials were sufficiently reasoned by the latter, thus resulting in a procedure of which, in its entirety and with respect to the allegations of lack of a reasoned court decision, meets the criteria set out in the relevant case law in interpreting Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights. Therefore, the Court found the allegations of the Applicant regarding violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR to be inadmissible as manifestly ill-founded on constitutional basis.

Whereas, in assessing the Applicant's allegations of violation of Articles 24 and 54 of the Constitution, the Court regarding the (i) former clarified that the Applicant did not specify any allegation regarding any difference in treatment and consequently has neither substantiated nor supported his allegations of violation of this article of the Constitution; and (ii) the second, clarified that those allegations are, in essence, the same as those for violation of Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, and which the Court has already rejected as manifestly ill-founded on constitutional basis.

Therefore, the Referral was declared inadmissible as manifestly ill-founded on constitutional basis, as defined by Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI131/19

Applicant

Sylë Hoxha

Constitutional review of Judgment AML No. 1/2019 of the Supreme Court of 16 April 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 Sylë Hoxha from the Municipality of Prizren (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges the constitutionality of Judgment [AML No. 1/2019] of 16 April 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) in conjunction with the Judgment [AA. No. 333/2018] of 31 October 2018 of the Court of Appeals of the Republic of Kosovo (hereinafter: the Court of Appeals) and Judgment [A. No. 1750/15] of 16 April 2018 of the Department for Administrative Matters of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The challenged Judgment of the Supreme Court was served on the Applicant on 13 May 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 24 [Equality Before the Law], 31 [Right to Fair and Impartial Trial], 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 6 of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

6. On 19 August 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 20 August 2019, the President of the Court appointed Judge Gresa Caka-Nimani as Judge Rapporteur and the Review Panel composed of Judges: Bajram Ljatifi (presiding), Safet Hoxha and Radomir Laban.

8. On 2 September 2019, the Applicant was notified about the registration of the Referral. On the same date, a copy of the Referral was sent to the Supreme Court, the Kosovo Prosecutorial Council (hereinafter: the KPC) and the Basic Court with the request to submit the acknowledgment of receipt indicating the date when the Applicant was served with the challenged decision.

9. On 10 September 2019, the Basic Court submitted the abovementioned document to the Court.

10. On 11 March 2020, 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

11. From the documents included in the Referral, it results that the KPC by Decision [No. 833/2014] of 29 July 2014, had appointed the Applicant in the position of Chief State Prosecutor. The Applicant had exercised this position until 21 April 2015, when Aleksandër Lumezi was decreed as the Chief State Prosecutor by the President of the Republic of Kosovo.

12. On 19 May 2015, the Applicant addressed the Chief State Prosecutor, as well as the Chair of the KPC in order to acquire the rights arising from Law No. 03/L-001 on Benefits to Former High Officials and Law No. 04/L-038 on Amending the Law No. 03/L-001 on Benefits to Former High Officials (hereinafter: the Law on Benefits of Former High Officials), based on Article 3 (Monetary Allowance, Support Staff, and Office Premises) of which "*former high officials*" are considered the former Prime Minister, former Chief State Prosecutor and former Presidents of the Assembly, the Constitutional Court and the Supreme Court.

13. Based on the case file and as the KPC has not issued any decision regarding the abovementioned submission, the Applicant submitted to the KPC a new submission, but with the same content, requesting that he be recognized the right to certain benefits by the Law on Benefits to Former High Officials in the capacity of "*former senior official*", namely the former acting State Prosecutor. The Applicant held that he meets all the legal requirements for the recognition of rights as a "*former senior official*" because during the exercise of the function of Acting Chief State Prosecutor for more than six (6) months, he fulfilled all his obligations and responsibilities and exercised his rights as if he had been appointed Chief State Prosecutor by the presidential decree.

14. On 11 September 2015, the KPC by the Decision [KPK/No. 258/2015] rejected the request of the Applicant. The KPC reasoned that the Applicant was appointed Acting Chief State Prosecutor by the Decision of the KPC and was not appointed by the President of the Republic of Kosovo in accordance with paragraph 7 of Article 109 [State Prosecutor] of the Constitution, and accordingly did not acquire the status of a former senior official, as stipulated in Article 3 of the Law on Benefits to Former High Officials.

15. On 13 October 2015, the Applicant filed a claim with the Basic Court, requesting the approval of his claim and the annulment of the challenged Decision of the KPC. The Applicant before the Basic Court stated that (i) taking into consideration that he had exercised the function of the Chief State Prosecutor for more than six (6) months, he met the criteria established in Article 3 of the Law on Benefits to Former High Officials and consequently had earned the right to realize a monthly salary of seventy percent (70%) of the current salary in the respective function as well as other benefits provided by this law; and (ii) despite the KPC reasoning, Article 3 of the Law on Benefits to Former High Officials only defines the requirement of "*exercising*" the duty of acting Chief State Prosecutor for six (6) months and not that of "*appointment*" in accordance with paragraph 7 of Article 109 of the Constitution. In the end, the Applicant stated that as an official acting in that position he exercised all the functions of Chief State Prosecutor, supervised the work of all basic prosecutions, issued various regulations, decisions and instructions, and received the salary of the Chief State Prosecutor as long as he was acting in the position in question.

16. On an unspecified date, the KPC filed a response to the Applicant's claim, stating that the Applicant was appointed to act in that position by Decision of the KPC and not in accordance with paragraph 7 of Article 109 of the Constitution, and consequently he may not be recognized the right to acquire the status of senior official based on Article 3 of the Law on Benefits to Former High Officials.

17. On 16 April 2018, the Basic Court by Judgment [A. No. 1750/15] rejected the Applicant's statement of claim as ungrounded. The Basic Court assessed that the KPC had decided correctly when rejecting as ungrounded the statement of claim of the Applicant, taking into account that he was not decreed by the President of the Republic of Kosovo under the procedure laid down in paragraph 7 of Article 109 of the Constitution; and accordingly, he had not gained the status of a former senior official based on paragraph 7 of Article 109 of the Constitution and Article 3 of the Law on Benefits to Former High Officials.

18. On 23 May 2018, the Applicant filed an appeal against the abovementioned Judgment with the Court of Appeals, alleging erroneous application of substantive law and erroneous and incomplete determination of the factual situation, proposing that the challenged Judgment be quashed and he be recognized the right to the relevant benefit under the Law on Benefits to Former High Officials.

In his appeal, the Applicant specifically claimed that (i) the Law on Benefits to Former High Officials "*in an explicit manner*" stipulates that former officials who have exercised for at least six (6) months one of the functions defined by this law gain the status of former senior official to realize a monthly salary in the amount of seventy percent (70%) of the current salary of the respective position; and (ii) the Basic Court when rendering the challenged Judgment did not challenge the fact that the claimant, namely the Applicant, met the legal criteria set out in the Law on Benefits to Former High Officials, and consequently, as long as the factual situation was determined correctly, it was the substantive law that was erroneously applied in the circumstances of his case.

19. On 31 October 2018, the Court of Appeals, by Judgment [AA. No. 333/2018], rejected as ungrounded the appeal of the Applicant and upheld the abovementioned Judgment of the Basic Court.

20. On 14 January 2019, the Applicant, referring to violation of the provisions of the procedure and violation of substantive law, proposed to the Office of the Chief State Prosecutor to file the request for protection of legality against the abovementioned decisions of the Basic Court and the Court of Appeals.

21. On 5 February 2019, the Office of the Chief State Prosecutor notified the Applicant that it approved his proposal to file a request for protection of legality. On the same date, the Office of the Chief State Prosecutor submitted the request [KMLA. No. 1/2019] for the protection of legality to the Supreme Court against the Judgment [AA. No. 333/2018] of 31 October 2018 of the Court of Appeals in conjunction with Judgment [A. No. 1750/15] of the Basic Court, of 16 April 2018, alleging erroneous application of substantive law in the context of item b) of paragraph 1 of Article 247 of Law No. 03/L-006 on Contested Procedure (hereinafter: the LCP) in conjunction with paragraph 1 of Article 3 of the Law on Benefits to Former High Officials.

22. The Office of the Chief State Prosecutor emphasized that the lower instance courts have erroneously applied Article 3 of the Law on Benefits to Former High Officials, because the Applicant for the period from August 2014 to April 2015 as an official acting in that position had performed all the actions and taken all decisions that were in the competence of the Chief State Prosecutor, based on the Law on the State Prosecutor and the relevant amendments and supplementations, emphasizing that this factual situation "*leads to the legal and logical conclusion that the Applicant gained the status of former high*

official, because otherwise, any action and decision of the Applicant for the period during which he was acting Chief State Prosecutor would be unlawful".

23. On 16 April 2019, the Supreme Court, by its Judgment [AML. No. 1/2019], rejected as ungrounded the request for protection of legality of the Office of the Chief State Prosecutor. The Supreme Court emphasized that the appointment of the Applicant as an official acting in that position was made through the decision of the KPC, but the latter was not decreed by the President of the Republic of Kosovo and, accordingly, the Applicant did not gain the status of former senior official, as defined by paragraph 7 of Article 109 of the Constitution and Article 3 of the Law on Benefits to Former High Officials.

Applicant's allegations

24. The Applicant alleges violation of his fundamental rights and freedoms guaranteed by Articles 24 [Equality before the Law], 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 of the ECHR and Article 54 [Judicial Protection of Rights] of the Constitution.

25. Regarding the allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Applicant alleges that the decisions of the regular courts were not sufficiently reasoned because they did not show the difference between the appointment of the acting Chief State Prosecutor through the KPC decisions and the appointment of the Chief State Prosecutor by the President of the Republic of Kosovo in accordance with paragraph 7 of Article 109 of the Constitution. More specifically, according to the Applicant, while the regular courts reasoned the legality of the rejection of the Applicant's right to be recognized the status of the former senior public official, with the lack of a presidential decree, they failed to justify the only requirement set by the Law on Benefits to Former High Officials, namely "*exercising at least six months of one of the functions defined in Article 2 item 3 of this law*" in the circumstances of the present case. The Applicant emphasizes the difference between "*exercise*" and "*appointment*" in the function of Chief State Prosecutor, a distinction which, according to him, was not reasoned by the regular courts. In support of his allegations of the lack of a reasoned court decision, the Applicant referred to the case law of the European Court of Human Rights (hereinafter: the ECHR), namely cases *Suominem v. Finland*, Judgment of 1 July 2003; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hiro Balani v. Spain*, Judgment of 9 December 1999; *Higgings and others v. the United Kingdom*, Judgment of 19 February

1998; *H. v. Belgium*, Judgment of 30 November 1987 and cases of the Court KI99/14 and KI100/14, Applicants *Shyqyri Syla and Laura Pula*, Judgment of 8 July 2014 (hereinafter: cases KI99/14 and KI100/14); KI97/16, Applicant "*IKK Classic",* Judgment of 9 January 2018; and KI87/18, Applicant *"IF Skadeforsikring",* Judgment of 15 April 2019.

26. The Applicant states that the regular courts have failed to take into consideration the particular circumstances of his case, and in particular the fact that (i) he was appointed Acting Chief State Prosecutor by decision of the KPC in an emergent situation when the Republic of Kosovo was left without a Chief State Prosecutor and held this position from 5 August 2014 to 21 April 2015; (ii) the appointment of the new Chief State Prosecutor would be subject to a lengthy procedure when announcing the public vacancy which could jeopardize the administration of justice and in support of the urgency of the appointment of the Chief State Prosecutor, the Applicant refers to the case law of this Court in cases No. KI99/14 and KI100/14; (iii) during the exercise of his duties, he had exercised all competencies of the Chief State Prosecutor established in the applicable laws in the Republic of Kosovo; and (iv) through non-recognition of the status of former senior official acting as Chief State Prosecutor, the issue of the legal status of decisions taken during this period of time "*calls into question the principle of legal certainty*".

27. The Applicant also alleges violations of fundamental rights and freedoms guaranteed by Articles 24 and 54 of the Constitution.

28. Regarding the former, namely Article 24 of the Constitution, the Applicant states that "*The Supreme Court and the courts of other instances, through the denial of the legal right, which derives from Article 3.1 of the Law No. 03/L-001 ON BENEFITS TO FORMER HIGH OFFICIALS, as the Applicant has exercised the function of a Chief State Prosecutor for more than eight (8) months, have violated the right to equality before the law*".

29. As for the second, namely Article 54 of the Constitution, the Applicant alleges that "*The Supreme Court and the courts of other instances, by failing to reason their decision, failed to guarantee a legal right of the Applicant, which derives from Article 3.1 of the Law No. 03/L-001 ON BENEFITS TO FORMER HIGH OFFICIALS and, thus violated Article 54 of the Constitution*".

30. Finally, the Applicant requests from the Court (i) to declare his Referral admissible; (ii) to hold that in rendering the challenged

Judgment, the Supreme Court violated Articles 24, 31 and 54 of the Constitution and Article 6 of the ECHR; and (iii) declare invalid the Judgment [AML. No. 1/2019] of 16 April 2019 of the Supreme Court and remand the latter for retrial.

Relevant Constitutional and Legal Provisions

The Constitution of the Republic of Kosovo

Article 16
[Supremacy of the Constitution]

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
2. The power to govern stems from the Constitution.
3. The Republic of Kosovo shall respect international law.
4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution.

Article 24
[Equality before the Law]

1. All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.
2. No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status.

Article 109
[State Prosecutor]

1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.
[…]
7. The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment.

Law no. 03/l-001 on Benefits to Former High Officials

Article 2
Definitions

When used in this law, the following words and phrases shall have the following meaning:
"Benefit" means monetary payments due to the benefit of, a former High Official from the Consolidated Kosovo Budget;
"A Former High Official" according to this law High Officials of Republic of Kosovo are considered: a former President of the Assembly, a former Prime Minister and a former President of the Supreme Court;
"Responsible Institution" means the Office of the Prime Minister of Kosovo, the Assembly of Kosovo, or the Supreme Court of Kosovo.

Article 3
Monetary Allowance, Support Staff, and Office Premises

3.1 Former High Officials who have performed for at least six months one of the functions defined in Article 2, point 3 of this Law, shall be entitled the status of the former High Official to receive a monthly payment in amount of 70% of the actual salary of respective function.

Law No. 04/l-038 on Amending and Supplementing the Law No. 03/l-001 on Benefits to Former High Officials

Article 3

Article 2 of the basic law, definition 2 and 3 shall be amended and reworded as follows:

"Former High Official" according to this law are considered: former President of the Assembly, former Prime Minister, former President of the Constitutional Court, former Chief State Prosecutor and former President of the Supreme Court.

"Responsible Institutions" shall mean the Assembly of Kosovo, Office of the Prime Minister, Constitutional Court of Kosovo, State Prosecutor and Supreme Court of Kosovo.

Admissibility of the Referral

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

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law".*

33. In addition, the Court also refers to the admissibility criteria, as provided by Law. In this respect, the Court refers to 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…".*

34. As to the fulfillment of the admissibility criteria, as stated above, the Court finds that the Applicant is an authorized party, challenging an act of a public authority, namely the Judgment [AML. No. 1/2019] of 16 April 2019 of the Supreme Court, after having exhausted all legal remedies prescribed by law. The Applicant has also clarified all rights and freedoms which he claims to have been violated, in accordance with Article 48 of the Law and submitted the Referral in accordance with the deadline established in Article 49 of the Law.

35. However, in addition, the Court examines whether the Applicant has fulfilled the admissibility criteria established in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Paragraph 2 of Rule 39 of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement for the Referral not to be manifestly ill-founded. Specifically, Rule 39 (2) stipulates that:

> *"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".*

36. In this regard, the Court recalls that the Applicant after the relevant decision of the KPC exercised the function of Chief State Prosecutor from 5 August 2014 to 21 April 2015, after the retirement of the previous Chief Prosecutor and until the election of the new Chief Prosecutor by the KPC and his decreeing by the President of the Republic. After the beginning of the exercise of the function of the latter, the Applicant addressed the KPC with the request for recognition of the rights defined by the Law on Benefits to Former High Officials, based on which (i) former Senior Officials are considered the former President of the Assembly, the former Prime Minister, the former President of the Constitutional Court, the former Chief State Prosecutor and the former President of the Supreme Court; and (ii) the same acquire this status and have the right to realize a monthly salary in the amount of seventy percent (70%) of the current salary of the respective function, provided that they have exercised one of these functions for at least six (6) months. The request of the Applicant was initially rejected by the KPC, by the Decision [KPK/No.

258/2015] of 11 September 2015, and the latter was subsequently upheld by all regular courts. All, in essence, had emphasized the difference between the two "*exercise*" of this function and "*appointment*" or "*decreeing*" in this function based on the relevant constitutional provisions of the following exercise of the latter for at least six (6) months. All instances, including the Supreme Court, stated that (i) the Applicant exercised this function in accordance with the decision of the KPC, and was not elected on the basis of the procedure laid down in paragraph 7 of Article 109 of the Constitution; and (ii) as a result, may not gain the status of former senior official under the Law on Benefits to Former High Officials.

37. The Applicant challenges this finding of the regular courts before the Court, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, and Articles 24 and 54 of the Constitution. The former, namely the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as explained above, the Applicant alleges due to lack of a reasoned court decision and more precisely the lack of logical connection between the conclusions of courts and the KPC on the one hand and the evidence and facts and circumstances of his case on the other hand, specifically with regard to the difference between "*exercise*" of a function and "*the appointment*" in a function, with only the first requirement, namely *the* "*exercise*" for the period of six (6) months specified in the Law on Benefits to Former High Officials and necessary according to the Applicant, for the recognition of the status of the former Senior Official, and consequently the acquisition of the right to the respective benefits.

38. The Court will further address the Applicant's allegations regarding (i) the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as to the lack of reasoning of the court decision; and (ii) the violation of Articles 24 and 54 of the Constitution, by applying the case law of the ECtHR, on the basis of which the Court, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

39. In this regard, the Court initially notes that the ECtHR case law establishes that the fairness of a proceeding is assessed based on the proceeding as a whole (See, in this regard, the ECtHR case *Barbera, Messeque and Jabardo v. Spain,* Judgment of 6 December 1988, paragraph 68). Therefore, in assessing the Applicant's allegations, the Court shall also adhere to this principle (See cases of the Court, KI104/16, Applicant *Miodrag Pavić*, Judgment of 4 August 2017,

paragraph 38; and KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility, of 13 June 2018, paragraph 31).

40. With regard to the allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, the Court will first focus on the allegations of the lack of the reasoning of the court decision by the Supreme Court. In this respect, the Court first notes that it already has a consolidated practice with regard to the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. This practice was built based on the ECtHR case law, including, but not limited to cases *Hadjianastassiou v. Greece*, Judgment of 16 December 1992; *Van de Hurk v. the Netherlands*, Judgment of 19 April 1994; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Garcia Ruiz v. Spain*, Judgment of 21 January 1999; *Hirvisaari v. Finland*, 27 September 2001; *Suominen v. Finland*, Judgment of 1 July 2003; *Buzescu v. Romania*, Judgment of 24 May 2005; *Pronina v. Ukraine*, Judgment of 18 July 2006; and *Tatishvili v. Russia*, Judgment of 22 February 2007. Moreover, the fundamental principles regarding the right to a reasoned judicial decision have also been elaborated in the cases of this Court, including but not limited to KI72/12, *Veton Berisha and Ilfete Haziri*, Judgment of 17 December 2012; KI22/16, *Naser Husaj*, Judgment of 9 June 2017; KI97/16, Applicant *"IKK Classic",* Judgment of 9 January 2018; and KI143/16, *Muharrem Blaku and others*, Resolution on Inadmissibility of 13 June 2018; KI24/17 Applicant *Bedri Salihu*, Judgment of 24 July 2019; and KI49/19, Applicant *Limak Kosovo International Airport*, Resolution on Inadmissibility of 21 October 2019.

41. In principle, the case-law of the ECtHR and that of the Court point out that the right to a fair trial includes the right to a reasoned decision and that the courts must "*indicate with sufficient clarity the reasons on which they base their decision*". However, this obligation of the courts cannot be understood as a requirement for a detailed answer to each argument. The extent to which the obligation to give reasons may vary depending on the nature of the decision and must be determined in the light of the circumstances of the case. The essential arguments of the Applicant are to be addressed and the reasons given must be based on the applicable law.

42. The Court recalls that the Applicant's allegations of lack of a reasoned court decision are related to the challenged Judgment of the Supreme Court, which was rendered as a result of a request for protection of legality filed by the State Prosecutor against the Judgment of the Court

of Appeals. The latter, namely the State Prosecutor before the Supreme Court alleged a violation of item b) of paragraph 1 of Article 247 of the LCP, namely erroneous application of the substantive law, and specifically, the erroneous application of Article 3 of the Law on Benefits to Former High Officials. According to the State Prosecutor, the fact that the Applicant has "*exercised*" the function of the Chief State Prosecutor for more than six (6) months, as defined in Article 3 of the Law on Benefits to Former High Officials, and which based on the latter is the only criterion for obtaining the status of former senior official, is sufficient for the approval of the request of the Applicant for the benefit of the rights arising from the recognition of the status of former senior official. The allegations of the State Prosecutor before the Supreme Court, in essence, include and reflect the essential allegations of the Applicant during the proceedings in the regular courts.

43. In this regard, the Court recalls that the KPC by the Decision [KPK/No. 258/2015] of 11 September 2015 and the Basic Court and the Court of the Appeals, through the relevant Judgments, clarified: (i) the difference between the appointment as the acting Chief State Prosecutor by decision of the KPC and the appointment of the Chief State Prosecutor by presidential decree in accordance with paragraph 7 of Article 109 of the Constitution; and (ii) the requirements to be met in order to realize the benefits of the former high official in accordance with the laws on the benefits of the former high officials. In principle, in the rejection of the request, claim and appeal of the Applicant, the regular courts, emphasizing the manner of the "*appointment*" of the high official, namely in the circumstances of the present case, the Chief Prosecutor, had clarified that the "*exercise*" of the relevant function defined in the Law on Benefits to Former High Officials is conditional on the manner of his "*appointment*" provided by paragraph 7 of Article 109 of the Constitution. The Supreme Court upheld such an attitude of the lower instances. By addressing the allegations of the State Prosecutor, it also pointed out that the Applicant was not appointed to the position of the Chief State Prosecutor as set out in the Constitution, but was appointed as acting official by the decision of the KPC for a temporary period of time.

44. In this regard, the Court points out the relevant part of the reasoning of the Supreme Court, which determines:

> *"Article 109, paragraph 7 of the Constitution of the Republic of Kosovo stipulates that the Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council.*

The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment. Further, Article 3 of Law No. 04/L-038 on Amending and Supplementing the Law on Benefits to Former High Officials establishes that Former High Official according to this law are considered: former President of the Assembly, former Prime Minister, former President of the Constitutional Court, former Chief State Prosecutor and former President of the Supreme Court.

From what was stated above, it results that the appointment of the claimant Sylë Hoxha, as acting Chief State Prosecutor, was made by a decision of the Prosecutorial Council of the Republic of Kosovo, and not by a decree of the President of the Republic of Kosovo, which means that the claimant has not acquired the status of a former high official as established in Article 3 of Law No. 04/L-038 on Amending and Supplementing the Law on Benefits to Former High Officials and Article 109, paragraph 7 of Constitution of the Republic of Kosovo.

Based on the above, the Supreme Court found that in this administrative-legal matter, the second instance court has correctly applied the provisions of the administrative conflict, the provision of Law No. 04/L-038 on Amending and Supplementing the Law on Benefits to Former High Officials and the provision of the Constitution of the Republic of Kosovo, and that the allegations of the State Prosecutor in the request for the protection of legality are ungrounded, because they do not affect the determination of another factual situation than what the court of second instance determined. According to the assessment of this Court, the challenged judgment of the second instance court is clear and understandable. In the reasoning of the challenged judgment, sufficient reasons have been given for the decisive facts, which also this court accepts. The court considers that the substantive law has been applied correctly and that the law has not been violated to the detriment of the claimant".

45. The Court, in this context, notes that the Supreme Court has interpreted Article 3 of the Law on Benefits to Former High Officials (i) recognizing the right to benefit from the status of former senior official and consequently the right to relevant benefits, only to former senior state officials appointed through the procedures set out in the Constitution and the applicable laws, under the condition that they have exercised the respective function for at least six (6) months; and (ii) determining that the benefits determined by this law do not belong to other officials and who may have "*exercised*" this function, but have

not been "*appointed*" in the manner prescribed by the Constitution and the relevant applicable laws, regardless of whether they have exercised this function for six (6) months and have exercised the full competencies of the respective function during this period of time.

46. The Court notes that the conditioning of the "*exercise*" of the respective function with the manner of the "*appointment*", namely the appointment according to the procedure determined by paragraph 7 of Article 109 of the Constitution, is in compliance with (i) the hierarchy of norms and the supremacy of the Constitution; and (ii) Article 3 of the Law on Benefits to Former High Officials.

47. Regarding the former, the Court emphasizes that in the present case, the regular courts and the KPC have respected the hierarchy of legal norms and the supremacy of the Constitution established in Article 16 [Supremacy of the Constitution], based on the wording of paragraph 7 of Article 109 of the Constitution to emphasize the distinction between "*acting*" of the Chief State Prosecutor by decision of the KPC and the "*appointment*" of the Chief State Prosecutor by the President of the Republic, following the proposal by the KPC.

48. While as regards the second, the Court emphasizes that despite the fact that Article 3 of the Law on Benefits to Former High Officials refers only to two conditions for the benefit of the rights arising from this law, namely the "*exercise*" of the function and that for a period of (6) six months, these conditions must be interpreted in conjunction with Article 2 and the relevant amendments to the same law , and according to which this right, have only a very limited number of former public officials, namely the former President of the Assembly, of the Constitutional Court, and the Supreme Court, and the former Prime Minister and former Chief Prosecutor.

49. Recognizing this right of such a narrow and specific list of officials means their "*appointment*" in accordance with the relevant constitutional and legal provisions, and then also the requirement of exercising this function for at least six (6) months. Therefore, the right to benefit from the status of "*former high official*" have only five (5) categories of positions specifically referred to in Article 2 of the abovementioned law, provided that beyond the "*appointment*" based on the constitutional and legal provisions, they meet the requirement of the "*exercise*" of this function for at least six (6) months. On the contrary, the rights deriving from the recognition of the status of the "*former high official*", they will not belong even to the five (5) categories specifically mentioned in Article 2 of the Law on Benefits to Former High Officials, if the latter have not "*exercised*" this function

for at least six (6) months. Therefore, the "*appointment*" does not automatically result in the acquisition of these rights, but is also conditioned by the "*exercise*" for at least a period of six (6) months.

50. In this regard, the Court notes that the distinction between the "*election*" and "*exercise*" of the function was also done in the case of the President of the Republic, through the applicable law, namely Law No.03/L-094 on the President of the Republic of Kosovo and Law no.06/L-004 on Amending and Supplementing the Law No. 03/L-094 on the President of the Republic of Kosovo (hereinafter: the Law on the President) and the case law of the Court in case no. KO97/10, Applicant *Jakup Krasniqi*, Judgment of 28 December 2010 (hereinafter: the case of Court no. KO97/10).

51. The Court emphasizes that Chapter II concerning the rights of the President of the Republic of Kosovo after the end of the term of the Law on the President, determines, *inter alia*, the right of the President to a pension, the amount of which is seventy percent (70%) of the salary, which is received by the President of the Republic of Kosovo. But the exercise of these rights is conditional on Article 18 of this Law, namely "*at the end of the term for which he was elected*". The abovementioned article, consequently, conditions the benefit of these rights by the President on the condition that (i) he is "*elected*" the President of the Republic based on the relevant provisions of the Constitution; and (ii) has completed his term, unless this term has ended as a result of the dismissal as defined in Article 10 (Dismissal of the President) of the Law on the President.

52. Furthermore, the Court also emphasizes that Article 90 [Temporary Absence of the President] of the Constitution defines the conditions under which the Acting President of the Republic of Kosovo may be the President of the Assembly, for no more than six (6) months and that the Court through its case law, namely case no. KO97/10, has emphasized the difference between election/appointment to a position and appointment to the exercise of this function, maintaining the position that the "*acting*" President is not an elected President of the Republic of Kosovo (See the case of Court no. KO97/10, paragraphs 23-25).

53. Consequently, and in this context, the Court reiterates that despite the allegations of the Applicant for the lack of reasoning for the court decision, namely the challenged Judgment, the Court considers that based on its case law and that of the ECtHR, the Applicant's allegations and those of the State Prosecutor have been addressed and reasoned by the Supreme Court. The Court considers that in the circumstances

of the present case, the substantive allegations of the Applicant before the regular courts regarding the erroneous interpretation of Article 3 of the Law on Benefits to Former High Officials, were sufficiently reasoned by the latter, thus resulting in a procedure which, in its entirety and with respect to the allegations of lack of a reasoned court decision, meets the criteria set out in the relevant case law in interpreting Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

54. The Court also recalls that the Applicant, in support of his allegation of lack of reasoned court decision, referred to a number of cases of the ECtHR and the Court. The Court, in this respect, states that all general principles regarding the right to a reasoned court decision guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, have already been included in the practice of the Court as reflected in paragraph 40 of this Resolution and have been applied in the circumstances of the present case.

55. The only case referred by the Applicant and which is not related to the right to a reasoned court decision is the case of the Court KI99/14 and KI100/14. In this context, the Court emphasizes that in addition to the fact that the Applicant referred to this decision, he did not elaborate on its factual and legal connection with the circumstances of the present case, a task which, based on the case law of the Court, belongs to the Applicant. The Court has consistently emphasized that the reasoning of other court decisions must be interpreted in the context and in light of the factual circumstances in which they were rendered (see, *inter alia* in this context the Judgment in Case KI48/18 of 4 February 2019, Applicants *Arban Abrashi and the Democratic League of Kosovo (LDK),* paragraph 275; and case KI 119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility, of 3 May 2019, paragraph 80). However, and regardless of the fact that the Applicant did not substantiate the connection of his case with that of KI99/14 and KI100/14, the Court emphasizes the fact that the relevant cases have no similarity and that the "*importance*" or "*urgency*" of the election of the Chief State Prosecutor and to whom the Applicant refers, in case KI99/14 and KI100/14 has been applied in the context of the assessment of the exhaustion of legal remedies which are not disputed in the circumstances of the present case (See paragraphs 50 to 54 of the Court case KI99/14 and KI100/14).

56. Therefore, in these circumstances, based on the foregoing and having regard to the allegations raised by the Applicant and the facts presented by him, the Court also based on the standards established in its own case law in similar cases and the case law of the ECtHR,

finds that the Applicant does not prove and sufficiently substantiate his allegation of a violation of fundamental rights and freedoms with regard to the reasoned court decision, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

57. The Court further reiterates that, in principle, the "*fairness*"' required by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, is not "*substantive*" fairness, but "*procedural*" fairness. This translates in practical terms into adversarial proceedings, in which submissions are heard from the parties and they are placed on an equal footing before the court. (See, in this regard, cases of the Court KI42/16 Applicant: *Valdet Sutaj*, Resolution on Inadmissibility of 7 November, paragraph 41 and other references therein; KI118/18, Applicant *Eco Construction l.l.c,* cited above, paragraph 48; and KI49/19, cited above, paragraph 55).

58. This means that the parties should be afforded a conduct of procedure based on adversarial principle; to be able to adduce the arguments and evidence they consider relevant to their case at the various stages of those proceedings; that all the arguments, viewed objectively, relevant for the resolution of their case were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decisions were presented and examined in detail; and that, according to the circumstances of the case, the proceedings, viewed in entirety, were fair (see, *inter alia*, case of the Court No. KI118/17, Applicant *Sani Kervan and Others*, Resolution on Inadmissibility of 16 February 2018, paragraph 35; see also *mutatis mutandis*, case *Garcia Ruiz v. Spain*, cited above, paragraph 29). The Court considers that, in the circumstances of the present case, the Applicant has not substantiated that this is not the case.

59. The Court finally reiterates that Article 31 of the Constitution, as well as Article 6 of the ECHR, do not guarantee anyone a favorable outcome in the course of a judicial proceeding nor provide for the Court to challenge the application of substantive law by the regular courts in a civil dispute, where often one of the parties wins and the other loses (See in this regard, cases of the Court KI118/17, cited above, paragraph 36; and KI142/15 Applicant: *Habib Makiqi*, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

60. The Court finally notes that the dissatisfaction of the Applicant with the outcome of the proceedings by the regular courts and the KPC cannot of itself raise an argumentative allegation for the violation of the fundamental rights and freedoms guaranteed by the Constitution. (See, ECtHR case, *Mezotur - Tiszazugi Tarsulat v. Hungary*,

Judgment of 26 July 2005, paragraph 21; and, among others, the case of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 20 December 2017, paragraph 42).

61. The Court also recalls that the Applicant alleges violations of Articles 24 and 54 of the Constitution. Regarding these allegations, the Court recalls its case law according to which the mere mention of an article of the Constitution, without clear and adequate reasoning as to how that right has been violated, is not sufficient as an argument to activate the machinery of protection provided by the Constitution and the Court, as an institution that cares for the respect of human rights and freedoms. (See, in this context, the cases of the Court KI02/18, Applicant *Government of the Republic of Kosovo [Ministry of Environment and Spatial Planning],* Resolution on Inadmissibility of 20 June 2019, paragraph 36; KI95/19, Applicant *Ruzhdi Bejta,* Resolution on Inadmissibility of 8 October 2019, paragraphs 30-31).

62. Such a position of the Court is based on the case law of the ECtHR, on the basis of which, unreasoned allegations or complaints, which are not substantiated with arguments and evidence are declared inadmissible as manifestly ill-founded on constitutional basis. (See, the ECtHR Guide of 30 April 2019 on Admissibility Criteria; Part I. Procedural Grounds for Inadmissibility; A. Manifestly ill-founded applications; 4. Unreasoned complaints: lack of evidence, paragraphs 280 to 283).

63. However, the Court regarding the allegations relating to (i) Article 24 of the Constitution, states that based on the case law of the ECtHR, in principle, in order for a case to be brought within the framework of Article 24 of the Constitution and Article 14 (Prohibition of discrimination) of the ECHR, there should be a difference in treatment between persons in similar or comparable situations. (See the ECtHR case, *X and others v. Austria,* Judgment of 19 February 2013, paragraph 98). Moreover, not every difference in treatment constitutes a violation of the abovementioned articles. In principle, the difference in treatment will be discriminatory if it lacks objective or reasonable justification; in other words, if it does not pursue a legitimate aim or if the reasonable relationship between the means employed and the aim sought is lacking (See the ECtHR case, *Guberina v. Croatia*, Judgment of 22 March 2016, paragraph 69 and other references stated therein). In the circumstances of the present case, the Applicant did not specify any claim regarding any difference in treatment and consequently did not justify or support his allegations of a violation of Article 24 of the Constitution; and (ii) Article 54 of the Constitution states that they are essentially the same

as allegations of a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and do not raise other issues that have not yet been considered by the Court. Consequently, in the circumstances of the present case, the Applicant did not specify any allegation regarding the violation of his right to judicial protection of rights and, consequently, did not reason or substantiate his allegations of violation of Article 54 of the Constitution.

64. In the circumstances of the present case, the Court considers that the Applicant did not accurately clarify the facts and allegations of violation of Articles 24 and 54 of the Constitution and, consequently, these allegations, in the wake of other allegations regarding Article 31 of the Constitution in conjunction with Article 6 of the ECHR and which have been elaborated and clarified above, must be declared inadmissible as manifestly ill-founded on constitutional basis, as established in paragraph 2 of Rule 39 of the Rules of Procedure.

65. Therefore, based on the above and taking into account the special characteristics of the case, the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law in similar cases and the ECtHR case law, finds that the Applicant does not sufficiently substantiate and prove his claim of a violation of his fundamental rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as Articles 24 and 54 of the Constitution.

66. Therefore, the Court finds that the Referral is manifestly ill-founded on constitutional basis and is declared inadmissible, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 11 March 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Gresa Caka-Nimani	Arta Rama-Hajrizi

KI231/19, Applicant: Privatization Agency of Kosovo which represents the SOE „Kosovo-Export", Request for constitutional review of Judgment AC-I-15-0212-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 22 August 2019

KI231/19, Resolution on inadmissibility of 26 February 2020, published on 22 April 2020

Keywords*: Individual referral, right to property, interim measure, manifestly ill-founded, resolution on inadmissibility*

The Applicant submitted the Referral to the Constitutional Court, because it considered that the decision of the Appellate Panel of the SCSC has allegedly violated its rights and freedoms guaranteed by Article 3 paragraph 1 [Equality Before the Law], Article 7 [Values], Article 24 paragraph 1 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 54 paragraph 1 [Judicial Protection of Rights], Article 102 paragraph 3 [General Principles of Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

The Applicant also requested the Court to impose an interim measure.

In fact, the Court notes that the substance of the dispute relates to the fact that the Appellate Panel of the SCSC rendered a final judgment resolving the subject matter of the dispute regarding the confirmation of property rights over several parcels of property filed by person Z. Rr.H. by the claim with Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters.

The Court considering the Applicant's allegations considers that the Applicant raised part of these allegations in the Referral at the level of legality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR, while the second part of the allegations, the Applicant raises and builds on the level of constitutionality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR.

Accordingly, because of these findings that the Court finds it necessary to divide the Applicant's allegations into ***i)*** the allegations raised by the Applicant at the level of legality regarding constitutional violations; as well as ***ii)*** the allegations raised by the Applicant at the level of constitutionality regarding constitutional violations.

Analyzing the allegations raised by the Applicant at the level of legality, the Court concluded that it did not find anything that would lead to the conclusion that the regular courts have erroneously or arbitrarily applied the relevant legal provisions, leading to the conclusion that there has been no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in relation to the first part of the Applicant's allegations.

With regard to the allegations raised by the Applicant at the level of constitutionality pertaining to the constitutional violations, the Court found that the Appellate Panel of the SCSC, in the reasoning of the Judgment, provided detailed explanations for all of the Applicant's allegations raised before the Appellate Panel of the SCSC, from which it follows and these allegations of the Applicant are also ungrounded.

The Court based on the analysis, both the allegations of the Applicant which concerned the question of legality and the allegations regarding the question of constitutionality, did not find that the proceedings before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC were in any way unfair or arbitrary for the Constitutional Court to be satisfied that the Applicant had been denied any procedural guarantees, which would lead to a violation of the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution namely Article 6 of the ECHR, and, consequently, the Court concludes that there is no violation of other articles of the Constitution and the ECHR cited by the Applicant in the Referral.

The Court also rejected the Applicant's request for the imposition of an interim measure as ungrounded.

RESOLUTION ON INADMISSIBILITY

in

case No. KI231/19

Applicant

Privatization Agency of Kosovo which represents SOE „Kosovo-Export“

Request for constitutional review of Judgment AC-I-15-0212-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters of 22 August 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

Applicants

1. The Referral was submitted by the Privatization Agency of Kosovo (hereinafter: the Applicant), which represents the SOE „Kosovo-Export“. The Applicant is represented by Vjollca Haliti, a lawyer from the Privatization Agency of Kosovo.

Challenged decision

2. The Applicant challenges Judgment AC-I-15-0212-A0001 of the Appellate Panel of the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the Appellate Panel of the SCSC) of 22 August 2019.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged Judgment of the Appellate Panel of the SCSC which allegedly violates their rights and freedoms guaranteed by Article 3 paragraph 1 [Equality Before the Law], Article 7 [Values], Article 24 paragraph 1 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial], Article 54 paragraph 1 [Judicial Protection of Rights], Article 102 paragraph 3 [General Principles of the Judicial System] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

4. In addition, the Applicant requests the imposition of an interim security measure on the property in question, more specifically on cadastral parcels no. 1740 in a surface area of 0.24,41 ha, c.p. 1741 in a surface area of 0.78,03 ha, c.p. 1742 in a surface area of 0.78,03 ha, c.p. 1743 in a surface area of 2.88,29 ha, c.p. 1744 in a surface area of 0.32,72 ha, k.p. 1745 in a surface area of 0.80,68 ha, c.p. 1899 in a surface area of 3.56,71 ha, in a surface area of 9.76,27 ha.

5. By this, according to the Applicant's allegations, would be *"prohibited any alienation of property, distribution of immovable property or encumbrance, thereby eliminating the possibility of irreparable damage"*.

Legal basis

6. The Referral is based on Articles 21.4 and 113.7 of the Constitution, Articles 22 [Processing Referrals], 27 [Interim measures] and 47 [Individual Requests] of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] and 56 [Request for Interim Measure] of the Rules of Procedure of the Constitutional Court (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 18 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 20 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), Bekim Sejdiu and Selvete Gërxhaliu-Krasniqi.

9. On 20 January 2020, the Court notified the Applicant's representative about the registration of the Referral and sent a copy of the Referral to the Appellate Panel of the SCSC.

10. On 26 February 2020, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

11. On 11 August 2014, the Privatization Agency of Kosovo (hereinafter: PAK), announced the tender for the privatization of the assets of the SOE „Kosovo-Export".

12. On 9 December 2014, person Z. Rr.H., filed a claim with the Special Chamber of the Supreme Court on the Privatization Agency of Kosovo Related Matters (hereinafter: the SCSC), for confirmation of property rights in connection with cadastral parcel no. 1740, plan 31, list 50, by culture pasture of 3 class, in a surface area of 0.24,41 ha, cadastral parcel no. 1741, plan 31, list 50, by culture arable land of 7 class, in a surface area of 0.65,63 ha, cadastral parcel no. 1742, plan 31, list 50, by culture arable land of 5 class, in a surface area of 0.78,03 ha and cadastral parcel no. 1743, plan 31, list 50, by culture pasture of 3 class, a surface area of 2.88,29 ha, at the place called "Veternik" in a total surface area of 9.76,27 ha, of the disputed immovable property. In the claim, Z. R.H. requested to be recognized this right *"because considers that this property was incorrectly registered in the name of the respondent"*.

13. The claimant Z. R.H., in addition to the claim for the confirmation of property rights, also filed a request for the imposition of an interim measure – the suspension of the tender announced by the PAK on 11 August 2014.

14. On 29 December 2014, PAK (the respondent) filed a response to the claim, stating that *"it challenges in entirety the claim and the allegations in the claim of the claimant as ungrounded based on the law. According to the respondent's allegations, the claimant filed a claim in violation of the principle "Legitimacio ad causam" as the latter lacks the active legitimacy for processing the court issue and the claimant did not emphasize the legal basis on which the statement of claim is based"*. Based on the PAK allegations, *"the ownership right*

over the contested parcels, based on the postulate of adverse possession, because he is the credible and legitimate holder, as well as it follows from the claim that the deadline of the claimant's rights to seek the restitution of object has expired, because the claimant had not been interested in its property since 1965 until the claim was filed during 2014, i and proposes to dismiss the claim as inadmissible or to reject it as ungrounded."

15. Based on the case file, the Court notes that the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on the Privatization Agency of Kosovo Related Matter (hereinafter: the Specialized Panel of the SCSC), and the Appellate Panel of the SCSC, conducted two separate court proceedings. The first court proceedings were conducted regarding the request for interim measure, whereas the second court proceeding was conducted upon the main statement of claim for the restitution of the property right.

Court proceeding regarding the request for imposition of interim measure

16. On 3 February 2015, the Specialized Panel of the SCSC rendered Decision C-II-14-0140-C0001, which approved the request of person Z.Rr.H., for issuing the preliminary court injunction, by which PAK would be prohibited to take any legal action regarding the privatization of the abovementioned cadastral parcels which were at the time registered as the property of the SOE „Kosova Export", in a total surface area of 9.76,27 ha.

17. In the reasoning of the decision for imposition of the interim measure, the Specialized Panel of the SCSC stated: „*The Special Chamber considers that the possibility of damage, loss or damage may arise in this case. In the event that the ultimate outcome of the main claim is that the claimant is entitled to request/claim, then it cannot be rationally compensated at a reasonable price because it was immovable property and because the material damage would be great. In addition, monetary compensation would not be rational because the price could be one that is not marketable, but even if it were, the payment could be late for no reason. The owners would be denied the disposal of the land and the proceeds from it*".

18. On 18 February 2015, the respondent (PAK) filed appeal with the Appellate Panel of the SCSC, against Decision C-II.-14-0140-C0001 of 3 February 2015, on the grounds of essential violation of the provisions of the contested procedure, erroneous and incomplete determination of factual situation and erroneous application of substantive law.

19. In the appeal, PAK stated that *„it considers that there has been no active legitimacy for filing the claim by the claimant, because it was not proved that the claimant is the legal successor of its predecessor. According to the PAK allegations, the claimant did not by any material evidence substantiate the request for imposing interim measure. That the claimant has not been interested in her property since 1965"*.

20. On 26 March 2015, the Appellate Panel of the SCSC, rendered Decision AC-I.-15-0041-A0001, which rejected the PAK appeal as ungrounded. In the reasoning of the Decision of the Appellate Panel of PAK is stated: *„The Appellate Panel also agreed with the assessment of the Specialized Panel of the SCSC that the interim measure should be imposed due to the fact that the claiming party submitted numerous evidence proving high probability of that right, such as: possession list of 1957 and 1960, the decision of the National Council of 1961, which took the claimant's property with a reasoning that she cannot cultivate that land because she does not have sufficient labor force, the decision of the Commission to discuss property relations as of 21 July 1965, which returned the taken property to the claimant, whereas the respondent did not prove the opposite by any evidence, therefore in accordance with Article 55.1 of the Annex to the LSCSC, the Appellate Panel considers that such an interim measure is necessary until the claim is decided on merits "*.

Court proceeding regarding claim for confirmation of the property right

21. On 1 September 2015, the Specialized Panel of the SCSC, rendered order C-II-14-0140-C0001, in which it stated that *„**i)** The Specialized Panel notifies the parties that it is currently considering issuing a waiver order to gather additional evidence. **ii)** Parties are invited, if any, to submit submissions and arguments at this stage of the proceedings within 7 (seven) days from the date of receipt of this notice.. **iii)** Submissions and all supporting documents must be submitted in one copy for the subject of the dispute of the court and one copy for submission to the opposing party"*.

22. On 11 September 2015, the Specialized Panel of the SCSC issued a new order C-II-14-0140-C0001, in which notifies the parties that *„since there are no disputable issues in the proceedings that need to be further clarified with respect to material facts for deciding the case or the subject matter, the Specialized Panel II decides to exempt the proceedings from gathering additional evidence"*.

23. On 14 September 2015, the SCSC Specialized Panel rendered Judgment C-II-14-0140-C0001, which approved the claim for recognition of the property right of Z.Rr.H., over the parcels she mentioned in the statement of claim, in a total surface area of 9.76,27 ha.

24. By the same Judgment, the Specialized Panel of the SCSC obliged PAK, to transfer to the claimant the full possession over the property described under the item I of the enacting clause, and to provide her with all the necessary documents in order to enable the registration of the property in her name in the cadastral offices.

25. The reasoning of Judgment C-II-14-0140-C0001 of the Specialized Panel reads:

> *„The Judge Rapporteur of the Specialized Panel issued an order as provided by Article 34 paragraph 4, notifying the parties of eventual possibility that the Court issues order to exclude the collection of additional evidence. With regard the procedural step, none of the parties submitted submission or arguments within the determined deadline, none of the parties requested the holding of oral hearing, nor gathering of additional evidence…“*
>
> *Regarding the issue of the existence of active legitimacy for filing a claim by the claimant, in all certificates of the possession list issued by the cadastral offices on 8 April 1957, 25 April 1957, 18 November 1961 and 26 June 1969, the contested parcels are registered in the name of the claimant Z.Rr.H., and as a result it is easily to understand that she has full active legitimacy for acting in realization of their rights regarding the disputed land parcels.*
>
> *Person R. A. P., the predecessor of the claimant Z.Rr.H., was the owner of the following cadastral parcels: 9/31, 9/32, 9/33, 9/34, 9/35, 9/36 i 9/80, Cadastral Zone Prishtina, of a total surface area of 9.76,27 ha.*
>
> *The claimant Z.Rr.H., as an exclusive inheritor of her deceased father inherited property and the land parcels are registered in her name and started to pay taxes for that property.*
>
> *All documents submitted by the claimant to the court are copies of the original documents certified by a public notary who is in the competent archives of the Municipality of Prishtina“.*

26. On 8 October 2015, PAK filed appeal with the Appellate Panel against the Judgment C-II-14-0140-C0001 of the Specialized Panel of the SCSC. In the appeal, the PAK *inter alia* stated "*that the first instance court committed violation of law and legal provisions, because it did not hold hearing at all, because the enacting clause of the judgment is contradictory with itself and reasoning of judgment and does not contain reasons on decisive facts – the judgment does not contain at all the reasoning, that the first instance court did not determine the fact whether the claimant possesses the disputed property, whether he is a conscientious holder and how long he has possessed it ".*

27. On 22 August 2019, the Appellate Panel of the SCSC rendered Judgment AC-I-15-0212-A0001, which rejected the PAK appeal as ungrounded. In the reasoning of the Judgment of the Appellate Panel is stated:

> *„Regarding the PAK appealing allegations that the first instance court violated the law and legal provisions for not holding a hearing at all, the Appellate Panel considers that the Specialized Panel in the present case acted in accordance with the Annex to the Law on the Special Chamber, namely Article 34 paragraphs 3 and 4 of the Order of 1 September 2015, the Specialized Panel informed the parties to the proceeding that the possibility of adopting an order for waiving collection of additional evidence was considered and invited the parties, if any, to submit submissions and arguments for this stage of the proceedings within 7 days from the date of receipt of such notice. Neither party provided any evidence, nor did it dispute such a possibility, so this allegation of the PAK was not substantiated either.*
>
> *From the evidence presented by the Specialized Panel and which are in the case file, it is confirmed that this disputed property has never been since 1957 in the name of this SOE, but in the name of the predecessor of the claimant and in the name of the claimant.*
>
> *The PAK appeal did not provide any additional evidence that could change the factual situation, determined by the Specialized Panel in the challenged appeal. It focused the entire reasoning of the objection on not holding the hearing, not providing any argument that could refute the evidence provided by the claimant. And without holding a hearing, PAK was given the opportunity to provide additional evidence and arguments to support it, as it was warned that the hearing would not be held in accordance with the law, namely Article 34 of the Annex to the*

Law on the Special Chamber. As the only evidence, which was on file with the Specialized Panel, the PAK mentions the certificate on property that is in the name of the SOE, but there was no evidence on the basis of which this property was transferred to the SOE when all the evidence confirms that this property was always in the name of the claimant".

Applicant's allegations

28. The Applicant alleges that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, in their judgments, violated the rights and freedoms guaranteed by Article 3 paragraph 1 [Equality Before the Law], Article 7 [Values], Article 24 paragraph 1 [Equality Before the Law], Article 31 [Right to Fair and Impartial Trial] Article 54, paragraph 1 [Judicial Protection of Rights], Article 102 paragraph 3 [General Principles of the Judicial System] of the Constitution and Article 6 (Right to a fair trial) of the ECHR.

29. More specifically, as regards the violation of Article 3 paragraph 1 of the Constitution, the Applicant also alleges *„Violation of the constitutionality and legality of Article 3, paragraph 1, because of a violation of the fundamental principle of full respect for the rule of law. We are also dealing here with the violation of respect for fundamental human rights and freedoms, the rights challenged by the judicial authority, which, according to the Constitution of Kosovo, is the ultimate guardian and sole protector of citizens' rights and the establishment of legality, by violating this principle, the fundamental human rights and freedoms have been violated".*

30. Further, as to the violation of Article 24, paragraph 1 and Article 31 of the Constitution, the Applicant alleges *„that the Special Chamber (first and second instance) violated the legal provisions of Article 4.7.1 of the Law on Chamber and Article 6 "Right to a fair trial" of the Convention for the Protection of Human Rights and Freedoms. This is because the court showed bias by speeding the completion of the proceedings when it decided before the written procedure was completed and without a hearing. According to Article 40 paragraph 1 item 1.3, the written procedure ends with the filing of counter reply, and in the present case, the court decided only upon the claim and the response to the claim".*

31. The Applicant further states that: *"The Court continued with processing of the case in contravention of Article 47 "Proceedings during the hearing" paragraphs 3, 4, 5, 6, 7. A session was not scheduled at all, but it was decided by only one procedural decision,*

unlike other cases without administration (reading and assessing the latter) as required by law. Also, such an action is contrary to the case law itself, because in cases when dealing with a claim for confirmation of ownership, and especially in this particular case (surface area of 9.76.27 ha), the court, or the Special Chamber, established the following case law: Based on the Annex to the Law on PAK, namely Article 10, the suspension of all actions, whether administrative or judicial, is determined".

32. The Applicant also states that *"the Chamber continued to consider the case in contravention of the case law and the Constitutional Court (ref. Judgment in case no. KG 142/16). Further, the Court explains why it did not hold the session being convinced that the claimant was the one who should have requested a court hearing"! This position of the courts does not find support and is not in accordance with any legal provision of the Law on the Special Chamber of the Supreme Court of Kosovo and the Law on Contested Procedure"* .

33. In relation to the violation of Article 54 paragraph 1 of the Constitution, the Applicant alleges *„that everyone has the right to judicial protection in the event of a violation or denial of any right guaranteed by this Constitution or law, as well as the right to effective legal measures if it is established that such a right has been violated ".*

34. In this regard, the Applicant alleges that the denial of the right to legal protection has led to a violation of Article 102 paragraph 3 of the Constitution, which states that courts shall adjudicate based on the Constitution and the law. According to the Applicant "a) *The claimant was returned the right of ownership of the land, without any legal basis, for return of the immovable property. There is still no law on property restitution in Kosovo. b) The second legal violation concerns the fact that the court rendered the decision without holding any court hearing (contrary to Article 53 of the Law on the Chamber), constitutes a serious violation, and contrary to Article 182.2, i) of the LCP, as can be seen from the decision of the Specialized Panel C-II-14-0140-C-0001 of 3 February 2015; c) Decision of the Appellate Panel AC-I-15-0212-A0001 of 22 August 2019, which seriously violates the applicable Law of the LCP, Article 277, and the Law on Amendments to the Law no. 03/L-006, on the Contested Procedure no. 04/L-118, because the claimant passed away on 23.9.2015 (death certificate dated 27.08.2015), while the court decided by Judgment on 22.08.2019, as a second instance body in the absence of active foreign legitimacy.*

35. The Applicant alleges a violation of Article 6, stating that the Appellate Panel of the SCSC, *"has been notified chronologically of all procedural and legal violations by the Specialized Panel of the SCSC, including constitutional violations. However, it is clear from the decision of the Court of Appeals that not all the appealing allegations were considered/established and that they were ignored".*

36. Finally, the Applicant concludes its allegations with an opinion *„that the Appellate Panel of the SCSC, in its judgment no. AC-I-15-021-A00012 decided that there has been a violation of Article 7 paragraph 1 of the Constitution of the Republic of Kosovo, which establishes that the courts adjudicate on social values with respect for the principle of equality, without violating human rights and freedoms and the rule of law".*

37. The Applicant also requests the Court to impose an interim measure, which would prevent the alienation, distribution or encumbrance of the property in question in order to prevent the damage that could occur during the proceedings before the court.

38. The Applicant requests the Court to render a judgment that would declare the referral admissible and annul Judgment AC-I-15-0212-A0001 of 22 August 2019, rendered by the Appellate Panel of the SCSC, and Judgment C-II-14-0140-C0001, of 14 September 2015, rendered by the Specialized Panel of the SCSC, or otherwise to remand the case for retrial.

Admissibility of the Referral

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

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

> *„1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
> (...)
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

41. The Court considers that in accordance with Article 21. 4 of the Constitution, which establishes that *„Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable*", the Applicant has the right to file a constitutional complaint, referring to alleged violations of his fundamental rights and freedoms applicable both to individuals and to legal persons (see, *mutatis mutandis*, resolution of 27 January 2010, case KI41/09, *AAB-RIINVEST University L.C.C., Prishtina v. Republic of Kosovo*).

42. In addition, the Court also refers to the admissibility requirements as defined by the Law. In this regard, the Court first refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

43. With regard to the fulfillment of these requirements, the Court finds that the Applicant filed the referral in the capacity of an authorized party, challenging the act of the public authority, namely Judgment AC-I-15-0212-A0001 of the Appellate Panel of the SCSC, of 22 August 2019, after exhaustion of all legal remedies. The Applicant also

clarified the rights and freedoms that allegedly were violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the time limits set forth in Article 49 of the Law.

44. In addition, the Court takes into account Rule 39 [Admissibility Criteria], paragraph (2) of the Rules of Procedure, which establishes:

> *"(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."*

45. In the present case, the Court notes that the essential issue in the Applicant's referral relates to the determination of the property right over immovable property. On that occasion, the regular courts conducted two court proceedings, one of which was related to the request for the imposition of an interim measure and the other to resolve property rights over the property in question.

46. Accordingly, having regard to the outcome of both court proceedings, the Court notes, that the court proceedings relating to the interim measure have become moot in the current circumstances, and this is because of the judgment of the Appellate Panel of the SCSC, the main issue in the present claim is resolved, consequently, all legal consequences which the Appellate Panel of the SCSC have ceased by Decision AC-I.-15-0041-A00010, on the imposition of the interim measure. For these reasons, the Court will not deal with this part of the court proceedings.

47. With regard to the court proceedings conducted in respect of the claim for the determination of the property rights over the property in question, despite the fact that the Applicant alleged violation of several articles of the Constitution and the ECHR in his referral, the Court is of the opinion that, as the primary violation, the Applicant mentions the violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, which he relates to the erroneous application of certain provisions of the law, as well as the failure to hold a hearing at which the issue of the property in question was resolved. Such a position of the regular courts was, according to the Applicant, partial and different from the case law (Articles 3 and 24 of the Constitution), because it did not have effective legal and judicial protection (Articles 54 and 102 of the Constitution).

48. In this regard, the Court considers that the Applicant raised part of these allegations in the Referral at the level of legality regarding the

violation of Article 31 of the Constitution and Article 6 of the ECHR, while the second part of the allegations, the Applicant raises and builds on the level of constitutionality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR.

49. Accordingly, it is because of these findings that the Court finds it necessary to divide the Applicant's allegations into ***i)*** the allegations raised by the Applicant at the level of legality regarding constitutional violations; and ***ii)*** the allegations raised by the Applicant at the level of constitutionality regarding constitutional violations.

i) allegations raised by the Applicant at the level of legality regarding the violation of Article 31 of the Constitution and Article 6 of the ECHR

50. In the Court's view, the allegations raised by the Applicant at the level of legality in order to build the alleged violations, are allegations that it relates to the fact that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, violated the legal provisions of Article 4.7.1 of Law no. 04/L-033 on the Special Chamber (hereinafter: the Law), that they have erroneously applied Article 40.1.3 of the Law, and have erroneously determined the factual situation regarding the ownership of the property in question, that the property right has been restored without the legal basis for the return of immovable property because there is still no law on the restitution of property in Kosovo, that the proceeding was continued even if the claimant did not have an active legitimacy, which hastened the completion of the proceedings regarding the property in question.

51. In support of the aforementioned violations, the Applicant adds that in the appeal proceedings before the Appellate Panel of the SCSC, it pointed out in chronological order all the failures of the Specialized Panel of the SCSC, but that the Appellate Panel of the SCSC, did not respond to any of these allegations. All of this, according to the Applicant, led to a violation of Article 31 of the Constitution and Article 6 of the ECHR.

52. Specifically, with regard to the first category of allegations, namely the allegations regarding the determination of the factual situation and the application of substantive law, the Court recalls that it has always emphasized that these allegations do not fall within the jurisdiction of the Court and, therefore, cannot in principle be considered by the Court (see, in this regard, among other cases, the cases of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility of 18 December 2017, paragraph 35, KI154/17 and

05/18 Applicants *Basri Deva, Afërdita Deva and Limited Liability Company "Barbas"* Resolution on Inadmissibility of 12 August 2019, paragraph 60, KI192/18, Applicant *Kosovo Energy Distribution and Supply Company*, KEDS jsc, Resolution on Inadmissibility, of 16 August 2019, paragraph 49).

53. The Court has consistently reiterated through its case law that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. If it were otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See ECtHR case, *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also cases of the Court Kl70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011, Kl154/17 and 05/18 Applicants *Basri Deva, Aferdita Deva and Limited Liability Company "Barbas*", cited above, paragraph 61, KlI92/18, Applicant, *Kosovo Distribution Company and Power Supply, KEDS jsc*, cited above, paragraph 50).

54. It is the duty of the Court to examine the proceedings as a whole, which in the present case also includes the decision of the Appellate Panel (see, *inter alia,* the ECtHR Judgment in case *Helmers v. Sweden*, of 29 October 1991 Series A. no. 212, page 15, paragraph 31). Furthermore, it is not within the ECtHR jurisdiction to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (See, *inter alia*, case *Edwards v. United Kingdom*, case no. 79/1991/331-404, Report of the European Commission on Human Rights, paragraph 34).

55. Returning to the present case and the first category of the appealing allegations, the Court notes that for the Applicant it was disputable the application of Article 4.7.1 of the Law by the Specialized Panel of the SCSC and the Appellate Panel of the SCSC. The Court recalls that Article 4.7.1 of the Law reads as follows::

"Article 4 Jurisdiction

1. The Special Chamber shall have exclusive jurisdiction over all cases and proceedings involving any of the following:
[…]
7.1 the subject matter of such claim, matter, proceeding or case is within the exclusive jurisdiction of the Special Chamber as specified in paragraph 1. of this Article; or…"

56. The Court notes from Article 4 of the Law that it regulates the issue of jurisdiction of the Special Chamber to deal with the requests in question. In accordance with law, the Specialized Panel and the Appellate Panel are an integral part of the Special Chamber of the Supreme Court, which as such adjudicate in two court instances. Accordingly, the Court does not find disputable the jurisdiction of the Specialized Panel of the SCSC, nor of the Appellate Panel of the SCSC, to deal with the case in question. Moreover, the Court in the referral did not find that the Applicant at any stage of the proceeding in any way challenged or questioned their jurisdiction, which in itself leads to the conclusion that the allegations of violation of Article 4.7.1 of the Law, which the Applicant relates to violation of Article 31 of the Constitution and Article 6 of the ECHR, are ungrounded.

57. The Court further notes that the Applicant considers that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC have erroneously applied Article 40 paragraph 1 item 1.3, of the Law. In support of this, it cited *that the written procedure ends with the filing of the counter reply, and in the present case, the court decided only upon the claim and the response to the claim".*

58. The Court recalls that Article 40 paragraph 1 item 3, of the Law, it states,

„Article 40 Objections against Witnesses and Expert Witnesses

1. Any party may object to the competence or eligibility of any proposed witness or expert by requesting the judge(s) hearing the concerned case or proceeding to bar the witness or expert from providing evidence, either entirely or on a specific matter.
[…]
3. The party making such an objection shall be required to state its reasons for such objection. Every other party shall be given an opportunity to support or oppose the objection and to provide their reasons for such position; provided, however, that if the objection is raised during the conduct of an oral hearing, only the parties present at such hearing shall be given such opportunity."

59. In this regard, the Court finds that at the time of filing the statement of claim for the determination of the right to property, the respondent, which in this case is the Applicant, had the opportunity to file its objections as well as the argument and evidence challenging the statement of claim of the claimant, and even from the moment of the first court proceedings when the courts resolved the grounds of the request for imposition of the interim measure. Also, the Applicant in the appeal proceeding regarding the request for interim measure, and also during the court proceeding when the courts decided on the substance of the claim, had the opportunity, and what it did, to bring all appealing arguments and evidence before the higher instance courts, which the courts had accordingly examined.

60. Regarding the Applicant's allegation that the Appellate Panel of the SCSC has erroneously determined the factual situation in connection with the ownership of the said property, that the property right was restored without legal basis for the return of the immovable property because there is still no Law on Return of Property in Kosovo, the Court notes that the Appellate Panel of the SCSC in Judgment AC-I-15-0212-A0001 reasoned that: "*From the evidence presented by the Specialized Panel and which are in the case file, it is confirmed that this disputed property has never been since 1957 in the name of this SOE, but in the name of the predecessor of the claimant and in the name of the claimant. The PAK appeal did not provide any additional evidence that could change the factual situation, determined by the Specialized Panel in the challenged appeal. It focused the entire reasoning of the complaint on not holding the hearing, not providing any argument that could refute the evidence provided by the claimant. And without holding a hearing, PAK was given the opportunity to provide additional evidence and arguments to support it, as it was warned that the hearing would not be held in accordance with the law, namely Article 34 of the Annex to the Law on the Special Chamber. As the only evidence, which was on file with the Specialized Panel, the PAK mentions the certificate on property that is in the name of the SOE, but there was no evidence on the basis of which this property was transferred to the SOE when all the evidence confirms that this property was always in the name of the claimant*".

61. Moreover, the Court notes that the Applicant is, *inter alia*, in his appeal with the Appellate Panel of the SCSC is still in the decision-making process on the request for the imposition of interim measure raised also the question *of active legitimacy for filing claim by the claimant because it was not proved that the claimant is the legal heir of the predecessor.*

62. The Court notes that the Appellate Panel of the SCSC is, among other responses to the appeal, it also provided the Applicant with answers regarding the issue of active legitimacy. On that occasion, the Appellate Panel of the SCSC concluded: *„The PAK appealing allegation that it was not proved that the claimant is the legal heir of her predecessor is ungrounded, because from the evidence in the case file it is clearly seen that the claimant Z.H. was the owner of property from 1957, and she filed the claim personally".*

63. Consequently, the Court and the Applicant's other allegations relating to the fact that the Appellate Panel of the SCSC did not in chronological order examined and responded to all of its appealing allegations as ungrounded, it follows that the Court in the decisions of the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, did not find anything that would lead to the conclusion that the regular courts have erroneously or arbitrarily applied the relevant legal provisions, leading to the conclusion that there is no violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, in relation to the first part of the Applicant's allegations.

ii) the allegations raised by the Applicant in the referral in the level of constitutionality regarding violation of Article 31 of the Constitution and Article 6 of the ECHR

64. In the Court's view, the allegations raised by the Applicant at the level of constitutionality with a view to building the alleged violations of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, are the allegations it relates to the fact that the Specialized Panel of the SCSC and the Appellate Panel of the SCSC, rendered judgments that resolved the issue of the property in question, but there was no public hearing.

65. In this regard, the Court recalls that "the right to a public hearing" as one of the elements of the right to a fair trial implies the right of a party to be present in court. More specifically, the concept of a fair trial requires that a so-called review proceeding be conducted, where the parties in the contested procedure have the right to know and comment on opinions or evidence filed by the other party. In criminal proceedings, the respect of this principle means that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. (see ECtHR Judgment *Brandstetter v. Austria,* Application no.11170/84, 112876/87 13468/87 of 28 August 1991,

Judgment *Bricmont v. Belgium*, Application no. 10857/84 of 7 July 1989).

66. When it comes to this element, this right means that the Applciant should personally participate in the hearing. It must be emphasized that the ECtHR case law under Article 6 paragraph 1 of the ECHR does not make a significant difference between cases where the Applicant was not personally present but represented through his lawyer, and those cases in domestic courts, the proceedings were conducted based on written evidence, without hearing the parties' representatives. In the context of the right to a public hearing, the ECtHR emphasized the distinction between the cases in which the Applicant was able to attend the hearing in person and those in which he had no such opportunity. Although the presence of a lawyer in the courtroom may be relevant in the context of a violation of some other rights guaranteed by Article 6 such as the rights guaranteed in items (b) and (c) of paragraph 3) where in the centre of attention in accordance with Article 6 paragraph 1 it must be the personal presence of the applciant in court (see ECtHR Judgment *Göç v. Turkey*, application no.36590/97, of 11 July 2002).

67. The Court also wishes to note that as a concept of Article 6 of the Convention, the ECtHR has, in its case law, found that it is also possible to waive most of the rights under Article 6 of the ECHR, and also the right to a public hearing. ECtHR in case *Poitrimol v. France* held that a person may waive his or her right to attend a hearing, whether in criminal or civil dispute. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see ECtHR Judgment *Poitrimol v. France*, application no. 14032/88 of 23 November 1993).

68. In this context, the Court wishes to add that the right to attend a hearing does not imply an obligation on the part of the authorities to bring the parties to trial if they themselves do not make sufficient effort to participate in the proceedings. (see, *mutatis mutandis*, ECtHR Judgment in case *Nunes Dias v. Portugal* application no.*55391/13, 57728/13 and 74041/13 of 6 November 2018*). The authorities are obliged to inform them of upcoming hearings, however, Article 6 does not give the parties to the dispute the automatic right to have the court specifically order them to participate in the proceedings (see decision *Nikolay Bogonos v. Russia*, application no. 68798/01, of 5 February 2004).

69. The Court, considering the Applicant's specific allegation that the public hearing was not held within the aforementioned ECtHR principles, notes that the Specialized Panel of the SCSC is in the

proceeding before the hearing on the statement of claim for confirmation of the property rights, rendered order C-II-14-0140-C0001, in which it notified the parties to the proceedings that it itself would not continue to gather evidence in the case at hand. Moreover, the Specialized Panel of the SCSC, invited the parties to submit additional submissions, arguments or requests at this stage of the proceedings within 7 (seven) days of receipt of the notification.

70. The Court notes that such a view was adopted by the Specialized Panel of the SCSC on the ground that the parties in the proceedings (the claimant and the Applicant), had already provided the evidence and arguments before the first court proceedings began, that is, before deciding on a request for an interim measure, which, as such, were sufficient for it to decide on the issue of a claim for the determination of property rights.

71. Specifically, the claimant brought evidence in a claimant for the determination of the property rights by which she supported her claims that she, as the owner of the subject property, is also entitled the rights over the subject property.

72. The Applicant also in a capacity of the responding party filed reply to the claim, by which it sought to challenge the statements of claims of the claimant, stating *inter alia* the issue of legitimacy of the claimant as well as the issue of the ownership over the property in question.

73. The Court notes that the Specialized Panel of the SCSC, bearing in mind that the parties did not submit additional arguments, evidence or request to hold a hearing to it within the prescribed time limit, rendered Order C-II-14-0140-C0001, notifying the parties that *„since there are no disputable issues in the proceedings that need to be further clarified as to the material facts for deciding the case or subject matter, the Specialized Panel II decides to dispense the proceedings with the collection of additional evidence "*.

74. The Court notes that the Specialized Panel of the SCSC, has taken such a position, based on Article 34.3 and 5 of Annex to Law no. 04/L-033 on the SCSC, which provides:

> „Article 34 Preliminary Report of the Single Judge
> *[…]*
> *3. Based upon the preliminary report, the Specialized Panel may issue an order to dispense with the collection of evidence if it determines that there remain no genuine disputes of material fact necessary to decide the case or issue concerned.*

[...]
5. If an order to dispense with the collection of evidence is issued pursuant to paragraph 3 of this Article, the provisions of Chapter XI of this Annex shall not apply to the case or issue that is the subject of such order."

75. In the opinion of this Court, the Specialized Panel of the SCSC notifies the parties to the proceedings that they may submit new evidence or present new arguments within the prescribed time limit, as well as the possible legal consequences that could arise if they did not, fulfilled the legal obligations towards the parties to the proceedings.

76. It is the Applicant, as the party alleging and claiming ownership of the property in question, should take all legal actions envisaged by law that would enable them to be thoroughly explained and argued before the court, in fact, the Applicant should actively participate in the proceedings before the Specialized Panel of the SCSC.

77. The Court wishes to point out that the active participation of a party to the proceedings is another element of the right to a public hearing which means that a person against whom is filed a claim in a civil dispute should not only be present in the court, but, that person must also be able to take an active part in the proceedings without restriction.

78. In this context, the Court notes that it was precisely the Applicant who acted contrary to this principle by not responding to the order of the competent authority and take the necessary actions within the prescribed deadline of which the course and the outcome of the court proceedings may depend. Its lack of activity in the proceedings did not arise as a result of some restrictions or prohibitions by the Specialized Panel of the SCSC. In fact, the Specialized Panel of the SCSC in accordance with the case file, made sufficient efforts, and allowed the Applicant to take an active part in the proceedings. However, the principle of attending a public hearing does not imply an obligation of the Specialized Panel of the SCSC to physically bring the parties to trial, if they themselves do not make sufficient effort to participate in the proceedings (see ECtHR decision in case *Nunes Dias v. Portugal*).

79. In the light of the foregoing, the Court cannot but make its observations, which is that the Applicant even under the assumption that it has submitted new evidence, arguments within the prescribed time limit or a request to the Specialized Panel of the SCSC to hold a public hearing, which would support by valid arguments and evidence could lead to this that the Specialized Panel of the SCSC, finds it

necessary that based on them calls a public hearing where the respondent and the claimant would have the opportunity to make and exchange arguments before the court even orally.

80. By such inactive position, the Applicant is also formally *„voluntarily waived the right"* to a public hearing as one segment of the right to fair and impartial trial.

81. In view of the aforementioned ECtHR case law, the Court is of the opinion that the Specialized Panel of the SCSC respected *„minimum safeguards*", required by ECtHR case law (see case above *Poitrimol v. France)*. Moreover, the Court particularly wishes to note that it is not the duty of the regular courts to take *„ special effort "*to force the party to take an active part in the proceedings or to bring it to attend the trial, such a decision is left to the party itself to make it (see case above *Nikolay Bogonos v. Russia*).

82. The Court further notes that the Applicant alleges *that the Appellate Panel of the SCSC, in the appeal procedure violated Article 7 paragraph 1 of the Constitution of the Republic of Kosovo, which establishes that the courts adjudicate on social values with respect for the principle of equality, without violating human rights and freedoms and the rule of law* , without providing any concrete explanation and evidence to justify its allegations.

83. Moreover, the Court finds that the Appellate Panel of the SCSC gave in the reasoning of the judgment detailed explanations of all the appealing allegations raised by the Applicant before the Appellate Panel of the SCSC, from which it follows that these Applicant's allegations are also ungrounded.

84. The Court based on the analysis, both the allegations of the Applicant which concerned the question of legality and the allegations regarding the question of constitutionality, did not find that the proceedings before the Specialized Panel of the SCSC and the Appellate Panel of the SCSC were in any way unfair or arbitrary for the Constitutional Court to be satisfied that the Applicant had been denied any procedural guarantees, which would lead to a violation of the right to fair and impartial trial, guaranteed by Article 31 of the Constitution namely Article 6 of the ECHR, and, consequently, the Court concludes that there is no violation of other articles of the Constitution and the ECHR cited by the Applicant in the Referral.

85. The Court reiterates that it is the Applicant's obligation to substantiate its constitutional allegations and to submit *prima facie* evidence

indicating a violation of the rights guaranteed by the Constitution and the ECHR (see case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December).

86. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for interim measure

87. The Court recalls that the Applicant also requests the Court to impose interim measure, "*that would prohibit any alienation of property, distribution of immovable property or encumbrance, thereby eliminating the possibility of irreparable damage "*.

88. However, the Court has just concluded that the Applicant's Referral should be declared inadmissible on constitutional basis.

89. Therefore, in accordance with Article 27.1 of the Law, and in accordance with Rule 57 (4) (a) of the Rules of Procedure, the Applicant's request for an interim measure should be rejected, because it cannot be considered as the referral was declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 27.1 of the Law, and Rules 39 (2) and 57 (1) of the Rules of Procedure, in the session held on 26 February 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO REJECT the request for interim measure;

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

KI158/19, Applicant: Fatos Dervishaj, constitutional review of the inactions of public authorities regarding the requests of the Applicant

KI158/19, Resolution on Inadmissibility, of 10 June 2020, published on 24 July 2020

Keywords: *individual referral, failure of public authorities to take actions, equality before the law, effective legal remedies, judicial protection of rights, protection of property, inadmissible referral*

The Applicant challenged before the Constitutional Court the constitutionality of the inaction of the public authorities, namely the Basic Prosecution in Prishtina, the State Prosecutor's Office, the Kosovo Prosecutorial Council, the Ombudsperson and the Supreme Court, regarding his requests for filing a criminal report, exclusion of prosecutor M.LL. and the disciplinary responsibilities of prosecutors, the transfer of the case to the competence of the Special Prosecution and the administrative silence of these authorities.

The Court, having assessed the allegations of the Applicant in relation to the criminal report, considered that his referral in respect of this allegation should have been declared out of time since from the day of receipt of the last decision of the Basic Prosecution in Prishtina there had passed more than four (4) months until the submission of the Referral. As regards the Applicant's claim for the exclusion of the case prosecutor M.LL. and the disciplinary responsibilities of prosecutors, the Court found that there does not stand the fact that the public authorities did not act because based on all his documents he had received answer from both, the Basic Prosecutor in Prishtina and the Supreme Court. As regards his allegation that the public authorities had not transferred the criminal case [PP.nr.65 / 17] for treatment to the Special Prosecution, the Court considered that the issue of sending the criminal case in question to the competence of the Special Prosecution for treatment, was in the exclusive competence of the Basic Prosecution in Prishtina. Further, the Court, based on the case file, noted that the Applicant's request for having the criminal case [PP. no. 65/17] sent to the competence of the Special Prosecution, was based simply on his suspicion that the prosecutor M.LL., who was in charge of the case, was prolonging the conduct of the investigation and the filing of the indictment against the suspects M.G., V.I., D.R., M.B., N.H., G.X. and S.B-SH. Moreover, in relation to this allegation, the Applicant alleged a violation of Article 24 [Equality before the Law] but the Court noted that he merely referred to discrimination, without explaining how the violation of this right occurred,

and by not explaining what was the "*different treatment, without objective and reasonable justification, of persons in relevantly similar situations.*"

Further, the applicant complained about the inaction of the Ombudsperson, claiming in violation of Articles 54 and 132 of the Constitution and Article 45 of the European Convention on Human Rights. The Court, having assessed the Applicant's allegations regarding the proceedings before the Ombudsperson, found that Articles 54 and 132 of the Constitution are not articles that in themselves contain a right or freedom. The above two articles are therefore not articles that can be interpreted independently of other constitutional provisions, important for this case. The Applicant referred also to the violation of Article 32 [Right to Legal Remedies], but failed to justify in any way what legal remedy he was deprived of and against which decision he did not have the opportunity to submit any legal remedy, but he linked the same allegations with Article 45 of the ECHR, for which the Court found that Article 45 of the ECHR, that is part of Chapter II [ECtHR European Court of Human Rights], cannot serve as a basis for building a claim for violation of the rights guaranteed by the ECHR before the Constitutional Court, given that this article refers to the competencies of the ECtHR regarding the decision-making procedures and not the competencies of the domestic courts, part of the protection mechanism guaranteed by the ECHR (see, analogically the Constitutional Court case KI108/18, Applicant: *Blerta Morina*, Resolution on Inadmissibility, of 5 September 2019, paragraph 195).

In conclusion, in accordance with Articles 20 and 49 of the Law, and Rules 39 (1) (c), 39 (2) and 59 (2) of the Rules of Procedure, the Court decided to declare the Applicant's Referral inadmissible, in all its parts.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI158/19

Applicant

Fatos Dervishaj

Constitutional review of inactions of the public authorities regarding the requests of the Applicant

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 Fatos Dervishaj (hereinafter: the Applicant), residing in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the inaction of the public authorities, namely the Basic Prosecutor's Office in Prishtina (hereinafter: the BPO), the State Prosecutor's Office (hereinafter: the SP), the Kosovo Prosecutorial Council (hereinafter: the KPC), the Ombudsperson and the Supreme Court, in relation to his requests for filing a criminal report, the exclusion of prosecutor M.LL. and disciplinary liabilities of prosecutors, sending the case to the competence of the Special Prosecutor's Office and administrative silence of these authorities.

Subject matter

3. The subject matter of the Referral is the constitutional review of the inactions and acts of the above-mentioned public authorities, alleging that the latter denied him the rights guaranteed by Articles: 24 [Equality Before the Law], 32 [Right to Legal Remedies], 54 [Judicial Protection of Rights] and 132 [Role and Competencies of the Ombudsperson] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), as well as Article 45 (Reasons for judgments and decisions) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Constitutional Court

5. On 20 September 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 25 September 2019, the President of the Court appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel composed of Judges: Arta Rama-Hajrizi (Presiding), Gresa Caka-Nimani dhe Safet Hoxha (members).

7. On 26 September 2019, the Applicant by electronic mail requested the Court to consider the Notification of the Supreme Court of 4 September 2019.

8. On 8 October 2019, the Court notified the Applicant about the registration of Referral KI158/19.

9. On 8 November 2019, the Applicant by electronic mail requested the Court to be notified about any document submitted by the responding parties.

10. On 25 November 2019, the Applicant again submitted additional information to the Court. Specifically, he requested the Court to review the Decision of the Ombudsperson No. 2033/2019, of 20 November 2019.

11. On 26 November 2019, the Applicant requested the Court that his Referral be dealt with public interest.

12. On 20 December 2019, the Court notified the Ombudsperson, the KPC, the State Prosecutor's Office and the Supreme Court about the Applicant's Referral. On the same date, the Applicant requested the Court to be informed about the comments or responses of the responding parties and to not address them if they were filed out of the legal deadline.

13. On 23 December 2019, the Applicant supplemented his Referral with additional arguments.

14. On 10 June 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

15. The Applicant is submitting a Referral for the second time to the Constitutional Court of the Republic of Kosovo. Previously, he had submitted Referral KI19/17 on which the Court by the Resolution of 20 February 2018, decided to declare it inadmissible. The legal facts of Referral KI19/17 are not related to the Referral filed now, which is registered under number KI158/19.

16. In present case KI158/19, the Applicant initiated a large number of proceedings before various public authorities, therefore, the factual situation will be presented for each public authority separately.

Summary of facts related to the contested procedure

17. On 29 February 2012, the Applicant filed the statement of claim with the Basic Court in Prishtina by which he sued the company "Wurth Kosova" l.l.c., due to the fact that the company in question dismissed the Applicant and 20 other employees of the of the same enterprise.

18. On 5 November 2015, the Basic Court in Prishtina by Judgment C. No. 428/12 rejected the Applicant's claim as ungrounded.

19. On 30 December 2015, the Applicant filed an appeal with the Court of Appeals against the Judgment of the Basic Court in Prishtina C. No. 428/12.

20. On 31 October 2016, the Court of Appeals by Judgment Ca. No. 858/2016, approved the Applicant's appeal, annulled Judgment Ca. No. 858/2016 of the Basic Court in Prishtina and remanded the case for retrial to the Basic Court.

21. On 20 June 2017, the Basic Court in retrial rendered Judgment C. No. 189/17, which rejected as ungrounded, the Applicant's statement of claim.

22. On 14 August 2017, the Applicant filed an appeal with the Court of Appeals against Judgment C. No. 189/17 of the Basic Court, of 20 June 2017.

23. The Applicant does not provide evidence whether the Court of Appeals decided on his appeal.

Summary of facts related to the criminal report

24. On 19 May 2017, the Applicant regarding the evidence administered in the civil case C. No. 189/17, filed a criminal report with the Basic Prosecutor's Office in Prishtina (hereinafter: the BPO), due to the suspicion that a larger number of persons, namely: M.G., V.I., D.R., M.B., N.H. and G.X., had committed the criminal offenses of abusing official position or authority under Article 422 of the CCRK and falsifying official documents under Article 434 of the CCRK. The Applicant in the criminal report stated that based on falsified official documents, he was dismissed and had lost the legal dispute for his reinstatment to work.

25. On 1 June 2017, the BPO authorized the Kosovo Police to collect information regarding the criminal report, so that it will hear the Applicant of this criminal report, ordering that:

> *"After receiving this statement from Fatos Dervishaj, and verifying and providing the appropriate evidence, and after analyzing them, if necessary, investigative measures should be taken and in a reasonable time to notify us in writing about all taken procedures".*

26. On 14 August 2017, the Applicant submitted to the BPO the supplement to the criminal report, requesting that in addition to the

persons M.G., V.I., D.R., M.B., N.H. and G.X., who are already involved in the criminal report filed by the Applicant on 19 May 2017, the criminal proceedings should be extended to the judge of first instance S.B-Sh., on suspicion of abuse of official duty.

27. On 13 September 2017, the Applicant filed again a new supplementation to the criminal report with the BPO, requesting that all persons previously suspected, M.G., V.I., D.R., M.B., N.H., G.X. and S.B-SH., in addition to previous criminal offenses, be charged with the criminal offense of legalization of false content under Article 403 of the CCRK.

28. On 9 November 2017, the Applicant submitted to the BPO a request for prompt review of the case [PP. No. 65/2017], due to the risk of statute of limitation, requesting the Prosecutor's Office: *"...to administer all evidence, including the minutes of 05.11.2015, of 17.05.2017, Judgments: C. No. 428/12 and C. No. 189/17, to accuse the defendants in court and to punish them according to the law"*.

29. On 4 May 2018, the Office of the Chief State Prosecutor, by Notification PPN. No. 66/18, informed the Applicant that the Chief Prosecutor of the BPO has been informed that the prosecutor of the case M.Ll., on 1 June 2017, has authorized the investigative bodies to collect information about the suspects and that this case is being dealt with.

30. On 30 October 2018, the BPO authorized the Kosovo Police to interview the suspects M.G., V.I., D.R., M.B., N.H. and G.X. in order to complete the overall case regarding the situation of the facts presented in this criminal report, on suspicion of having committed criminal offenses under Articles 422 and 434 of the CCRK.

31. On 25 January 2019, the Applicant addressed a complaint to the Chief Prosecutor of the BPO, by which he requested the undertaking of measures and the continuation of criminal investigations against MG, VI, DR, MB, NH, GX, and SB-Sh., according to CCRK and CPCRK.

32. On 28 February 2019, the prosecutor of the case notified (PP. I. No. 65/17) the Applicant that: *"In accordance with Article 82 par.3. of the CPCRK we inform you that this Prosecutor's Office has rejected the criminal report filed against: M.G., V.I., D.R., M.B., N.H., G.X. and S.B-Sh., in terms of criminal offenses Abuse of official position or authority under Article 422 par. 1. of the CCRK, Falsification of documents under Article 398 of the CCRK, Issuing unlawful judicial decisions under Article 432 of the CCRK, Tampering with evidence*

under Article 397 of the CCRK, due to the fact that even after undertaking all investigative actions in the direction of full clarification of this criminal case in which case you have filed a criminal report, with no evidence we have managed to argue that the abovementioned are the perpetrators of these criminal offenses".

33. On 4 March 2019, the Applicant, against Notification PP. I. 65/17 of 28 February 2019, by electronic mail, requested the KPC and the State Prosecutor's Office to review the request for protection of legality; to annul the Decision of 28 February 2019, by which the prosecutor rejected the criminal report as ungrounded; to delegate the case to the Special Prosecutor's Office of Kosovo; and, after the examination of the case, to file indictment against the above-mentioned persons; as well as requested their punishment according to the applicable law.

Summary of facts regarding the Applicant's request for exclusion of the prosecutor and the request for disciplinary responsibility of the prosecutor

34. On 26 March 2018, the Applicant requested the Office of the Chief State Prosecutor to take measures against the prosecutor of the case M.LL., requesting her exclusion from the criminal case, according to the criminal report [PP. No. 65/17] and initiated the opening of disciplinary proceedings against her, due to the suspicion that she was delaying the review and initiation of investigations and the filing of a criminal indictment against the suspects as mentioned above.

35. On 18 January 2019, the Applicant filed an appeal with the Supreme Court, requesting that his appeal be reviewed in accordance with Article 15, paragraph 3, of Law 06/L-057 on Disciplinary Liability of Judges and Prosecutors, due to the silence of the BPO and the KPC, from whom he had requested to take measures for the exclusion of the prosecutor of the case M.LL., and to send the case within the jurisdiction of the Special Prosecutor's Office.

36. On 13 February 2019, the President of the Supreme Court, responding to the Applicant's appeal of 18 January 2019, notifies him that the Supreme Court *"after analyzing the allegations regarding possible inappropriate conduct, we have concluded that at this stage we are not an authorized body to review your allegations, and in accordance with Article 9 paragraph 2 of Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors, on 13 February 2019 we have sent it to the competence of the Chief Prosecutor of the Basic Prosecutor's Office in Prishtina as an authorized authority for further proceedings".*

37. On 16 July 2019, the Chief Prosecutor of the BPO notifies the President of the Supreme Court that on 13 February 2019 he received his letter regarding the Applicant's appeal, which he filed against the prosecutor M.LL., and after reviewing it carefully, he managed to find that there are insufficient grounds for initiating disciplinary proceedings against the prosecutor in question.

38. On 23 July 2019, the BPO by Notification AD. No. 04/19, informed the Applicant that his request for exclusion of the prosecutor M.LL., and initiation of the procedure regarding the disciplinary liability of the prosecutor has been rejected as ungrounded. In addition, it is written on paper: *"Complaints and dissatisfactions from the submission, related to the decision-making process can be sent to the Commission for Review of the Performance of Prosecutors in the Kosovo Prosecutorial Council".*

39. On the same date, the Applicant, against the notification in question, filed a complaint with the KPC, through which he requested: "*...to review these 6 points within the legal deadline (take into account other letters sent earlier to the KPC, about the same issue) and take a legal decision on merits*".

40. On 26 August 2019, the Applicant, due to the silence of the KPC regarding his appeal of 23 July 2019, addresses again the Supreme Court with an appeal, requesting: "*...that this court, within the legal deadline, make a detailed review of these 6 points (to take into account other documents previously sent to the Supreme Court, for the same case dated 18.01.2019, including the Review of the Request for Protection of Legality of 04.03.2019 addressed to KPC), and the Supreme Court to take a legal decision on merits".*

41. On 4 September 2019, the Supreme Court, by electronic mail, notifies the Applicant as follows:: *"After reviewing your request received by electronic mail on 26.08.2019, in which you complained about the silence of the Kosovo Prosecutorial Council - KPC regarding your complaint of 23.07.2019, we concluded that, based on the Law on Disciplinary Liability of Judges and Prosecutors No. 06/L-057, Article 12, point 3 and Article 15 point 1- "Parties shall have the right to appeal against the disciplinary decisions of the Council, directly to the Supreme Court of Kosovo", and Article 15 point 3 – "and in accordance with Article 12 paragraph 3 of this Law, the Ombudsperson may file a complaint before the Supreme Court for failure to act by the relevant Council", in the present case your appeal is not directed against a disciplinary decision of the relevant Council,*

and that you as a party are not competent to file an appeal against the inaction of the relevant Council, therefore, we inform you that your appeal to the Supreme Court does not constitute a substantive basis to deal with".

Summary of facts regarding the Applicant's request for sending the criminal case to the competence of the Special Prosecutor's Office

42. On 14 May 2018, the Applicant requested the KPC that the case [PP. No. 65/17], according to the criminal report of the Applicant, be transferred to the competence of the Special Prosecutor's Office, for further proceeding.

43. On 16 May 2018, the Applicant sent the same request to the Office of the Chief State Prosecutor, requesting that the case [PP. No. 65/17], according to the criminal report of the Applicant, be transferred to the competence of the Special Prosecutor's Office, for further proceeding.

44. On 21 May 2018, the Office of the Chief State Prosecutor, by the Notification PPN. No. 66/18, notified the Applicant that: *"...we are not competent to decide that a case be sent to the competence of the Special Prosecutor's Office of the Republic of Kosovo. According to the Law on the Special Prosecutor's Office of the Republic of Kosovo, this can only be done by the prosecutor in charge of the case, in accordance with his Chief Prosecutor, while the final assessment is made by the Chief Prosecutor of the Special Prosecutor's Office of the Republic of Kosovo". For this reason, we have sent your request to the Prosecutor of the case with a request to assess whether the conditions for sending the case to the Special Prosecutor's Office of the Republic of Kosovo have been met".*

45. On 12 September 2018, the Applicant addresses a request to the Chief Prosecutor of the BPO, from whom he requests: *"...that based on legal provisions and administrative instructions, to review this Request, and within a reasonable legal deadline, to Approve the request, that the case PP. No. 65/2017, be transferred to the Special Prosecutor's Office of the Republic of Kosovo".*

46. On 4 October 2018, the Applicant submitted a request to the Kosovo Prosecutorial Council, through which he further requested that the case [PP. No. 65/17], according to the criminal report of the Applicant, be sent to the competence of the Special Prosecutor's Office of the Republic of Kosovo for further proceeding.

Summary of facts regarding the Applicant's request addressed to the Ombudsperson

47. On 26 December 2018, the Applicant filed a request with the Ombudsperson, requesting that he file an appeal with the Supreme Court, due to administrative silence and failure to take action by the Chief Prosecutor of the BPO and the KPC, from whom he requested the exclusion of the prosecutor of the case M.LL. and sending the case [PP. No. 65/17] for addressing to the Special Prosecutor's Office.

48. On 12 February 2019, the Ombudsperson rendered Decision A. No. 926/208, and after reviewing the complaint, took the following actions: *"On 16 January 2019, the Ombudsperson's representative contacted the prosecutor in charge of the complainant's case. The purpose of the meeting was to obtain information on the stage of the proceedings in the complainant's case and on the actions that have been taken or will be taken by the Prosecutor's Office, so that the complainant's case can be processed within the time limit, in accordance with the Law. The prosecutor announced that the case is being handled according to legal procedures and presented his actions in the case file. On 16 January 2018, the Ombudsperson's representative contacted the complainant and informed him about the meeting with his case prosecutor. Also, the complainant was informed that his request is out the competence of the Ombudsperson. Taking into account the circumstances presented above, the Ombudsperson, in accordance with Article 21, paragraph 1.3, subparagraph 1.3.1 of Law No. 05/L-019 on the Ombudsperson, decided to terminate the investigation regarding the above mentioned issue".*

49. On 3 September 2019, the Applicant again filed a complaint (No. 672/2019) with the Ombudsperson, against the BPO and the KPC. The essence of the complaint had to do with the failure to take action from the above and the silence of his request for protection of legality. Furthermore, the Applicant requested the Ombudsperson to handle this case in accordance with Law No. 06 / L-057 on Disciplinary Liability of Judges and Prosecutors.

50. On 13 September 2019, the Ombudsperson, by electronic mail, notifies the Applicant as follows: "*We inform you that we have received your complaint which we have identified with no. 672 12019, and we have carefully considered your appealing allegations. Your complaint cannot be handled in accordance with Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors, for the fact that we consider that it exceeds the competencies of the Ombudsperson in this*

law. Also, this law, regarding the issue of decision, considers the decision of the Chief Prosecutor as a final decision and the law does not give the right to appeal, except in other specified cases. In terms of good administration, the Ombudsperson will ask the Prosecutorial Council to be notified about the reasons why you have not received a response (whatever it is) to your allegations and you will be kept informed of this".

51. On 25 November 2019, the Applicant notified the Court that on 22 November 2019 he received from the Ombudsperson, Decision No. 2033/2019, rendered on 20 November 2019, which states:

> *"After analyzing the complaint, on 13 September 2019, by official electronic mail, Mr. Dervishaj was informed that the appeal regarding Decision AD. No. 04/19, accepted by the BPO, cannot be handled in accordance with Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors, because it exceeds the competencies of the Ombudsperson, based on this law, because it considers the decision of the Chief Prosecutor as a final decision, except in other cases specified and when the Law does not give the right to appeal. While regarding the allegations of silence, Mr. Dervishaj was informed that, in terms of good administration, he would contact the responsible authority to obtain information regarding the complainant's case.*
> *On 13 September 2019, Mr. Dervishaj, by electronic mail, expressed dissatisfaction by disagreeing with the position of the Ombudsperson and stressed that he would address the Constitutional Court for procedural violations of the BPO and the Ombudsperson, thus determining the way which will follow.*
> *Given the circumstances presented above, the Ombudsperson, in accordance with Article 22, paragraph 1, subparagraph 1.1, of Law No. 05/L-019 on the Ombudsperson, decided to terminate the investigation regarding the above mentioned issue".*

Applicant's allegations

52. The Applicant alleges that due to the inaction of public authorities (Basic Prosecutor, Chief State Prosecutor, Kosovo Prosecutorial Council, the Ombudsperson and the Supreme Court) according to the Applicant's requests, criminal charges were filed against some individuals; the exclusion of the case prosecutor M.LL.; disciplinary liabilities of prosecutors, there have been procedural violations by which he has been denied his constitutional rights as follows:

i. Article 24 [Equality Before the Law] of the Constitution, because he was discriminated against due to the lack of treatment of his complaints and requests for exclusion of the case prosecutor and failure to send his case for treatment to the Special Prosecutor's Office by the Chief State Prosecutor, KPC and BPO;

ii. Article 32 [Right to Legal Remedies] of the Constitution, because: *"Competent authorities which are legally summoned and obliged to act according to legal provisions, while by not acting at all, such as the Silence of the Prosecutorial Council and the inaction of the Ombudsperson, to review the case and issue a Reasoned Decision, and send the case to the Supreme Court. The fact that with this Procedural violation, action-inaction, it was not possible for the case to be reviewed by the Supreme Court";*

iii. Article 54 [Judicial Protection of Rights] of the Constitution, because it was possible for the case to be handled by the Supreme Court: *"since the Ombudsperson has violated the Procedures provided in clear legal provisions, Law No. 06/L-057, ON THE DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS, Article 9 point 3 and point 5, Article 12 point 3 and Article 15 point 3, and LAW No. 05/L-019 on the Ombudsperson, Articles 1 and 16, but also interpreted by the Supreme Court, on 04.09.2019. Further claiming that pursuant to Article 15 paragraph 1 of the law in question: "Parties shall have the right to appeal against the disciplinary decisions of the Council, directly to the Supreme Court of Kosovo, within fifteen (15) days from the day of receipt of the decision. Other courts in Kosovo shall not have competence to review and decide on the disciplinary procedure against judges and prosecutors. In case the Council does not take a decision in accordance with Article 14, paragraph 6, the judge or prosecutor and the Competent Authority which has requested the initiation of investigations, as well as in the cases provided for in Article 12 par. 3 of this Law, the Ombudsperson may file an appeal with the Supreme Court for inaction by the relevant Council. And in this case there is no Decision by the Prosecutorial Council and there is no Action by the Ombudsperson according to the interpretation of the Supreme Court, of 04.09.2019";*

iv. Article 132 [Role and Competencies of the Ombudsperson] of the Constitution, because the Ombudsperson has not protected him from the inactions of other public authorities, thus acting in contradiction with the provisions of Law No. 05/L-019 on the Ombudsperson and the provisions of Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors. Furthermore, the

Applicant alleges that the reasoning and finding of the Ombudsperson, that according to Law No. 06/L-057, the decision of the Chief Prosecutor of BPO in this case is considered final, is manifestly ill-founded and biased because the request for exclusion of the prosecutor of the case, according to him, was not addressed by any prosecutorial authority and that prosecutor M .LL., without waiting for the decision of the Chief Prosecutor of the BPO for exclusion, dismissed the criminal report as ungrounded;

v. Article 45 of the ECHR, *"...because, the Prosecutorial authorities and the Ombudsperson are obliged to issue Reasoned Decisions, and not to Silence or to violate them without justifying the Complaints at all, as the law stipulates that every Decision must be Reasoned for the main and accessory issue, and not as the Chief Prosecutor of the Basic Prosecutor's Office in Prishtina, and the Ombudsperson ... for rejecting the complaint of 16.07.2019 and the Decision of the Ombudsperson, of 12.02.19, the first time and the Notification from the Institution of the Ombudsperson, of 13.09.2019, ... that closes this issue... ."*

53. Finally, the Applicant requests the Constitutional Court to hold the following:

1. *To find that there have been procedural violations by the prosecutorial authorities, starting from the Basic Prosecutor's Office in Prishtina, the Prosecutorial Council and the State Prosecutor - Chief Prosecutor.*
2. *To hold that there has been a procedural violation by the Ombudsperson.*
3. *To annul the Decision on dismissal of the criminal report PP. I. No. 65/17 of 28.02.2019, as ungrounded.*
4. *To send the case to the Special Prosecutor's Office in order to proceed to the competent court after reviewing the criminal report and the findings of the investigation.*
5. *To request the competent authorities to apply the legal provisions in order not to be brought before the Constitutional Court.*
6. *To take a meritorious and reasoned decision on the main and accessory issues, as an example for other cases.*

Relevant legal provisions

LAW No. 06/L-057 ON DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS

Article 9
Complaints against judges and prosecutors for disciplinary offenses

1. Natural and legal persons may submit complaints against a judge or prosecutor concerning an allegation of a disciplinary offense to the following authorities (hereinafter the "Competent Authority"):

1.1. the President of the Basic Court and Court of Appeals where the judge is employed concerning alleged disciplinary offences of that judge;
1.2. the President of the Supreme Court concerning alleged disciplinary offences of the Presidents of the Basic Courts and the President of the Court of Appeals;
1.3. the Kosovo Judicial Council concerning alleged disciplinary offences of the President of the Supreme Court;
1.4. the Chief State Prosecutor concerning alleged disciplinary offences of Chief Prosecutors;
1.5. the Chief Prosecutor concerning alleged disciplinary offences of prosecutors employed at the Prosecutor's Office office for which the Chief Prosecutor is responsible;
1.6. the Kosovo Prosecutorial Council concerning alleged disciplinary offenses of the Chief State Prosecutor.
[…]
6. The Competent Authority pursuant to Article 9, paragraph 1, shall review the complaint within thirty (30) days from the day it has received the complaint and shall proceed in accordance with Article 12, paragraph 2 unless it determines that the complaint is evidently frivolous, unsubstantiated, not related to a disciplinary offence or subject to statutory limitation. The Competent Authority shall immediately inform the person who has submitted the complaint in writing of its decision. A copy of the decision shall also be submitted to the respective Council, and in cases provided for in paragraph 3 to this Article, also to the Ombudsperson.

Article 12
Investigation procedure

1. The Council shall initiate disciplinary procedures based on a request submitted pursuant to Article 9, paragraph 1 of this Law.

2. A Competent Authority shall request the Council to initiate disciplinary investigations based on a complaint submitted by a natural or legal persons which is not dismissed according to Article 9, paragraph 6 of this Law, or ex-officio when it has reasonable grounds to believe that a judge or a prosecutor has committed a disciplinary offence.

3. The Ombudsperson may request the Council to initiate disciplinary investigations against a Court President or the Chief Prosecutor if they have reasons to believe that they have committed a disciplinary offense pursuant to Article 9, paragraph 7 of this Law. The Ombudsperson may also request the Council to initiate disciplinary investigations against a judge or prosecutor if they consider that a Competent Authority has decided to dismiss a complaint against such judge or prosecutor in contradiction with Article 9, paragraph 5, in which case they shall provide a reasoning why the complaint should not have been dismissed.

[,,,]

Article 15
Complaint against disciplinary decisions

1. Parties shall have the right to appeal against the disciplinary decisions of the Council, directly to the Supreme Court of Kosovo, within fifteen (15) days from the day of receipt of the decision. Other courts in Kosovo shall not have competence to review and decide on the disciplinary procedure against judges and prosecutors.

[...]

LAW No. 05/L-019 ON OMBUDSPERSON

Article 21 Procedure after receiving the complaint

1. After receiving the complaint, the Ombudsperson within ten (10) working days decides for the admissibility of the case as follows:
1.1. to review the case under accelerated procedure;
1.2. to start full investigation; 1.3. to reject the complaint because:

1.3.1. it is not in the jurisdiction of the Ombudsperson according to this Law;

[...]

Article 22 Cases of rejection of complaint review

1. Ombudsperson rejects the request for reasons as follows:

1.1. when from the entries submitted and the circumstances of the case reveals that the rights and freedoms are not violated or any maladministration is not performed;

Admissibility of the Referral

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

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

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

[...]

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

56. In addition, the Court also examined whether the Applicant has fulfilled the admissibility requirements as further specified in the Law. In this regard, the Court refers to Articles: 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual

rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

57. With regard to the fulfillment of the admissibility criteria, as mentioned above, the Court considers that the Applicant is an authorized party, who challenges the constitutionality of the inaction of some public authorities, namely the BPO, KPC, the Supreme Court and the Ombudsperson, including their acts, as notifications and decisions.

58. Considering that the Applicant in essence challenges five different proceedings before the public authorities, the Court will examine whether the requirements set out in Articles 47, 48 and 49 of the Law regarding each procedure have been met.

59. In addition, the Court will review for each procedure whether the Applicant has also fulfilled the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure, in accordance with paragraphs 1, points (c) and 2 of Rule 39 of the Rules of Procedure, which establish:

" (1) The Court may consider a referral as admissible if:
(…)
(c) the referral is filed within four (4) months from the date on which the decision on the last effective remedy was served on the Applicant […]

"(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".

60. The Court recalls that the Applicant challenges the constitutionality of the inactions of some public authorities, namely the BPO, SP, KPC, the Supreme Court and the Ombudsperson, alleging that they denied his rights guaranteed by Articles: 24, 32, 54, and 132 of the Constitution and 45 of the ECHR, due to inaction and failure to address his complaints/requests submitted to these authorities.

61. The Court, based on the case file, notes that we are dealing with five (5) sets of proceedings: 1) the contested procedure, namely the labor dispute; 2) with the procedure related to the filing of the criminal report against M.G., V.I., D.R., M.B., N.H. and G.X; 3) with the procedure for exclusion of the prosecutor of the case M.LL. and disciplinary liabilities of prosecutors; 4) with the requests of the Applicant for sending the case [PP. No. 65/2017] for handling within the competence of the Special Prosecutor's Office, and 5) with the requests of the Applicant sent to the Ombudsperson. Therefore, the Court will analyze and deal separately with each of the Applicant's allegations regarding these proceedings.

1) Regarding the contested procedure (labor dispute)

62. With regard to this procedure, the Court notes that the procedure has not been completed, but that it is before the Court of Appeals, according to the appeal submitted by the Applicant on 14 August 2017, against the Judgment of the Basic Court C. No. 189/17 of 20 June 2017.

63. However, in relation to the contested procedure (labor dispute), the Court notes that the Applicant has not raised any allegation of a violation of his constitutional rights in relation to this procedure. Therefore, the Court will not assess the constitutionality of the decisions of the regular court regarding the contested procedure.

2) As to the proceedings regarding the criminal report

64. With regard to the proceedings regarding the criminal report, which the Applicant filed against a certain number of persons, the Court notes that the Applicant has not specifically referred to any specific provision of the Constitution. In relation to this procedure, the Applicant requests the Court *"To annul the decision to dismiss as ungrounded the criminal report PP. I. No. 65/17 of 02/28/2019".*

65. The Court, referring to the case file, recalls that the Applicant on 19 May 2017 in the BPO filed a criminal report, against M.G., V.I., D.R., M.B., N.H. and G.X., on suspicion of having committed several offenses under Article 422 and Article 434 of the CCRK. In the meantime, the Applicant on 14 August 2017 and 13 September 2017, supplemented the criminal report in the BPO, requesting: 1) that in addition to the abovementioned persons, to conduct investigation also against the judge of the first instance SB-Sh. under the suspicion of abuse of official position or authority, and 2) that against the suspects, M.G., V.I., D.R., M.B., N.H., G.X. and S.B-SH, to be charged with the criminal offense of "legalization of false content" under Article 403 of the CCRK.

66. In this regard, the Court notes that, first of all, at the discretion of the basic Prosecutor's Offices, which, under the laws in force, assess whether all the elements of the commission of an offense, or the criminal offenses to file an indictment against certain persons. Furthermore, the Court finds that the proceedings in question belong to the category of investigative proceedings, where the Applicant is not charged with a criminal offense, but is a party requesting the BPO to file an indictment against several third parties, requesting their punishment for the abovementioned criminal offenses.

67. The Court, regarding this case, noted that the BPO, after administering all the evidence, on 28 February 2019 decided to reject as ungrounded the criminal report, namely the criminal case [PP. No. 65/2017], against the suspects M.G., V.I., D.R., M.B., N.H., G.X. and S.B-SH., reasoning that: "*...with no evidence have we managed to argue that the above are perpetrators of these criminal offenses"*. According to the assessment of the Court, the procedure related to the criminal report [PP. I. 65/17] is considered completed with the decision of the BPO of 28 February 2019.

68. The Court first refers to the date on which the final decision was served and the date on which the Referral was submitted to the Court to assess whether the Applicant filed the Referral within a specified period of 4 (four) months.

69. The Court further notes that the Applicant does not state when he received the decision on dismissal of the criminal report [PP. I. 65/17] of 28 February 2019. Based on the case file, the Court concludes that the Applicant, on 4 March 2019, was notified about the latter, and through electronic mail. In addition, the Court noted that it requested the KPC and the State Prosecutor's Office to revoke the decision to

dismiss the criminal report PP. I. 65/17, of 28 February 2019, by which the prosecutor dismissed the criminal report as ungrounded.

70. Therefore, the Court considers that the Applicant received the challenged decision no later than 4 March 2019, while the Referral was submitted to the Court on 20 September 2019, which means that the Applicant's request *"for annulment of the decision for dismissal of the criminal report PP. I. no. 65/17 of 02/28/2019, as ungrounded."* was submitted out of the legal deadline.

71. The Court recalls that the rationale of the 4 (four) month legal deadline under Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedures, is to promote legal certainty by ensuring that cases raising constitutional matters are dealt within a reasonable time and to prevent the parties and other persons involved from being in a state of uncertainty for a long period of time (see, *mutatis mutandis*, case *Sabri Guneş v. Turkey* [GC} no. 27396/06, paragraph 39, Judgment of 29 June 2012; *El Masri v. "The former Yugoslav Republic of Macedonia*" [GC], no. 39630/09, paragraph 135, and *Bayram and Yıldırım v. Turkey* (decision), no. 38587/97, ECHR 2002-III).

72. Therefore, the Court finds that the Applicant's request *"For annulment of the decision on dismissal of the criminal report PP. I. No. 65/17 dated 02/28/2019"* was not filed within the legal deadline provided in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure. Consequently, the Court finds that the Applicant's request is inadmissible because the Applicant's Referral was submitted out of the legal deadline..

3) Regarding the procedure for exclusion of the case prosecutor, M.LL., and the disciplinary liabilities of prosecutors

73. The Court recalls that the Applicant alleges that due to the inaction of the public authorities (BPO Prosecutor, Chief State Prosecutor, Kosovo Prosecutorial Council, the Ombudsperson and the Supreme Court), for the exclusion of Prosecutor M.LL. and the disciplinary liabilities of the prosecutor were violated the rights guaranteed by Articles 24, 32, 54 and 132 of the Constitution and Article 45 of the ECHR, because they did not address his complaints and requests for opening disciplinary proceedings against prosecutor M.LL. and her exclusion from the review of his case.

74. In this regard, the Court notes that the Applicant regarding the disciplinary liability of the prosecutor and the exclusion of the prosecutor of the case, on 26 March 2018 first addressed the Office of

the Chief State Prosecutor to take measures against the prosecutor of the case, while on 18 January 2019, regarding the disciplinary liability of the prosecutor and the exclusion of the prosecutor of the case the Applicant filed an appeal with the Supreme Court.

75. On 13 February 2019, the President of the Supreme Court responded to the Applicant that *"after analyzing the allegations regarding possible inappropriate conduct, we have concluded that at this stage we are not an authorized body to review your allegations, and in accordance with Article 9 paragraph 2 of Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors, on 13 February 2019 we have sent it to the competence of the Chief Prosecutor of the Basic Prosecutor's Office in Prishtina as an authorized authority for further proceedings".*

76. Acting upon the Applicant's complaint, on 23 July 2019, the BPO by Notification AD. No. 04/19, informed him that his request for exclusion of prosecutor M.LL. and the initiation of proceedings concerning the disciplinary liability of the prosecutor was rejected as ungrounded. In addition, the letter reads: *"You can refer the allegations and dissatisfactions with the submission regarding the decision-making process to the Commission for Review of the Performance of Prosecutors in the Kosovo Prosecutorial Council. Pursuant to Article 9, paragraph 6 of the Law on Disciplinary Liability of Judges and Prosecutors, the competent authority informs you that for now your complaint has resulted as ungrounded.".*

77. The Court further notes that the Applicant, against the Notification of 23 July 2019, addressed a complaint to the KPC, from which he requested the review of the complaints on merit. The same appeal was submitted by the Applicant, on 26 August 2019, to the Supreme Court, which, on 4 September 2019, notifies the lattter, as follows:: *"After reviewing your request received by electronic mail on 26.08.2019, in which you complained about the silence of the Kosovo Prosecutorial Council - KPC regarding your complaint of 23.07.2019, we concluded that, based on the Law on Disciplinary Liability of Judges and Prosecutors No. 06/L-057, Article 12, point 3 and Article 15 point 1- "Parties shall have the right to appeal against the disciplinary decisions of the Council, directly to the Supreme Court of Kosovo", and Article 15 point 3 – "and in accordance with Article 12 paragraph 3 of this Law, the Ombudsperson may file a complaint before the Supreme Court for failure to act by the relevant Council", in the present case your appeal is not directed against a disciplinary decision of the relevant Council, and that you as a party are not competent to file an appeal against the inaction of the relevant*

Council, therefore, we inform you that your appeal to the Supreme Court does not constitute a substantive basis to deal with".

78. In this respect, the Court notes that the Applicant's appeal was found to be unsuccessful for purely procedural reasons on the grounds that: *"...in the present case your appeal is not directed against a disciplinary decision of the relevant Council, and that you as a party are not competent to file appeal against the inaction of the relevant Council, therefore we inform you that your appeal to the Supreme Court does not constitute a substantive basis for treatment".*

79. From the above, the Court finds that the fact that the Applicant's complaints were not considered by the public authorities, is ungrounded, because it is clear from the case file that the procedure regarding the request for exclusion of the prosecutor M.LL. and the initiation of disciplinary proceedings against the latter was reviewed and decided by the BPO by the Decision [AD. No. 04/19] of the BPO of 23 July 2019. The Court also notes that the Supreme Court also responded to the Applicant's appeals filed against the decision of the BPO and the silence of the KPC, providing a detailed reasoning for their refusal. Thus, in this respect, the Court finds that the fact that the public authorities did not act is ungrounded and consequently in the circumstances of the present case we are not dealing with inaction of the public authorities.

80. In this context, the Court recalls that the reasons for rejecting a complaint for procedural reasons should not automatically be understood as a violation of constitutional rights. The Court considers that there is nothing in the case file to indicate that the public authorities who examined the Applicant's case relating to this proceeding have not been impartial or that the proceeding has otherwise been unfair. The Court, as above, considers that the Applicant is merely dissatisfied with the outcome and responses of the public authorities. However, the Court reiterates that his dissatisfaction with the outcome of the proceedings conducted by the public authorities cannot in itself raise an arguable allegation of a violation of the fundamental rights and freedoms guaranteed by the Constitution and the ECHR (see the case of the ECtHR *Mezotur-Tiszazugi Vízgazdálkodási Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

81. Therefore, based on the above, the Court finds that the Applicant's allegations that due to inaction by public authorities (BP Prosecutor, Chief State Prosecutor, Kosovo Prosecutorial Council, Ombudsperson and the Supreme Court) according to the requests of the Applicant for

the dismissal of the prosecutor and the disciplinary liability of the prosecutor, his right has been violated which is guaranteed by Articles 24, 32, 54 and 132 of the Constitution and Article 45 of the ECHR. They must therefore be declared manifestly ill-founded, in accordance with Rule 39 (2) because the Applicant has not sufficiently proved and substantiated his claim.

4) Regarding sending the case for proceedings to the competence of the Special Prosecutor's Office

82. The Court recalls that the Applicant's main allegation regarding the failure to send the case to the jurisdiction of the Special Prosecutor's Office Office constitutes a violation of Article 24 [Equality Before the Law] of the Constitution.:" *because he was discriminated against because his complaints and requests for the dismissal of the prosecutor in this case were not reviewed and because the Chief State Prosecutor, KPC and BPO did not send his case to the Special Prosecutor's Office for further proceedings".*

83. The Court, in this regard, recalls that the Applicant, on 14 May 2018, requested the KPC that the case [PP. No. 65/17] be sent to the competence of the Special Prosecutor's Office for further proceedings. The same request, on 16 May 2018, was sent to the Chief State Prosecutor.

84. On 21 May 2018, the Office of the Chief State Prosecutor by Notification PPN. No. 66/18, informs the Applicant that they are not competent to decide *"that a case be sent to the competence of the Special Prosecutor's Office of the Republic of Kosovo. According to the Law on Special Prosecutor's Office of Kosovo, this can be done only by the prosecutor in charge of the case, in accordance with his Chief Prosecutor, while the final assessment is made by the Chief Prosecutor of the Special Prosecutor's Office of the Republic of Kosovo". For this reason, we have sent the request to the Prosecutor of the case with a request to assess whether the requirements for sending the case to the Special Prosecutor's Office of the Republic of Kosovo are met".*

85. The Court initially notes that it is not within the jurisdiction of the regular courts or the Constitutional Court to determine whether a criminal case (criminal report) falls within the jurisdiction of a Basic Prosecutor's Office or the Special Prosecutor's Office. The jurisdiction of the Special Prosecutor's Office is precisely defined by Law No. 03/L-052 on the Special Prosecutor's Office of the Republic of Kosovo and relevant amendments. This law in article 5 defines the special

competence of the Special Prosecutor's Office, while article 9 of this law defines the additional competence of the Special Prosecutor's Office.

86. It is up to the representatives of the prosecutorial system itself, namely the relevant basic Prosecutor's Offices, to determine whether a criminal case falls within their subject matter jurisdiction to be dealt with or not. This jurisdiction, however, does not depend on the request or will of the person filing the criminal report.

87. In the present case, the issue of sending the criminal case [PP. No. 65/17] to the competence of the Special Prosecutor's Office for proceeding was within the exclusive competence of the BPO. Further, the Court, based on the case file, notes that the Applicant's request for sending the criminal case [PP. No. 65/17] in the competence of the Special Prosecutor's Office, was based simply on his suspicion that Prosecutor M.LL., who was in charge of his case, was delaying the investigations and filing the indictment against the suspects M.G., V.I., D.R., M.B., N.H., G.X. and S.B-SH.

88. Returning to the Applicant's allegations he was *"discriminated against because his* complaints *and requests for dismissal of the prosecutor in this case were not reviewed and because the Chief State Prosecutor, KPC and BPO did not send his case to the Special Prosecutor's Office for further proceedings"*, the Court refers to the case law of the ECtHR in conjunction with Article 24 of the Constitution, which states that "discrimination constitutes a different treatment, without objective and rational reasoning, of persons in relatively similar situations" (see *Willis v. the United Kingdom*, paragraph 48, Judgment of the ECtHR of 11 September 2002; *Bekos and Koutropoulos v. Greece*, paragraph 63, Judgment of the ECtHR of 13 March 2006).

89. In order for the Applicants' allegations of a violation of the right to discrimination to be successful, the Applicants must prove, *inter alia*, that their position can be considered to be similar to that of another person who has had a better treatment (see *Fredin v. Sweden* (no. 1), paragraph 60, ECtHR Judgment of 18 February 1991).

90. The Court notes that in the present case, the Applicant does not clarify in any way nor "*proves that his position can be considered to be similar to that of another person who had better treatment"*.

91. The Court notes that the Applicant only referred to discrimination, not explaining how the discrimination occurred and not explaining what

was the "*different treatment, without objective and rational reasoning, of persons in relatively similar situations*".

92. In view of all the above, the Court finds that the Applicant's allegations of a violation of Article 24 [Equality Before the Law] of the Constitution are manifestly ill-founded in accordance with Rule 39 (2), because the Applicant has not sufficiently proved and substantiated his claim.

5) Regarding the procedures regarding the Applicant's requests sent to the Ombudsperson

93. The Court recalls that the Applicant's main allegation regarding the violation of his constitutional rights relating to the proceedings regarding the Applicant's requests submitted to the Ombudsperson which, according to the Applicant's allegations, resulted in a violation of Articles 32, 54 and 132 of the Constitution and Article 45 of the ECHR is essentially summarized *"...The Ombudsperson did not protect him from the inaction of other public authorities, thus acting in contradiction with the provisions of Law no. 05/L-019 on the Ombudsperson and the provisions of Law no. 06/L-057 on Disciplinary Liability of Judges and Prosecutors"*. As well as that ..." *... the Ombudsperson has violated the Procedures provided in clear legal provisions, Law No. 06/L-057, ON THE DISCIPLINARY LIABILITY OF JUDGES AND PROSECUTORS, Article 9 point 3 and point 5, Article 12 point 3 and Article 15 point 3, and LAW No. 05/L-019 on the Ombudsperson, Articles 1 and 16... "*.

94. With regard to the Applicant's allegations, the Court notes that the Applicant addressed with appeal the Ombudsperson twice, first on 26 December 2018, the Applicant filed a request with the Ombudsperson, from whom he requested to file an appeal to the Supreme Court due to administrative silence and inaction on the part of the Chief Prosecutor of BP and KPC, from whom he requested that Prosecutor M.LL. be excluded, while the case [PP. No. 65/17] to be sent to the Special Prosecutor's Office.

95. On 12 February 2019, the Ombudsperson rendered Decision A. No. 926/208, and after reviewing the complaint, took these actions: *"On 16 January 2019, the Ombudsperson's representative contacted the prosecutor in charge of the complainant's case. The purpose of the meeting was to obtain information on the stage of the proceedings in the complainant's case and on the actions that have been taken or will be taken by the Prosecutor's Office, so that the complainant's case can be processed within the time limit, in accordance with the Law. The*

prosecutor announced that the case is being handled according to legal procedures and presented his actions in the case file. On 16 January 2018, the Ombudsperson's representative contacted the complainant and informed him about the meeting with his case prosecutor. Also, the complainant was informed that his request is out the competence of the Ombudsperson. Taking into account the circumstances presented above, the Ombudsperson, in accordance with Article 21, paragraph 1.3, subparagraph 1.3.1 of Law No. 05/L-019 on the Ombudsperson, decided to terminate the investigation regarding the above mentioned issue".

96. In addition, the Applicant addressed a second complaint to the Ombudsperson who, on 13 September 2019, regarding the inactions and administrative silences of the BPO and KPC, notified the Applicant in advance by e-mail.: "*We inform you that we have received your complaint which we have registered with no. 672 12019, and we have carefully considered your complaints. (...) In terms of good administration, the* Ombudsperson *will ask the Prosecutorial Council to be notified about the reasons why you have not received a response (whatever it may be) to your allegations and you will be kept informed about this".*

97. Further, in relation to the Applicant's appeal, the Court recalls that on 22 November 2019, the Ombudsperson, rendered Decision No. 2033/2019 which answered the latter on two issues:

> 1) the first concerned his appeal against decision AD. No. 04/19 of the BPO, which rejected his appeal for the exclusion and initiation of disciplinary proceedings against the prosecutor M.LL. The Ombudsperson reasoned on this complaint: *"After analyzing the complaint, on 13 September 2019, via official e-mail, Mr. Dervishaj was informed that the appeal regarding Decision AD. No. 04/19, accepted by the BPO, cannot be handled in accordance with Law No. 06/L-057 on Disciplinary Liabilities of Judges and Prosecutors, because it exceeds the competencies of the Ombudsperson based on this law, because it considers the decision of the Chief Prosecutor as a final decision, except in other cases specified and when the Law does not give the right to appeal";* and
>
> 2) the second was related to the complaint of the Applicant for silence of the BPO and the KPC, for not sending the criminal case for handling to the Special Prosecutor's Office, for which the Ombudsperson, reasoned:*"... regarding the allegations of silence, Mr. Dervishaj was informed that, in terms of good*

administration, he would contact the responsible authority to obtain information regarding the complainant's case. On 13 September 2019, Mr. Dervishaj, via e-mail, expressed dissatisfaction by disagreeing with the position of the Ombudsperson and stressed that he would address the Constitutional Court for procedural violations of the BPO and the Ombudsperson, thus determining the way which he will follow. Given the circumstances presented above, the Ombudsperson, in accordance with Article 22, paragraph 1, subparagraph 1.1, of Law No. 05/L-019 on Ombudsperson, has decided to terminate the investigation regarding the above mentioned issue".

98. From the case file, namely from Decision No. 2033/2019 of the Ombudsperson, of 20 November 2019, the Court noted that the Applicant being dissatisfied with the response of the Ombudsperson of 13 February 2019, on the same date notified him that regarding the silence of public authorities and the inactions of the Ombudsperson himself will address the complaint to the Constitutional Court. Consequently, the Court notes that the Ombudsperson, in accordance with Article 22, paragraph 1, subparagraph 1.1 of Law no. 05/L-019 on Ombudsperson, decided to terminate the investigation regarding the silence of the public authorities in question.

99. Initially, the Court notes that the Applicant has, to a large extent, clarified the violation of Articles 32, 54 and 132 of the Constitution. The Court notes that Articles 54 and 132 of the Constitution do not contain rights that can be interpreted in the abstract, if there is no connection with other articles of Chapter II of the Constitution.

100. In this regard, the Court clarifies that Articles 54 and 132 of the Constitution are not articles which in themselves contain a right or freedom. Both of the abovementioned articles are therefore not articles that can be interpreted independently of the other constitutional provisions relevant to this issue.

101. The Applicant also refers to the violation of Article 32 [Right to Legal Remedies], but does not justify in any way what legal remedy he was deprived of and against what decision he was not able to file any legal remedy, but connects the same allegations with Article 45 of the ECHR.

102. The Court notes and finds that Article 45 of the ECHR, which is a part of Section II [European Court of Human Rights] of the ECHR cannot serve as a basis for raising an allegation of violation of the rights

guaranteed by the ECHR before the Constitutional Court, as this Article refers to the competences of the ECtHR regarding the decision-making procedures and not the competencies of the domestic courts, a part of the protection mechanism guaranteed by the ECHR (see, similarly, the Constitutional Court, case KI108/18, Applicant: *Blerta Morina*, Resolution on Inadmissibility, of 5 September 2019, paragraph 195).

103. Returning to the allegations of the Applicant, the Court notes that part of the allegations relates to the inaction of the Ombudsperson, while the other part relates to the erroneous application and interpretation of the law by the Ombudsperson.

104. With regard to the Applicant's allegations that the Ombudsperson has not taken any action in his case, the Court considers that these allegations are entirely ungrounded, because based on the attached documentation it can easily be concluded that the Ombudsperson acted in relation to any request submitted by the Applicant.

105. With regard to the second part of the Applicant's allegations concerning erroneous application of the law and erroneous interpretation of the law, the Court reiterates, first of all, it is not its duty to deal with the errors of fact or law allegedly committed by public authorities or the regular courts, unless, and in so far as they may have violated the rights and freedoms protected by the Constitution (see *Garcia Ruiz v. Spain* [GC], No. 30544/96, paragraph 28, ECHR 1999-I).

106. The Court notes that all the answers of the Ombudsperson were clear and reasoned, and that all the allegations of the Applicant, which were relevant to the decision-making in this case, were properly heard and examined by the Ombudsperson. The Court, therefore, concludes that the proceedings before the Ombudsperson, in their entirety, were fair (see, *mutatis mutandis*, ECtHR Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, No. 30544/96, paragraphs 29 and 30).

107. The Court reiterates that the mere fact that the Applicant does not agree with the outcome of the responses of the public authorities and a mere mentioning of a relevant article of the Constitution, without elaborating on the alleged violation, is not sufficient for the Applicant to raise an arguable claim of constitutional violation. When such a violation of the Constitution is alleged, the Applicants must provide substantiated allegations and convincing arguments (see the case of the Constitutional Court KI136/14, *Abdullah Bajqinca*, Resolution on Inadmissibility, 10 February 2015, paragraph 33).

108. Therefore, based on the above, the Court finds that the Applicant's allegations that the Ombudsperson did not protect him from the inactions of other public authorities, and that the Ombudsperson's inaction itself violates his rights guaranteed by Articles 32, 54 and 132 of the Constitution and Article 45 of the ECHR, are manifestly ill-founded, because the Applicant has not sufficiently proved and substantiated his allegations of violation of these concrete provisions. Consequently, the Referral in respect of these allegations is to be declared manifestly ill-founded and inadmissible pursuant to Rule 39 paragraph (2) of the Rules of Procedure

Conclusion

109. In sum, with regard to the allegations of violation of the rights guaranteed by the Constitution and the ECHR by the public authorities, the Court finds that the Referral:

i. With regard to the contested procedure, or the labor dispute, the Court notes that the Applicant has not filed any allegation regarding the violation of his constitutional rights in relation to this procedure. Therefore, the Court has not entered assessment of the constitutionality of the regular court decisions pertaining to this contested proceeding;

ii. Regarding the procedure for filing a criminal report, the Court finds that the Applicant's request "*On the annulment of the decision to dismiss the criminal report PP. I. No. 65/17 of 02/28/2019*" was not submitted within the legal deadline set out in Article 49 of the Law and Rule 39 (1) (c) of the Rules of Procedure. Consequently, the Court finds that the Applicant's Referral is inadmissible because it was submitted out of the legal deadline;

iii. With regard to the Applicant's request for exclusion of the prosecutor and the disciplinary liabilities of the prosecutors, the Court finds that the Applicant's allegations that by the inaction of public authorities, his rights guaranteed by Articles 24, 32, 54 and 132 of the Constitution and Article 45 of the ECHR have been violated, are manifestly ill-founded, as the Applicant has not sufficiently proved and substantiated his allegations regarding these concrete provisions. Consequently, the Referral in respect of these allegations is to be declared manifestly ill-founded and inadmissible, pursuant to Rule 39 paragraph (2) of the Rules of Procedure;

iv. Regarding the Applicant's requests, which are related to the submission of the case [PP. No. 65/2017] for review in the competence of the Special Prosecutor's Office, the Court finds that the Applicant's allegations of violation of Article 24 of the Constitution are also manifestly ill-founded, because the Applicant has not sufficiently proved and substantiated his allegation in relation to this specific article. Consequently, the request in respect of these allegations is to be declared manifestly ill-founded and inadmissible in accordance with Rule 39 paragraph (2) of the Rules of Procedure;

v. With regard to the Applicant's requests submitted to the Ombudsperson, the Court finds that the Applicant's allegations that the Ombudsperson did not protect him from the inactions of other public authorities, and that the Ombudsperson's inaction itself violates his rights guaranteed by Articles 32, 54 and 132 of the Constitution and Article 45 of the ECHR, are manifestly ill-founded, because the Applicant has not sufficiently proved and substantiated his allegations of violation of these concrete provisions. Consequently, the Referral in respect of these allegations is to be declared manifestly ill-founded and inadmissible pursuant to Rule 39 paragraph (2) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (1) (c), 39 (2) and 59 (2) of the Rules of Procedure, on 10 June 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the parties;

III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20 (4) of the Law;

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Radomir Laban	Arta Rama-Hajrizi

KI122/19, Applicant: F.M., Constitutional review of Judgment PML. No. 49/2019 of the Supreme Court of Kosovo, of 7 March 2019 in conjunction with Judgment PA1. No. 358/2018 of the Court of Appeals of Kosovo of 19 November 2018, and Judgment P. No. 927/14 of the Basic Court in Prishtina, of 15 January 2018

KI122/19, Resolution on inadmissibility, adopted on 9 July 2020, published on 31 August 2020

Keywords: *individual referral, manifestly ill-founded referral, equality of arms, administration of evidence, right to remain silent, non-disclosure of identity*

On 15 January 2018, the Basic Court in Prishtina found the Applicant guilty, who in order to terminate the pregnancy of the injured party X, as a result of the physical violence exercised against her, has committed the criminal offense of attempted "*Unlawful termination of pregnancy*" and was sentenced to imprisonment for a term of one (1) year. Against the Judgment of the Basic Court, the Applicant filed an appeal with the Court of Appeals, which was rejected as ungrounded by this Court. Further, the Applicant also filed a request for protection of legality with the Supreme Court, *inter alia* alleging that the challenged judgments were based on the testimony of the injured party, which evidence was contrary to the material evidence and that the Basic Court did not take into account the fact that in the main hearing he defended himself by remaining silent. The Supreme Court rejected the request for protection of legality as ungrounded, finding that the Basic Court took into account the other evidence, and that it had respected the right of the Applicant to remain silent during the court hearings of this Court.

The Applicant challenges these findings before the Court, alleging that his fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) have been violated in conjunction with Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: ECHR) and Article 7 of the Universal Declaration of Human Rights (hereinafter: UDHR), Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR, Article 31 [Right to a Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as Articles 53 [Interpretation of on Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution. With regard to the Applicant's allegation of violation of his right to fair and impartial trial, the Court notes that the Applicant's allegations refer to: (i) the administration of evidence by

the court and the principle of equality of arms; (ii) protection by remaining silent; and (iii) the reasoning of the court decision by the Supreme Court.

The Court, after having assessed the Applicant's allegations, applying the standards of the case law of the European Court of Human Rights, found that the Referral is inadmissible, because (i) allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR; as well as Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 7 of the UDHR are inadmissible because they are 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; and (ii) allegations of violation of Article 29 of the Constitution in conjunction with Article 5 of the ECHR, as well as Article 54 of the Constitution are inadmissible in accordance with Article 48 of the Law in conjunction with item (d) of paragraph (1) of Rule 39 of the Rules of Procedure.

Finally, the Court, in accordance with Rule 32 of the Rules of Procedure and based on the case file, as well as taking into account the sensitivity of the case, assessed that in order to protect the identity of the victim and the minor child, the non-disclosure of the

RESOLUTION ON INADMISSIBILITY

in

Case No. KI122/19

Applicant

F.M.

Constitutional review of Judgment PML. No. 49/2019 of the Supreme Court of Kosovo, of 7 March 2019 in conjunction with Judgment PA1. No. 358/2018 of the Court of Appeals of Kosovo of 19 November 2018 and Judgment P. No. 927/14 of the Basic Court in Prishtina, of 15 January 2018

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 is submitted by F.M., (hereinafter: the Applicant), who is represented by Flutra Hoxha, a lawyer in Prishtina.

Challenged decision

2. The Applicant challenges the constitutionality of the Judgment PML. No. 49/2019, of 7 March 2019 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), in conjunction with Judgment PA1. No. 358/2018 of 19 November 2018 of the Court of Appeals of Kosovo (hereinafter: the Court of Appeals) and Judgment P. No. 927/14, of 15 January 2018 of the Basic Court in Prishtina (hereinafter: the Basic Court).

3. The Applicant was served with Judgment PML. No. 49/2019, of the Supreme Court, of 7 March 2019 on 30 March 2019.

Subject matter

4. The subject matter is the constitutional review of the challenged decisions, which allegedly violated the Applicant's fundamental rights and freedoms guaranteed by Article 24 [Equality Before the Law] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 14 (Prohibition of discrimination) of the European Convention on Human Rights (hereinafter: the ECHR) and Article 7 of the Universal Declaration of Human Rights (hereinafter: the UDHR), Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR, Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as Articles 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution.

Legal basis

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

Proceedings before the Constitutional Court

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

7. On 31 July 2019, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi (members).

8. On 19 August 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit the acknowledgment of receipt, which proves when he received the challenged decision of the Supreme Court. On the same date, the Court sent a copy of the Referral to the Supreme Court of Kosovo.

9. On 30 August 2019, the Applicant submitted to the Court the acknowledgment of receipt, which proves that he was served with the challenged decision on 30 March 2019.

10. On 24 January 2020, the Court requested the Applicant to submit additional documents, namely a copy of the Judgment of the Court of Appeals, a copy of the appeal, submitted to the Court of Appeals, as well as a copy of the request for protection of legality.

11. On 3 February 2020, the Applicant submitted the requested documents to the Court.

12. On 12 February 2020, the Court requested from the Applicant information regarding the status of his request for review of the criminal proceedings.

13. On 26 February 2020, the Applicant submitted to the Court the requested information and relevant documents regarding his request for review of the criminal proceedings.

14. On 9 July 2020, after having considered the Report of the Judge Rapporteur, the Review Panel unanimously recommended to the Court the inadmissibility of the Referral. On the same date, the full Court examined and decided not to disclose the identity of the Applicant.

Summary of facts

15. On 13 February 2012, the former District Public Prosecutor's Office, through Indictment PP. No. 510/05/2011 accused the Applicant of committing two criminal offenses, namely (i) "*Attempted unlawful termination of pregnancy*" under Article 152 paragraph 2, in conjunction with Article 20 of the Provisional Criminal Code of Kosovo (hereinafter: the PCCK); and (ii) "*Light bodily injury*" under Article 153 paragraph 1 in conjunction with subparagraph 1 of the CCK. According to the case file, in this case, the Applicant was accused of having committed this criminal offense against person X, with whom he had been in a relationship for a certain period of time.

16. In the main trial before the Basic Court, the Applicant was defended in silence. However, the Applicant's defense counsel during the main hearing requested that an acquittal judgment be rendered on the grounds that for the criminal offense "*Light bodily injury*" an absolute statute of limitations was reached while for the other criminal offense "*Attempted unlawful termination of pregnancy*" based on the additional clarification of the forensic expertise, it was not established

that the Applicant committed this criminal offense. Based on the case file, the Applicant's defense counsel filed an objection regarding the testimony of person X, which in the proceedings had the capacity of the injured party as well as other evidence administered by this Court.

17. On 15 January 2018, the Basic Court by Judgment P. No. 927/14:

> (i) found the Applicant guilty of committing the criminal offense of *Attempted unlawful termination of pregnancy*" under Article 152, paragraph 2, in conjunction with Article 20 of the CCK, sentencing him to imprisonment for a term of one (1) year; (ii) rejected the indictment relating to the criminal offense of "*Light bodily injury*" under Article 153 paragraph 1 in conjunction with sub-paragraph 1 of the CCK due to the absolute statute of limitations for criminal prosecution: and (iii) person X, in the capacity of the injured party instructed him in civil dispute.

18. The Basic Court found that the Applicant *"in order to terminate the pregnancy, physically abused the injured party [person X] with whom he was in a love affair by tying her hands with handcuffs, legs with straps, and closing her mouth with handkerchief, and then hit her with fists on various parts of the body, including the lower part of the back, in order to terminate the pregnancy, which was unwanted for him, without the consent of the injured party, who initially threatened her over the phone. in order for the injured party to abort the child, but this termination has remained an attempt".* Finally, the Basic Court found that the Applicant, with the intention of terminating the pregnancy, and as a result of the physical violence exercised against the injured party X, had committed the criminal offense of termination of pregnancy, which had remained an attempt.

19. The Basic Court, during the review and assessment of the case, had administered the following evidence: (i) the testimony of the injured party (person X); (ii) the report of the Emergency Center no. 20158, dated 6 July 2011; (iii) Report from UCCK, Clinic of Gynecology, of 6 July 2011 (iv) report on physical examination, of 6 July 2011 prepared by forensic expert A.G.; (v) report no. PP-510/5/2011, dated 23 December 2011, prepared by forensic expert A.G; (vi) photo documentation; (vii) confidential photo documentation, made during the forensic examination, of 6 July 2011; and (viii) SMS from the report of Post Telecom of Kosovo (hereinafter: PTK), of 8 August 2011.

20. On an unspecified date, the Applicant filed an appeal against Judgment P. No. 927/14, of 15 January 2018, of the Basic Court in the Court of

Appeals, alleging essential violations of the provisions of criminal procedure, incomplete and erroneous determination of factual situation, as well as violations of criminal law.

21. The Applicant in his appeal, regarding (i) the allegation of essential violation of the provisions of the criminal procedure specified that the enacting clause of the Judgment of the Basic Court was incomprehensible and contradictory to the reasoning given by this Court. The Applicant specifically alleged that the Judgment of the Basic Court was based only on the testimony of the injured party X, which is contrary to the Applicant's defense, and on the material evidence of the medical and forensic institutions, including the report of PTK sms. As for (ii) allegations of incomplete and erroneous determination of the factual situation and violation of criminal law, the Applicant stated that he did not commit the criminal offense for which he was found guilty. The Applicant further alleged that the Basic Court administered the evidence in a biased and subjective manner, and consequently this Court violated the criminal law.

22. On 19 November 2018, the Court of Appeals by Judgment PA1. No. 358/2018 rejected as ungrounded the Applicant's appeal and upheld Judgment P. No. 927/14, of the Basic Court, of 15 January 2018.

23. Initially, the Court of Appeals found that the challenged Judgment did not contain essential violation of the criminal provisions, with the reasoning that the Judgment was clear, contains convincing reasoning in relation to the decisive facts, in particular in relation to the establishment of a criminal offense. The Court of Appeals further found that the challenged judgment based its reasoning and assessment on the testimony of the injured party, forensic expertise, as well as other evidence and evidence, administered by the Basic Court, which the latter has listed in its judgment.

24. Secondly, with regard to the Applicant's allegation of erroneous determination of factual situation and violation of criminal law, the Court of Appeals found that his allegations are ungrounded. With regard to the determination of the factual situation, the Court of Appeals reasoned that: *" From all this evidence administered and correctly assessed by the court of first instance but also from the testimony of the witness, there is no doubt that the criminal offense was committed by [the Applicant], as [the Applicant] used violence on the critical night but also intimidation of the injured party with the claim of termination of pregnancy, therefore the appealing allegations of the defense counsel that the factual situation in this criminal case has not been established is not true".*

25. Thirdly, with regard to the allegation of a violation of the criminal law, the Court of Appeals, confirming the fact that the Applicant was found guilty of the criminal offense of *"Unlawful termination of pregnancy*", considered that the Basic Court correctly applied the criminal law. Furthermore, regarding the Applicant's specific allegation that this criminal offense can be committed only by authorized persons, namely specialist doctors or midwives, the Court of Appeals confirmed that "[...] *according to the legal provisions in force, in addition to health workers, the criminal offense can be committed by any other person who attempts to terminate a pregnancy without the consent of the wife".*

26. Finally, with regard to the sentencing decision, the Court of Appeals found that with the sentence imposed on the Applicant by the Basic Court for committing a criminal offense, for which, according to the provisions of the CCK, a sentence of one (1) up to eight (8) years of imprisonment was foreseen, the purpose of the punishment, provided by Article 41 of the CCK, will be achieved.

27. On an unspecified date, the Applicant filed a request for protection of legality against Judgment P. No. 927/14 of the Basic Court and Judgment PA1. No. 358/2018 of the Court of Appeals, alleging essential violations of the provisions of criminal procedure and violation of criminal law with the proposal that the challenged judgments be annulled and the case be remanded for retrial.

28. The Applicant, regarding the allegation of violation of the provisions of the criminal procedure, stated that the challenged judgments were based on the testimony of the injured party, which evidence is contrary to the material evidence. Furthermore, the Applicant specifies that the Judgment of the Basic Court did not mention the Applicant's defense, submitted to the Prosecution on 7 September 2011, and also did not mention the fact that the Applicant defended himself in the main hearing session at the Basic Court in silence. The Applicant also alleged that the Court of Appeals did not give importance to the Applicant's defence and the forensic expert report.

29. Regarding the allegation of violation of the criminal law, the Applicant stated that the Basic Court found him guilty of the offense "*Attempted unlawful termination of pregnancy*" under Article 152, paragraph 2 in conjunction with Article 20 of the CCK, although this provision, according to him, sanctions the actions of persons who are authorized to terminate pregnancy, namely doctors or midwives.

30. On 15 February 2019, the State Prosecutor through the submission KLMP. II. No. 36/2019, proposed to the Supreme Court that the request for protection of legality, submitted by the Applicant be rejected as ungrounded.

31. On 7 March 2019, the Supreme Court by Judgment PML. No. 49/2019 rejected the request for protection of legality, filed by the Applicant as ungrounded.

32. The Supreme Court, in relation to the Applicant's allegation of violation of the provisions of the criminal procedure, reasoned that *"[...] The first instance judgment was not only based on the statement of the injured party [X], but also on other evidence that was in the court hearing [...]. The reasoning assesses all the evidence administered and does not support the fact that both judgments are based on only one piece of evidence - the statement of the injured party"*. According to the Supreme Court, the Basic Court took into account other evidence, namely the reports of relevant medical institutions and forensic expertise, including material evidence of electronic communication, which proved that the pregnancy of the injured party was unwanted. Further, the Supreme Court also reasoned that the Basic Court had not considered his defense in the Prosecution because the Basic Court in accordance with Article 346, paragraph 1 of the Criminal Procedure Code of Kosovo (hereinafter: CPCK) respected the right of the Applicant to defend himself in silence during the court hearings of this Court.

33. As to the Applicant's allegations regarding the violation of the criminal law, namely Article 152 [Unlawful Termination of Pregnancy], paragraph 2 in conjunction with Article 20 [Attempt] of the CCK, the Supreme Court reasoned: *"[...] doctors and midwives are not the only persons who can commit this criminal offense as alleged in the Referral, but this criminal offense can be committed by anyone, and in this case [the Applicant] has attempted to terminate the unwanted pregnancy for him , without the consent of the injured party [...] This is evidenced by the injuries [...] caused by the violent blows with a strong tool [defense] [...]"*.

34. Based on the case file, it results that the Applicant, at the time of submission of the Referral, was serving a prison sentence imposed by the Judgment of the Basic Court in a correctional facility in the Republic of Kosovo.

35. Furthermore, based on the submissions submitted by the Applicant, it results that on 9 August 2019, the latter filed a request for review of the criminal proceedings with the Basic Court in Prishtina. By

notifying the Applicant on 26 February 2020, and submitting a copy of the Decision KP. No. 1472/2019, of 20 September 2019, the Basic Court in Prishtina rejected the Applicant's request for review of the criminal proceedings as ungrounded.

Applicant's allegations

36. The Applicant alleges that by the Judgment of the Supreme Court, in conjunction with Judgment PA1. No. 358/2018, of the Court of Appeals of 19 November 2018 and Judgment P. No. 927/14, of the Basic Court in Prishtina, of 15 January 2018, his rights and freedoms guaranteed by Article 24 [Equality Before the Law] of Constitution in conjunction with Article 14 (Prohibition of discrimination) of the ECHR and Article 7 of the UDHR, Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as Article 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution.

37. The Court recalls that the Applicant, in addition to the final Judgment of the Supreme Court, specifically challenges the Judgments of the Basic Court and the Court of Appeals.

38. The Applicant essentially alleges that the administration of criminal evidence was not properly conducted in the Applicant's case. Second, the Applicant states that in the proceedings before the Basic Court the Applicant was defended in silence.

39. With regard to the allegation of the administration of evidence, the Applicant states that the issue of *"taking of evidence lawfully constitutes an important aspect of respecting the right to a fair trial, provided by the Constitution and Article 6 of the ECHR"*. In this regard, the Applicant refers to the case law of the European Court of Human Rights (hereinafter: the ECtHR), namely the cases *Bykov v. Russia*, application no. 4378/02, Judgment of 10 March 2009], and *Van Mechelen and Others v. the Netherlands*, applications no. 21363/93, 21364/93, 21427/93, and 22056/93, Judgment of 23 April 1997.

40. With regard to this allegation, the Applicant *"[...] requests the Court to assess the legality of the procedural actions related to criminal evidence, obtaining, administering, verifying and assessing them, the means of seeking evidence and the whole process of proving, are*

provided by the provisions of the Criminal Code of Kosovo, which derive and the whole probation process, are provided by the provisions of the Criminal Code of Kosovo, which originate and are in full compliance with the Constitution, the European Convention on Human Rights and other international acts".

41. With regard to the allegation of defense in silence, the Applicant *"[...] the court's assessment of the defendant's silence during the defense (even though the lawyer had repeatedly denied committing the offense) should be made with the same degree of credibility and without prejudice, but based on the elements resulting from the available evidence".*

42. The Applicant alleges that the Court of Appeals did not take into account the exculpatory evidence presented by the Applicant. The Applicant specifies that *"The Court of Appeals, when deciding on the appeal of the defendant's defense counsel, did not find it appropriate to go into more detail regarding the determinaton of factual situation, it did not take as a very important fact the acquittal evidence of the defendant during the conduct of the criminal proceedings. [...]".*

43. The Applicant initially states that: *"Starting from the procedure in the first instance until the Judgment of the third instance - the Supreme Court, the rights of [the Applicant] for a fair trial has been violated [...]".* In this regard, the Applicant alleges that *"the principle of a fair trial also includes the right of each party to be given a reasonable opportunity to present its case, provided that they do not place him in an unfavorable position vis-a -vis another party".*

44. The Applicant further alleges that: *"The Supreme Court, acting as a court of third instance, did not provide clear legal constitutional reasons regarding the facts relevant for the issuance of a lawful decision, but very briefly assessed as ungrounded the appeals decisions of the Applicant".*

45. The Applicant also specifies that: *"The Supreme Court decided the same as the Court of Appeals, disregarding the alleged violations of the criminal procedure and disregarding the violations which affected the legality of the court decision. Based on the purpose of the request for protection of legality, as a legal remedy filed by the defense counsel of the applicant, the Supreme Court was obliged to remove the legal violations from the final decision on the sentence of the applicant. Having established procedural violations in the conducted court proceedings, the Supreme Court was able to annul*

the sentencing decision and order holding the court hearing (Article 439 of the Criminal Procedure Code of Kosovo)".

46. Finally, the Applicant reiterates that during the criminal proceedings before the regular courts *"The court has mostly protected the injured party [person x] and this care to protect her in public life has also been noticed from the institutional point of view, namely with the sentence of [the applicant] and gender discrimination that the court and the prosecution have done to him from the beginning throughout the procedure".*

47. The Applicant states that *"[...] the right to a fair and impartial trial, as guaranteed by the Constitution of the Republic of Kosovo - Article 31, then by the ECHR, Articles 5 and 6, and Article 14".*

48. According to the Applicant in his case, the Supreme Court violated the equality of arms in the proceedings because it outweighed the arguments of one party. In this regard the Applicant underlines that his main allegation relates to *"evidence for the determination of guilt"* especially in the pre-trial procedure and *"the length of the proceedings of 7 years- of such an offense".*

49. The Applicant, alleging a violation of the above-mentioned Articles of the Constitution, and the ECHR clarifies that *" The alleged articles were violated, due to the adoption of an unfair Judgment by the local Court, the violation of the rights to submit relevant evidence, the fairness of the procedure, that the intervention of this nature is not proportionate and sufficient to provide the applicant with procedural guarantees that are necessary in a democratic society and respect for the protection of human rights and freedoms, guaranteed by the Constitution and international acts".*

50. Finally, the Applicant requests the Court to deal with his case urgently and requests to: (i) declare the Referral admissible; (ii) find a violation of the Applicant's rights guaranteed by Articles 24, 29, 31, 53 and 54 of the Constitution; Articles 5, 6, 14 of the ECHR; and Article 7 of the UDHR.

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) to 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.

Article 14 (Prohibition of discrimination)

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Universal Declaration of Human Rights

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Provisional Criminal Code of Kosovo
(UNMIK/REG/2003/25)

Article 20
ATTEMPT

(1) Whoever intentionally takes action toward the commission of an offense but the action is not completed or the elements of the intended offense are not fulfilled, is considered that he or she has attempted to commit a criminal offense.

Article 152
UNLAWFUL TERMINATION OF PREGNANCY

(1) Whoever, with the consent of the pregnant woman, but in violation of the Law for Termination of Pregnancy terminates a pregnancy, commences to terminate a pregnancy, or assists in terminating a pregnancy shall be punished by imprisonment of six (6) months to three (3) years.
(2) Whoever terminates or commences to terminate a pregnancy without the consent of the pregnant woman shall be punished by imprisonment of one (1) to eight (8) years.
(3) When the offense provided for in paragraph 1. or 2. of this Article results in grievous bodily injury, serious impairment to health or the death of the pregnant woman, the perpetrator shall be punished by imprisonment of six months to five years in the case of the offense provided for in paragraph 1 or at least three years of imprisonment in the case of the offense provided for in paragraph 2.

Criminal Procedure Code No. 04/L-123, published in the Official Gazette on 28 December 2012

Article 9
Equality of Parties

1. The defendant and the state prosecutor shall have the status of equal parties in criminal proceedings, unless otherwise provided for by the present Code. 2. The defendant has the right and shall be allowed to make a statement on all the facts and evidence which incriminate him or her and to state all facts and evidence favorable to him or her. He or she has the right to request the state prosecutor to summon witnesses on his or her behalf. He or she has the right to examine or to have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

Article 346
Examination of the Accused

1. The accused has the right to not declare. If he or she chooses to declare, his or her testimony shall be conducted in accordance with paragraph 2 through 4 of the present Article.

2. The lead defense counsel shall question the defendant in accordance with Article 333 of the present Code.

3. The state prosecutor shall question the defendant in accordance with Article 334 of the present Code.

4. The co-defendants, if any, may question the defendant in accordance with Article 334 of the present Code

Admissibility of the Referral

51. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and as further specified by the Law and foreseen by the Rules of Procedure.

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

> 1. *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> 7. *Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

53. The Court further examines whether the Applicant has met the admissibility requirements as defined by the Law. In this regard, the Court first refers to Article 47 [Individual Requests], Article 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…".

54. As regards the fulfillment of these criteria, the Court finds that the Applicant is an authorized party challenging an act of a public authority namely Judgment Pml. No. 49/2019, of 7 March 2019 of the Supreme Court after having exhausted all the legal remedies provided by the law, regarding Judgment PA1. nr. 358/2018 of the Court of Appeals, of 19 November 2018 and Judgment P. No. 927/14 of the Basic Court, of 15 January 2018. The Court notes, that the Applicant after the challenged Judgment of the Supreme Court was rendered filed request for review of the criminal proceedings with the Basic Court in Prishtina, which request by Decision, KP. No. 1472/2019, of 20 September 2019 was rejected as ungrounded. Therefore, the Court finds that the last and challenged decision in the Applicant's case is Judgment Pml. No. 49/2019 of the Supreme Court, of 7 March 2019.

55. Further, the Court also notes that the Applicant submitted his Referral within a period of 4 (four) months, as provided by Article 49 of the Law.

56. In this case, the Court will also examine whether the Applicant has met the other admissibility criteria set out in Rule 39 (2) of the Rules, which stipulates:

"(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."

57. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court, in conjunction with the Judgment of the Court of Appeals, PA1. No. 358/2018, of 19 November 2018 and the Judgment of the Basic Court P. No . 927/14, of 15 January 2018, violated his rights and freedoms guaranteed by Article 24 [Equality

Before the Law] of the Constitution in conjunction with Article 14 (Prohibition of discrimination) and Article 7 of the UDHR, Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to Liberty and Security) of the ECHR, Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR, as well as Articles 53 [Interpretation of Human Rights Provisions] and 54 [Judicial Protection of Rights] of the Constitution.

58. The Court notes, however, that the Applicant's substantive allegations raised in his Referral refer to the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, as well as equality before the law and prohibition of discrimination guaranteed by Article 24 of the Constitution, in conjunction with Article 14 of the ECHR and Article 7 of the UDHR respectively.

59. In addressing the Applicant's allegations related to his allegation regarding the right to fair and impartial trial, as well as his second allegation that he was discriminated against during the criminal proceedings, the Court will apply the case law of the ECtHR on the basis of which the Court, based on Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

I. Regarding allegations of violation of Article 31 of the Constitution, in conjunction with Article 6 of the ECHR

60. With regard to the Applicant's allegation of a violation of his right to fair and impartial trial, the Court notes that the Applicant's allegations refer to: (i) the administration of evidence by the court and the principle of equality of arms; (ii) defense in silence; and (iii) the reasoning of the judgment by the Supreme Court.

(i) Regarding the principle of equality of arms and the administration of evidence by regular courts and equality of arms

61. In this regard, the Court recalls that the Applicant alleges that the administration of criminal evidence in the Applicant's case was not properly conducted in the Basic Court. Furthermore, the Applicant alleges that the Court of Appeals also did not take into account the exculpatory evidence presented by the Applicant.

62. In this respect, the Applicant *"[...] requests the Court to assess the legality of procedural actions related to criminal evidence, obtaining,*

administering, verifying and assessing them, the means of seeking evidence and the whole process of proving, are provided by the provisions of the Criminal Code of Kosovo, which derive and the whole probation process, are provided by the provisions of the Criminal Code of Kosovo, which originate and are in full compliance with the Constitution, the European Convention on Human Rights and other international acts".

63. The Court further recalls that in the context of his allegation regarding the administration of evidence, the Applicant also states that the regular courts have violated the principle of equality of arms because, in his view, the regular courts have consistently "*over-weighed the arguments of one party*", underlining that his main allegation has to do with "*evidence for determination of guilt*" especially in the pre-trial proceedings and "the length of the proceedings of 7 years - of such an offense". In this respect, namely with regard to the issue of length, the Applicant, in addition to mentioning this allegation in the Referral and in the context of violation of the principle of equality of arms, does not elaborate further and reasons this in the Referral. Furthermore, the Court notes that this allegation has not been raised or specifically mentioned in its submissions before the lower courts.

64. However, the Court notes that the Applicant only specifies that in the proceedings before the regular courts his right to a fair trial has been violated, which according to him *"the principle of a fair trial also includes the right of each party to be given a reasonable opportunity to present his case, provided that it does not place it in an unfavorable position vis-a-vis another party".*

65. In the case law of the ECtHR and that of the Court it has been emphasized that the principle of *"equality of arms"*, requires *"fair balance between the parties"* that each party must be afforded a reasonable opportunity to present his or her case, under conditions that do not place him/her at a substantial disadvantage *vis-a-vis* his/her opponent (see the cases of the ECtHR *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, see Cases of the Court, KI52/12, Applicant *Adije Iliri*, Judgment of 5 July 2013, KI103/10, Applicant *Shaban Mustafa*, Judgment of 20 March 2012, paragraph 40*).*

66. In the following, and in the context of the specific allegation concerning the administration of evidence by the courts, the Court

first refers to the case law of the ECtHR, which in principle has stated that *"While Article 6 guarantees the right to a fair hearing, 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"* (see ECtHR case *Schenk v. Switzerland*, no. 10862/84, Judgment, 12 July 1988 paragraphs 45-46).

67. However, the ECtHR has pointed out that the aspect to be considered in such cases is whether the proceedings, including the manner in which the evidence was collected, were fair in its entirety (see ECtHR cases *Khan v. United Kingdom*, Application No. 35394/97, Judgment of 12 May 2000, paragraph 34; *P.G. and J.H. v. the United Kingdom*, Application No. 44787/98, Judgment of 25 September 2001, paragraph 76; and *Allan v. the United Kingdom*, Application no. 48539/99, Judgment of 5 November 2002, paragraph 42).

68. Therefore, whether the proceedings were fair as a whole, it should be borne in mind whether the rights of the defense have been respected. In that regard, the Court shall assess whether the Applicant had the opportunity to challenge the lawfulness of the evidence and to object to the use of such evidence (see, ECtHR Judgment, *Szilagyi v. Romania*, application 30164/04 of 17 December 2013; see also the case of Court KI34/18, Applicant *Albert Berisha*, Resolution on Inadmissibility, of 23 May 2018, paragraph 63).

69. More specifically, the ECtHR has pointed out that when the evidence is very sustainable and not questioned at all, the need for further evidence in support of it becomes less (see the cases *Bykov v. Russia* [GC], application no. 4378 / 02, Judgment of 10 March 2009, paragraph 89, and other references cited therein; *Jalloh v. Germany*, application no. 54810/00 [GC], Judgment of 11 July 2006, paragraph 96). Consequently, the ECtHR has emphasized that it also attaches importance to the point whether or not the evidence in question was decisive for the outcome of the criminal proceedings (see *Gäfgen* v. *Germany* [GC], application no. 22978/05, Judgment of 1 June 2010, paragraph 164).

70. Based on the above and referring to the proceedings before the regular courts, in particular as regards the administration of evidence by these courts, the Court first refers to the Judgment of the Basic Court, which in its decision finding the Applicant guilty was based on the testimony of person X in the capacity of injured party in criminal proceedings, medical reports issued by various health institutions, forensic reports, photo-documentation, conducted during the examination by medical

experts and forensic ones, and communication via sms from the PTK report.

71. The Court notes, on the basis of the submissions submitted by the Applicant, that he was given the opportunity to challenge the evidence in the Basic Court, through his legal representative. In this context, in its Judgment, the Basic Court regarding the Applicant's objection to the administration of the abovementioned evidence stated that "*The court could not accept the position of the defense counsel of the accused [...] that the accused did not commit the criminal offense of Attempted Unauthorized Termination of Pregnancy under Article 152 par. 2, in conjunction with Article 20 of the CCK, as there is no evidence to prove this, but assessed this defense as unfounded and aimed at avoiding criminal responsibility, as this defense was contrary to the testimony of the witness - of the injured party [person X] and other material evidence such as: the report of the Emergency Center no. 20158, of 06.07.2011, Report of UCCK Gynecology Clinic, of 06.07.2014, report on the Physical Examination, of 06.07.2011, prepared by the forensic expert Dr. A. G., photo-documentation and confidential photo-documentation made during the forensic examination of 06.07.2011, as well as by sms and the PTK report of 08.09.2011, which were in compliance with each other.*"

72. In conclusion, after elaborating on each of the Applicant's objections to the evidence administered by the Basic Court, the latter found that the court, in its assessment, has the authority to admit and consider any evidence, and to assess the importance of each piece of evidence to be taken into account during the criminal proceedings. The Basic Court further stated that the court during the administration of evidence *"In particular, assesses the accuracy of the evidence, the reason for their approval as well as the reasons on which it is based when resolving this criminal-legal case in the case of determination of criminal offenses and the criminal responsibility of the accused"*.

73. In conclusion, the Basic Court with regard to the material evidence administered during the criminal proceedings concluded that *"The statement of the injured party - witness stated above and the material evidence were assessed by the court as convincing, real and objective, so it gave trust to them and basing the judgment in this criminal case, while the material-legal and formal-legal protection in the present case aimed to justify the incriminating actions of the accused to avoid criminal liability"*.

74. In addition, the Court also refers to the Judgment of the Court of Appeals, through which it was found that the challenged Judgment of

the Basic Court based its reasoning and assessment on the testimony of the injured party, the expertise of forensic medicine and the evidence and testimony of others, administered by the Basic Court, which it has listed in its judgment. The Court of Appeals concluded that the Basic Court has reviewed the Applicant's defense, giving the relevant reasoning as to why it did not give trust to the Applicant's defense in this case.

75. Finally, the Supreme Court, referring to the specific allegation regarding the administration of evidence by the Basic Court and the Court of Appeals, which the Applicant had raised in his request for protection of legality, found that: *"[...] The first instance judgment was not only based on the statement of the injured party [X], but also on other evidence that was in the court hearing [...]. The reasoning assesses all the evidence administered and does not support the fact that both judgments are based on only one piece of evidence - the statement of the injured party"*.

76. In the present case, the Supreme Court established that the Basic Court took into account other evidence, namely the reports of the relevant specialized medical institutions and forensic expertise, including the material evidence of electronic communication, on the basis of which upheld the legal position of the lower courts.

77. In light of the general principles of the ECtHR elaborated above and the reasoning of the regular courts, the Court first notes that in the Applicant's case the regular courts have rendered their decisions in accordance with the standards required for fair and impartial trial and based their decision-making not only on one piece of evidence but on a number of evidence, all of which the Basic Court had listed in its Judgment.

78. Second, the Court also notes that the criminal proceedings against the Applicant were fair in its entirety, as the courts respected the right of defense. In this regard, the Court notes that the Applicant in the proceedings before the regular courts through his legal representative has been given the opportunity to challenge the evidence, namely to challenge the testimony of the injured party and the material evidence, which was presented during the course of the criminal proceedings.

79. Thirdly, the Court also notes that the regular courts, namely the Basic Court and the Court of Appeals, respectively, reasoned concretely and sufficiently why they did not give trust to the Applicant's defense.

80. Finally, the Court also notes that the Basic Court through its Judgment had given the concrete reasoning, consequently concluding that all the evidence administered by this Court, and listed in its Judgment were decisive for finding the Applicant guilty for the commission of a criminal offense, for which he was consequently convicted.

81. Therefore, based on the reasoning above, the Court notes that the Applicant failed to prove that in his case the regular courts did not administer the evidence in accordance with the principles established through the case law of the ECtHR, which are also embodied in the relevant provisions of criminal procedure.

82. The Court further considers that the Applicant, apart from mentioning the allegation of violation of the principle of equality of arms in the proceedings, which he raises in the context of the administration of evidence, has not provided additional arguments and proved the grounds of this allegation in his referral.

83. The Court notes in this respect that the Applicant's dissatisfaction with the outcome of the proceedings by the regular courts cannot in itself raise a substantiated claim of a violation of the fundamental rights and freedoms guaranteed by the Constitution (see the case of the ECtHR *Mezotur -Tiszazugi Tarsulat v. Hungary*, Judgment of 26 July 2005, paragraph 21).

84. Therefore, the Court considers that the Applicant has not substantiated his allegation of a violation of fair and impartial trial, as a result of the improper administration of evidence by the regular courts, and has also not provided any relevant reasoning and arguments regarding the grounds of his allegation of a violation of the principle of equality of arms in the proceedings, and consequently his allegations are ungrounded on constitutional basis.

(ii) As to the right to be defended in silence

85. The Court recalls that the Applicant in his Referral states that during the proceedings before the regular courts, namely before the Basic Court, he was defended in silence.

86. In this regard, the Applicant states that *"[...] the court's assessment of the defendant's silence during the defense (even though the lawyer had repeatedly denied the commission of the criminal offense) should be made with the same degree of credibility and without prejudice, but based on the elements resulting from the available evidence"*. In the context of this allegation, the Court notes that the Applicant tries

to relate to some extent the issue of the defense in silence with the principle of presumption of innocence, which, however, he does not continue to elaborate and further specify in his Referral.

87. Initially and with regard to the Applicant's allegation regarding his right to be defended in silence and in the context of the criminal proceedings before the courts, the Court refers to Article 346 of the CPCK, which provides that: "*1. The accused has the right to not declare. If he or she chooses to declare, his or her testimony shall be conducted in accordance with paragraph 2 through 4 of the present Article*".

88. The Court also recalls that the right to fair trial as guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, provides certain minimum guarantees for any person charged with a criminal offence, which includes the right to be defended in silence and the right to liberty from self-blame, according to the ECtHR case law (see ECtHR Judgment, *Saunders v. United Kingdom*, application No. 19187/91, paragraph 68 and 69, of 17 December 1996, as well as the ECtHR *John Murray v. United Kingdom*, application no. 18731/91, paragraph 45, of 8 February 1996 paragraph 45, see also the above-mentioned case of the Court, KI34/18, Applicant *Albert Berisha*, paragraph 59).

89. In the Applicant's case, with regard to his defense in silence in the proceedings before the regular courts, the Court notes on the basis of the submissions submitted with the Referral that the Basic Court respected the Applicant's right to remain silent.

90. In this regard, based on the challenged Judgment of the Supreme Court, the latter had also established that the Basic Court in accordance with Article 346 of the CPCK had respected the Applicant's right of defense to be defended in silence during the court hearings of this court.

91. Furthermore, during the criminal proceedings before the regular courts, the Applicant at all times had the opportunity of his legal representation through a lawyer. In this regard, the Court, based on the Judgment of the Basic Court reiterates that the Applicant's defense counsel in the hearings of this court had the opportunity to challenge the testimony of person X and the material evidence presented before it.

92. The Court notes that, based on the proceedings before the regular courts and the reasons given by the latter, it cannot be concluded that

during his defense in silence the regular courts prejudged the guilt or treated the Applicant as guilty before the latter decided on his guilt.

93. Therefore, the Court considers that the allegations raised by the Applicant regarding his right to be defended in silence are ungrounded on constitutional basis.

(iii) Regarding the right to a reasoned decision of the court decision

94. The Court recalls that the Applicant alleges that the Supreme Court, through its Judgment, briefly assessed his allegations in the request for protection of legality, failing to provide a detailed reasoning regarding the relevant facts.

95. The Applicant specifically alleged that *"The Supreme Court decided the same as the Court of Appeals, disregarding the alleged violations of the criminal procedure and disregarding the violations which affected the legality of the court decision. Based on the purpose of the request for protection of legality, as a legal remedy filed by the defense counsel of the applicant, the Supreme Court was obliged to remove the legal violations from the final decision on the sentence of the applicant. [...]."*

96. In light of this allegation of the Applicant, the Court first recalls that the Court of Appeals rejected his appeal against the Judgment of the Basic Court and then the Supreme Court also rejected his request for protection of legality, filed against the Judgments of the Basic Court and that of the Court of Appeals. In this context, the Court notes that the Supreme Court and the Court of Appeals during the decision-making 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.

97. In this respect, the Supreme Court through its Judgment concluded that *"[...] after examining the allegations from the request as well as based on the case file found that none of the allegations is grounded. This is due to the fact that the judgment of the court of first instance was not based only on the statement of the injured party [...], but also on other evidence which were examined in the court hearing and for which sufficient legal reasons were given in the judgment. The Court also finds that the provisions of the judgments are clear and include all legal justifications for the decisive facts on the basis of which the decision on merits was taken, and which reasons this court considers as legal and fair".*

98. Consequently, the Supreme Court reached this conclusion after considering the reasoning given by the Basic Court, when it found the Applicant guilty of the committed criminal offense, his appeal submitted to the Court of Appeals and his request for protection of legality, filed with the Supreme Court.
99. In this regard, the Court recalls that in rejecting an appeal, or as the case may be, in rejecting a request for protection of legality, the Supreme Court may, in principle, merely approve the reasons for rendering the decision of the lower courts, in this case the Court of Appeals and the Basic Court (see the cases of the ECtHR, *García Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, application no. 20772/92, Judgment of 19 December 1997, paragraphs 59-60).

100. In this regard, the Court also recalls that cases where a court of third instance or appellate court, as in the case of the Applicant, the Supreme Court, which confirms the decisions taken by the lower courts - its obligation to reason decision-making differs from cases where a court changes the decision-making of lower courts. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court- which found the Applicant guilty but only proved their legality, given that, according to the Supreme Court, there were no essential 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).

101. In this respect, the Court considers that, even though the Supreme Court may not have responded at every possible issue raised by the Applicants in his request for protection of legality, it has addressed the Applicant's substantive arguments as to the application of the substantive and procedural law (see, *mutatis mutandis*, the 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, see case of the Court KI194/18, Applicant *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility, of 5 February 2020, paragraph 107). In doing so, the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, in accordance with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the case law of the ECtHR and this Court itself.

102. Therefore, based on the above, the Court finds that the Applicant has not proved and has not sufficiently substantiated his allegation of non-

reasoning of the court decision, and is, therefore, manifestly ill-founded on constitutional basis.

103. Finally, having regard to all his abovementioned allegations, presented in his Referral and referring to the right to fair and impartial trial, guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, and the facts presented by it, the Court, based on the reasoning above and the principles established by this Court and the case law of the ECHR in similar cases, finds that his referral regarding the allegation is manifestly ill-founded on constitutional basis.

II. Regarding allegations of violation of Article 24 of the Constitution, in conjunction with Article 14 of the ECHR and Article 7 of the UDHR, as well as Article 29 of the Constitution

104. The Applicant alleges that during the criminal proceedings before the regular courts "*The court has mostly protected the injured party [person x] and this care to protect her in public life has also been noticed from the institutional point of view, namely with the sentence of [the applicant] and gender discrimination that the court and the prosecution have done to him from the beginning throughout the procedure*".

105. In this regard, the Court also notes that the Applicant relates this allegation to the issue of the administration of evidence by the regular courts and the equality of arms in the proceedings. With regard to the issue of the administration of evidence, the Applicant has consistently alleged that the regular courts based their judgments mainly on the testimony of person X. However in this regard, the Court in elaborating his allegation and the reasoning of the regular courts, applying the principles of the ECtHR, found that the Applicant's allegation was manifestly ill-founded, on constitutional basis. Regarding the allegation of violation of the principle of equality of arms, the Court recalls that this allegation was not supported by the Applicant with relevant reasons and evidence.

106. With regard to the Applicant's allegation of a violation of equality before the law, the Court refers to its case-law and that of the ECHR, which notes that only differences in treatment, based on an identifiable characteristic, *or status*, may constitute unequal treatment within the meaning of Article 24 of the Constitution. Furthermore, in order for a case to be raised under Article 24, there must be a change in the

treatment of persons in analogous or similar situations (see, *mutatis mutandis*, the case of the Constitutional Court, KI157/18, Applicant. *the Supreme Court of Kosovo*, Judgment of 13 March 2019, paragraph 33, see also the cases of the ECtHR *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, applications Nos. 5095/71, 5920/72 and 5926/72, 7 December 1976 , paragraph 56; and *Carson and Others v. the United Kingdom*, application no. 42184/05, Judgment of 16 March 2010, paragraph 61). Moreover, not every difference in treatment will be discriminatory if it lacks objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if it lacks a reasonable relationship between the means used and the aim pursued (see the case of the ECtHR *Guberina v. Croatia*, Judgment of 22 March and other references cited therein).

107. Therefore, the Court notes that the Applicant has not substantiated his allegation of being discriminated against on the basis of gender, moreover given the fact that Applicant and person X in criminal proceedings before the regular courts were not in same factual situations, because in the conducted criminal procedure one was in the capacity of the suspect and the other was in the capacity of the witness and the injured party.

108. Consequently, the Applicant's allegation of a violation of Article 24 of the Constitution, in conjunction with Article 14 of the ECHR and Article 7 of the UDHR, is manifestly ill-founded on constitutional basis.

109. Finally, with regard to the Applicant's allegation of a violation of Article 29 [Right to Liberty and Security] of the Constitution, in conjunction with Article 5 (Right to liberty and security) of the ECHR, and Article 54 [Judicial Protection of Rights] of the Constitution, the Court notes that the Applicant has not submitted any argument as to how these constitutional provisions, in relation to the equivalent provisions of the ECHR, have been violated by the regular courts in rendering their judgments in the criminal proceedings. The Applicant cited these Articles of the Constitution and the ECHR without providing any relevant justification for supporting his allegations.

110. In this regard, the Court, recalling its case law, states that merely citing Articles of the Constitution or the ECHR cannot be considered as fulfillment of the obligation deriving from Article 48 of the Law in conjunction with item (d) of paragraph (1) of Rule 39 of the Rules of Procedure, which requires Applicants to clarify "*accurately and adequately [...] the allegations of violations of constitutional rights or provisions*".

111. In the context of his allegation of a violation of Article 29 of the Constitution, in conjunction with Article 5 of the ECHR, the Applicant did not specify and clarify how the application of this Article was applicable in his case, namely in the criminal proceedings before the regular courts, the judgments of which he challenged in his referral before the Court.

112. In this respect, and in line with the case law of this Court, the latter, the Applicant's allegation of a violation of Article 29 of the Constitution, in conjunction with Article 5 of the ECHR, as well as Article 54, will not further address, as the Applicant has not clearly clarified and provided relevant justification regarding the merits of his allegations of violation of these provisions (see, in this regard, cases KI02/18, Applicant *Government of the Republic of Kosovo [Ministry of Environment and Spatial Planning],* paragraphs 40-41, Resolution on Inadmissibility of 20 June 2019; and KI91/18, Applicants *Njazi Gashi, Lirije Sadikaj, Nazife Hajdini-Ahmetaj and Adriana Rexhepi*, Resolution on Inadmissibility of 10 September 2019, paragraphs 52-54).

113. Therefore, and based on the above, the Court concludes that the Applicant's Referral regarding his allegations of violation of Article 29 of the Constitution, in conjunction with Article 5 of the ECHR, as well as Article 54 of the Constitution is inadmissible in accordance with Article 48 of the Law in conjunction with item (d) of paragraph (1) of Rule 39 of the Rules of Procedure.

Conclusion

114. For the reasons set out above, the Court concludes that in accordance with Rule 39 (2) of the Rules of Procedure, the Applicant's Referral relates to his allegations of violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, as well as Article 24 of the Constitution in conjunction with Article 14 of the ECHR and Article 7 of the UDHR, is manifestly ill-founded on constitutional basis.

115. Whereas, the Applicant's Referral regarding his allegations of violation of Article 29 of the Constitution in conjunction with Article 5 of the ECHR, as well as Article 54 of the Constitution is inadmissible under Article 48 of the Law in conjunction with item (d) of paragraph (1) of Rule 39 of the Rules of Procedure.

Non-disclosure of identity

116. Finally, the Court first notes that the Applicant did not file a request for non-disclosure of identity. However, in the circumstances of the present case, the Court refers to Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure, which stipulates that *"[…] The Court by majority vote authorizes non-disclosure of identity or grants it without a request from a party. When non-disclosure of identity is granted by the Court, the party should be identified only through initials or abbreviations or a single letter".*

117. In this regard, the Court, based on the case file, as well as taking into account the sensitivity of the case, considers that in order to protect the identity of the victim and the minor child, the non-disclosure of the identity of the Applicant is considered necessary. Therefore, the Court referred to the Applicant in this Resolution with initials.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20, 47 and 48 of the Law and Rules 32 (6), 39 (1) (d) and (2) and 39 (1) (b) of the Rules of Procedure, on 9 July 2020, unanimously:

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOT DISCLOSE the Applicant's identity;

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**
Selvete Gërxhaliu - Krasniqi	Arta Rama-Hajrizi

KI243/19, Applicant: Muhamet Idrizi, Constitutional review of Judgment PML. No. 290/2019 of the Supreme Court of Kosovo, of 21 October 2019

KI243/19, Resolution on Inadmissibility, adopted on 16 September 2020, published on 06 October 2020

Keywords: *individual referral, criminal procedure, manifestly ill-founded referral, inadmissible referral*

The Referral was submitted by Muhamet Idrizi, residing in the Municipality of Viti.

The Applicant therefore challenges the abovementioned Judgment, alleging in essence a violation of the right to a fair and impartial trial. The Applicant essentially requests the Court to declare his Referral admissible; annul all decisions of the regular courts and remand his case for retrial to the first instance court, and complains that he was not properly represented by his lawyer.

In assessing the Applicant's allegations, the Court reiterates its general position that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would result in exceeding the limits set by its jurisdiction. In accordance with its already consolidated case-law, the Court reiterates that it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law and that the Constitutional Court cannot make assessments as to why a regular court has decided in one way and not in another (see case of the Court KI70/11, Applicant *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

Based on the case file, the Court notes that the reasoning given in the Judgment of the Supreme Court is clear and after reviewing all the proceedings, the Court also found that the proceedings before the regular courts were not unfair or arbitrary.

Regarding the allegation concerning his defense counsel, where, according to the Applicant, his defense counsel acted in violation of the Law on the Bar to the detriment of his interests, which in fact does not constitute a valid argument for review before the Constitutional Court, moreover when the Applicant himself had the opportunity to revoke his defense counsel at all stages of the proceedings, and it is proved that he did not do so until now. The Court reiterates that the bringing the lawyer or the representative

authorized by the Applicant himself is responsibility of the Applicant. Any procedural action or inaction on the representative's part are in principle attributable to the applicant himself.

Therefore, taking into account the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicant has not proved and has not sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR. Consequently, the Referral on constitutional basis, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (2) of the Rules of Procedure, is manifestly ill-founded and is to be declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI243/19

Applicant

Muhamet Idrizi

Constitutional review of
Judgment PML. No. 290/2019 of the Supreme Court of Kosovo,
of 21 October 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 Muhamet Idrizi, residing in the Municipality of Viti (hereinafter: the Applicant).

Challenged decision

2. The challenged decision is Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court).

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment, which allegedly violates the Applicant's fundamental human rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution

of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights (hereinafter: the ECHR).

Legal basis

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

Proceedings before the Court

5. On 30 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 9 January 2020, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.

7. On 9 January 2020, lawyer Shemsedin Pira submitted a Referral to the Court on behalf of the Applicant.

8. On 30 January 2020, the Court notified the Applicant about the registration of the Referral and requested clarification as to whether he is represented by lawyer Shemsedin Pira or not.

9. On 5 February 2020, the Applicant notified the Court that he was not represented by any lawyer including lawyer Shemsedin Pira, proving this by attaching the revocation of the notarized power of attorney.

10. The Court notified and sent a copy of the Referral to the Supreme Court, it also notified the lawyer Shemsedin Pira about his revocation by the Applicant.

11. On 15 July 2020, the Applicant submitted urgency to the Court.

12. On 16 September 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 29 December 2008, the District Prosecutor's Office in Gjilan (hereinafter: the District Prosecutor's Office) filed the Indictment [PP. No. 168/08] against the Applicant, on the grounded suspicion that he in cooperation with Sh. I. and assisted by E.I., committed the criminal offense established in Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration) and Article 328 (Unauthorized ownership, control, possession or use of weapons) of the Provisional Criminal Code of Kosovo (hereinafter: PCCK), as on 2 September 2008, he attempted to deprive of life R.E. and Sh. E.

14. On 8 June 2009, the District Court in Gjilan (hereinafter: the District Court) by Judgment [P. No. 25/2009] acquitted the Applicant of the abovementioned charges, while the person, who allegedly assisted in the commission of the criminal offense, namely, E.I. was acquitted of the charge of committing the criminal offense set forth in Article 147 of the PCCK, while finding him guilty of committing the criminal offense established in Article 328 of the PCCK.

15. The District Prosecutor's Office filed an appeal with the Supreme Court against the abovementioned Judgment of the District Court on the grounds of essential violations of the provisions of criminal procedure and incomplete and erroneous determination of factual situation, with the proposal that the case be remanded for retrial. The Applicant and E. I. filed a response to the appeal of the District Prosecutor's Office, requesting that it be rejected as ungrounded.

16. On 7 March 2012, the Supreme Court, by Decision [AP. No. 393/2012] approved the appeal of the District Prosecutor's Office as grounded and annulled the Judgment [P. No. 25/2009] of the District Court in respect of the Applicant and remanded the case for retrial.

17. On 22 November 2017, the Basic Court, by Judgment [PKR. No. 107/2012], found the Applicant guilty of committing the criminal offense under Article 147 (Aggravated Murder) in conjunction with Articles 20 (Attempt) and 23 (Co-perpetration) of the PCCK and sentenced him to 3 (three) years of imprisonment. Whereas, the charge of committing the criminal offense provided by Article 328 (Unauthorized ownership, control, possession or use of weapons) of the PCCK was rejected. By the same Judgment, the accused E. I. was acquitted of the charge.

18. The Applicant and the Basic Prosecutor's Office in Gjilan (hereinafter: the Basic Prosecutor's Office) filed an appeal against the

abovementioned Judgment. The first, namely the Applicant, on the grounds of essential violations of the provisions of the criminal procedure, incomplete and erroneous determination of factual situation, violation of the criminal law and the decision on the criminal sanction; while the second, namely the Basic Prosecutor's Office, for the acquittal part of the Judgment for the accused E.I., and on the grounds of essential violations of the provisions of the criminal procedure and in conjunction with the criminal sanction for the criminal offense for which the Applicant was found guilty.

19. On 19 April 2018, the Court of Appeals by Judgment [PAKR. No. 108/2018], rejected the appeals of the Basic Prosecutor's Office and the Applicant and upheld the aforementioned Judgment of the Basic Court, namely Judgment [PKR. No. 107/2012] of 22 November 2017.

20. The Applicant and his defense counsel, separately, filed requests for protection of legality with the Supreme Court against the Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with Judgment [PKR. No. 107/2012] of the Basic Court, on the grounds of essential violations of the provisions of criminal procedure and violation of criminal law. In their requests they alleged, *inter alia*, that the Basic Court, by changing the description of the criminal offense and finding that the Applicant "*committed the criminal offense with persons currently unknown*", exceeded the charge contrary to the provisions of the Criminal Procedure Code of the Republic of Kosovo (hereinafter: CPCRK). State Prosecutor by submission [KMLP. No. 155/2018], submitted a response to the requests for protection of legality, proposing that they be rejected as ungrounded.

21. On 18 October 2018, the Supreme Court, acting upon the request for protection of legality filed by the Applicant's defense counsel, by Judgment [PML. No. 226/2018] rejected as ungrounded this request for protection of legality against Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with Judgment [PKR. No. 107/2012] of the Basic Court.

22. On 3 December 2018, the Supreme Court, acting upon the request for protection of legality filed by the convict, namely the Applicant, by Judgment [PML. No. 293/2018] also rejected as ungrounded this request for protection of legality against the Judgment [PAKR. No. 108/2018] of the Court of Appeals in conjunction with the Judgment [PKR. No. 107/2012] of the Basic Court.

23. On 30 November 2018, namely on 14 January 2019, the Applicant and his defense counsel submitted their Referrals to the Court, which were registered as KI187/18 and KI11/19.

24. On 29 July 2019, the Court decided to declare Referral KI187/18 inadmissible, while it declared admissible for review on merits Referral KI11/19 and found that in Judgment PML. No. 293/2018, of 3 December 2018 of the Supreme Court there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with paragraph 1, of Article 6 [Right to a fair trial] of the ECHR.

25. On 21 October 2019, the Supreme Court by Judgment [PML. No. 290/19] rejected as ungrounded the Applicant's request for protection of legality.

Applicant's allegations

26. The Applicant in his Referral alleges that the Supreme Court by Judgment [PML. No. 290/2019] of 21 October 2019, violated his fundamental rights and freedoms guaranteed by Articles 30 [Rights of the Accused] and 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

27. The Applicant specifically alleges that his rights guaranteed by Articles 30 and 31 of the Constitution in conjunction with Article 6 of the ECHR have been violated because his representative did not properly protect him during the trial and according to the Applicant, made the defense in contradiction with paragraph 7 of Article 11 of Law No. 03/L-117 on the Bar of 25 March 2009 (hereinafter: the Law on the Bar), because there was a conflict of interest, a fact of which the Applicant was not informed. According to the Applicant, the lawyer of the case Sh. P., was also the defense counsel of the person R. E. in another criminal case, but who was also the main witness in the criminal proceedings against the Applicant. In addition, according to the Applicant's allegations, the lawyer in question reflected obvious and persistent negligence during his defense.

28. The Applicant further states that (i) his lawyer was not sufficiently engaged and did not prepare a convincing legal argument, which allegedly violated his rights guaranteed by the Constitution and the ECHR, which relate to effective defense during the trial, and (ii) that the engagement of his lawyer was minimal, and in many court

hearings he sent another lawyer to replace him and that he did not attend at all the hearings.

29. The Applicant also alleges that the Judgments of the regular courts contained essential violation of the criminal provisions under Article 384 paragraph 1 subparagraphs 1.10 and 1.12 in conjunction with Article 370 of the CPCRK.

30. Finally, the Applicant requests the Court to declare his Referral admissible; annul all decisions of the regular courts and remand his case for retrial to the first instance court.

Admissibility of the Referral

31. The Court first examines whether the admissibility requirements established in the Constitution, and further specified in the Law in the Rules of Procedure have been met.

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

> *"1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*
>
> *[...]*
>
> *7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law."*

33. The Court also examines whether the Applicant has fulfilled the admissibility requirements, which are further prescribed in the Law. In this regard, the Court first refers to Article 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47
[Individual Requests]

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

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

Article 48
[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

34. With regard to the fulfillment of these requirements, the Court finds that the Applicant is an authorized party, who challenges an act of a public authority, namely Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court, after having exhausted all legal remedies provided by law. In this regard, the Applicant's Referral is in accordance with the criteria set out in paragraphs 1 and 7 of Article 113 of the Constitution and Articles 47 and 48 of the Law. The Applicant also submitted the Referral in accordance with the deadline set out in Article 49 of the Law.

35. In addition, the Court considers whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (2) of the Rules of Procedure establishes the criteria based on which the Court may consider a referral, including the requirement that the Referral is not manifestly ill-founded. Specifically, Rule 39 (2) 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."

36. The Court recalls that the Applicant alleges that, despite the review of his case by the Supreme Court, the challenged decision violated his right to a fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR. The Applicant also alleges that his rights guaranteed by Article 30 [Rights of the

Accused] of the Constitution have been violated, because he has not been well protected by his lawyer.

37. The Court first recalls that in its Judgment in cases KI187/18 and KI11/19, it found a violation of the right to a fair trial, as the Judgment of the Supreme Court PML. No. 293/2018, of 3 December 2018, was rendered in violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR because (i) it was rendered in the composition of a Panel, in which, contrary to the relevant provisions of the criminal procedure and the case law of the ECtHR and of the Court, was attended by a judge who was also part of the decision-making in the earlier stages of the same criminal case, namely he participated as a member of the trial panel in the District Court when it was decided on the criminal charge of the Applicant and also as a member of the Panel when it was decided on his request for protection of legality in the Supreme Court; and in such circumstances, (ii) legitimate suspicions about the lack of impartiality of the court are objectively justifiable.

38. The Court notes that by Judgment in cases KI187/18 and KI11/19, it declared invalid only one of the Judgments of the Supreme Court, namely, Judgment [PML. No. 293/2018] of 3 December 2018, rendered as a result of the request for protection of legality of the defendant, namely the Applicant, against the Judgment [PAKR. No. 108/2018] of 19 April 2018 of the Court of Appeals. Whereas, it did not address the allegations regarding the Judgment [PML. No. 226/2018] of 18 October 2018 of the Supreme Court, because the request regarding the constitutional review of the latter, was declared inadmissible. This result of the review of the constitutionality of two Judgments of the Supreme Court dealing with requests for protection of legality against the same Judgment of the Court of Appeals, stems from the fact that the Supreme Court, in the circumstances of the present case, treated separately requests for protection of legality of filed by the defendant and his defense counsel, deciding by two Judgments.

39. In this regard, the Court considers that it was the duty of the Supreme Court to reconsider its decision in accordance with the findings of the decision of the Constitutional Court and to inform the Court about the implementation of its decision.

40. The Court notes that the Supreme Court, pursuant to the Judgment of the Court, reconsidered the request for protection of legality of the Applicant on the basis of the findings of the Judgment in case KI187/18 and KI11/19, regarding the allegations of the composition of

the trial panel. The Supreme Court, after eliminating the violation found by the Judgment of the Court, reconsidered the allegations of the Applicant and decided to declare them ungrounded.

41. Consequently, the Court considers that the Supreme Court eliminated the violation according to the findings in Judgment KI187/18 and KI11/19 of the Court, and thus fulfilled its obligation regarding the implementation of the Judgment of the Constitutional Court.

42. The Court recalls that the Applicant also raises other allegations in relation to Judgment [PML. No. 290/2019] of 21 October 2019 of the Supreme Court. The Applicant refers to the violation of Article 30 [Rights of the Accused] of the Constitution, while with regard to Article 31 of the Constitution in conjunction with Article 6 of the ECHR, he also alleges, as stated above, that (i) his defense counsel acted in violation of the Law on the Bar, thereby harming his interests; and (ii) the challenged Judgment was rendered in violation of certain provisions of criminal procedure.

43. With regard to the alleged violation of Article 30 of the Constitution, the Court notes that a mere mentioning of articles of the Constitution, is not sufficient to build a reasoned allegation of constitutional violations. When alleging such violations of the Constitution, the Applicants must provide reasoned allegations and convincing arguments (see, in this regard, case of the Court, KII36/14, *Abdullah Bajqinca*, Resolution on Inadmissibility of 10 February 2015, paragraph 33).

44. With respect to the allegations that (i) the challenged Judgment was rendered contrary to certain provisions of criminal procedure; (ii) his defense counsel acted in violation of the Law on the Bar, consequently harming his interests, the Court considers that the Applicant has built his case on the basis of legality, namely on erroneous determination of facts, as regards his representation by his defense counsel, as well as the erroneous interpretation of the law by the regular courts.

45. The Court recalls that these allegations relate to the way in which the regular courts have determined the facts of the case and made the relevant legal interpretations.. As such, these allegations relate to the domain of legality and, in principle, do not fall within the jurisdiction of the Constitutional Court (see case of the Court KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 35).

46. In this regard, the Court reiterated its general position that it is not its duty to deal with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). If it were otherwise, the Court would be acting as a court of "*fourth instance*", which would result in exceeding the limits set by its jurisdiction. In accordance with its already consolidated case-law, the Court reiterates that it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law and that the Constitutional Court cannot make assessments as to why a regular court has decided in one way and not in another (see case of the Court KI70/11, Applicant *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

47. The Constitutional Court can only examine whether in a court proceeding, the evidence was presented in a correct manner and whether the proceedings in general, viewed in their entirety, were conducted in such a way that the Applicant had a fair trial.

48. Based on the case file, the Court notes that the reasoning given in the Judgment of the Supreme Court is clear and after reviewing all the proceedings, the Court also found that the proceedings before the regular courts were not unfair or arbitrary.

49. The Court notes that the Supreme Court, having eliminated the violation found in Judgments KI187/18 and KI11/19 of the Constitutional Court, rejected the Applicant's request for protection of legality as ungrounded, filed against the Judgment. of the Basic Court in Gjilan and the Judgment of the Court of Appeals. The Court notes that in Judgment [Pml. No. 290/2019] of 21 October 2019 of the Supreme Court, Judge R.R. was not part of the review panel, thusm he was not part of the decision-making. Part of the review panel in the aforementioned Judgment of the Supreme Court were the judges: E.P. presiding, A.M. and M.M. members. Thus, the Supreme Court eliminated the violation found by the Court through Judgments KI187/18 and KI11/19.

50. Therefore, the Supreme Court, after reviewing the Applicant's allegations in Judgment [Pml. No. 290/2019] of 21 October 2019, stated as follows:

> *"The Supreme Court of Kosovo, after eliminating the violation highlighted in the Judgment of the Constitutional Court of the Republic of Kosovo, again reconsidered the allegations presented in the request.*

The Supreme Court of Kosovo in the panel session reviewed the case file within the meaning of Article 435 par. 1 in conjunction with Article 436 par.1 of the PCCK and after assessing the allegations in the request, found that: the request is ungrounded. According to the assessment of the Supreme Court of Kosovo, the claim of the convict is ungrounded, because the judgments against which he filed a request do not contain violations that are alleged.

In the enacting clause of the judgment of the court of first instance is the description that the convict has acted with other persons currently unidentified, however, this does not make the enacting clause incomprehensible as it is evident that by this judgment only the convict Muhamet Idrizi was found guilty. and was convicted because he used an automatic rifle, which statement is in line with the ballistic expertise, which confirmed that 26 cartridges of 7.26x39 mm caliber were found at the scene and fired from the same weapon, and this was exactly the reason that the court of first instance acquitted the other defendant Enver Idrizi of the criminal offense of aggravated attempted murder. In this case, it turns out that it is not disputed that only the convict Muhamet Idrizi shot with a long gun, which is also confirmed by the injured witnesses Reshat and Shaip Emerllahu, as the court of first instance states in its judgment [on page 5-7 and this reasoning is fully approved by the Supreme Court of Kosovo. The judgment of the first instance court, namely the provisions, is clear and concrete and includes all the data regarding the time, place and manner of committing the criminal offense, while in its reasoning are given clear reasons for the decisive facts which have also been confirmed by the court of second instance.

The allegations stated in the request regarding the alibi of the convict Muhamet Idrizi, namely the circumstance that at the time when the criminal offense was committed he was in another place were not grounded. According to the assessment of the Supreme Court of Kosovo, the allegations regarding the violation of the criminal law, as in this case the fact that the criminal offense was committed for reasons of unscrupulous revenge, were also ungrounded allegations. Based on the manner and circumstances of committing this criminal offense, namely ambush the wel and waiting for the injured, is undoubtedly an aspect of cunning and which is also related to the motive of revenge as a result of the murder that previously the family member of the injured namely, their uncle's son committed to the family of the now convict

Muhamet Idrizi. The fact that it is about revenge motives is also confirmed through the continuation of the chain of violence between these families, namely the murder committed by the family member of the convict Muhamet Idrizi against the relatives of the injured clearly shows the motive for revenge in this case. Therefore, based on the conclusions of the of lower instances courts about the development of the event, the motive and legal qualification are the result of a fair assessment of the evidence administered and consequently the criminal law was correctly applied".

51. In this regard, the Court further considers that the Applicant did not substantiate that the proceedings before the Supreme Court were unfair or arbitrary, or that his fundamental rights and freedoms protected by the Constitution were violated, as a result of erroneous interpretation of the substantive law. The Court reiterates that the interpretation of law is a duty of the regular courts and is the issue of legality (see, *mutatis mutandis*, cases of the Court: KI63/16, Applicant *Astrit Pira*, Resolution on Inadmissibility of 8 August 2016, paragraph 44; and see also case KI150/15; KI161/15; KI162/15; KI14/16; KI19/16; KI60/16 and KI64/16, Applicants *Arben Gjukaj, Hysni Hoxha, Driton Pruthi, Milazim Lushtaku, Esat Tahiri, Azem Duraku and Sami Lushtaku*, Resolution on Inadmissibility of 15 November 2016, paragraph 62).

52. Regarding the allegation concerning his defense counsel, where, according to the Applicant, his defense counsel acted in violation of the Law on the Bar to the detriment of his interests, which in fact does not constitute a valid argument for review before the Constitutional Court, moreover when the Applicant himself had the opportunity to revoke his defense counsel at all stages of the proceedings, and it is proved that he did not do so.

53. The Court reiterates that bringing the lawyer or the representative authorized by the Applicant himself is responsibility of the Applicant. Any procedural action or inaction on the representative's part are in principle attributable to the applicant himself (see *Bekauri v. Georgia*, No. 14102/02 ECtHR, Judgment of 10 April 2012, paragraphs 22-25; and see *mutatis mutandis*, *Migliore and Others v. Italy*, No. 58511/13 ECtHR, Decision of 27 January 2014; see cases of the Court: case No. KI02/10, *Applicant Roland Bartezko,* Resolution on Inadmissibility, , paragraph 25-28, 21 March 2011; KI61/15, *Applicant Islam Krasniqi*, Resolution on Inadmissibility of 10 September 2015, paragraph 33).

54. Therefore, taking into account the allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, finds that the Applicant has not proved and has not sufficiently substantiated his allegations of violation of his fundamental rights and freedoms guaranteed by the Constitution and the ECHR.

55. Consequently, the Referral on constitutional basis, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (2) of the Rules of Procedure, is manifestly ill-founded and is to be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113.1 and 113.7 of the Constitution, Articles 20 and 47 of the Law and Rules 39 (2) and 59 (2) of the Rules of Procedure, on 16 September 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Arta Rama-Hajrizi

KI71/20, Applicant, Etem Arifi, Constitutional review of Judgment Pml. No. 380/2019, of the Supreme Court of Kosovo, of 30 January 2020

KI71/20, Resolution on Inadmissibility of 23 September 2020, published on 28 October 2020

Keywords: *Individual referral, right to fair and impartial trial, legal certainty, manifestly ill-founded*

The Basic Court in Prishtina, by its Judgment PKR. 740/16, found the Applicant guilty of committing, in co-perpetration the criminal offense "*Subsidy fraud*" under Article 336 paragraph 3 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK) in conjunction with Article 31 of the CCRK, sentencing him to imprisonment in terms of two (2) years, provided that within a period of three (3) years he does not commit any other criminal offense. The Basic Court in Prishtina also obliged the Applicant and the other convict [B.G.] to jointly compensate the damage caused: (i) 22,900 euro - to the Ministry of Labor and Social Welfare; and (ii) 2,749 euro – to the Office of the Prime Minister. Compensation was ordered to be made in installments within a time period of six (6) months. With regard to the accusation of committing the criminal offense of "*trading in influence*", under Article 431 paragraph 1 of the CCRK, the Basic Court acquitted the Applicant of charges in this point. Following the appeal of the Applicant and the Special Prosecution of the Republic of Kosovo, the Court of Appeals modified the Judgment of the Basic Court in Prishtina in the sentencing part regarding the decision on punishment and obligation regarding the legal qualification of the criminal offense, so that the Court of Appeals found that in the actions of the accused, the elements of the criminal offense of fraud in subsidies are formed, under Article 336 paragraph 3, in conjunction with paragraphs 2 and 1 of Article 31 of the CCRK and for this criminal offense sentences the Applicant with (1) year and (3) months imprisonment, while as to the acquittal part regarding the Applicant, the decision is annulled and the case is remanded to the same court for retrial. Following the Applicant's request for protection of legality filed by the Applicant, the Supreme Court upheld the request for protection of legality, annulling the Judgment of the Court of Appeals and remanding the case to reconsideration, due to the participation of the judge who should have been excluded. The main reason on which the Supreme Court decided to approve the request for protection of legality as grounded was precisely the participation of the judge who in the procedure for confirmation of the indictment in the Court of Appeals should have been excluded

The Court of Appeals, acting on the retrial, decided the same as in its first Judgment, except for item II through which it decided that the Applicant and [B.G] are obliged to compensate the Ministry of Labor and Social Welfare in the name of the damage caused in the amount of 22,900 euro, while the Office of the Prime Minister of the Republic of Kosovo - Office for Communities in the amount of 2,749 euro, all within 3 months. Following the second request for protection of legality, filed by the Applicant, the Supreme Court rejected as ungrounded the request for protection of legality.

The Applicant alleged that the challenged decision was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights.

In essence, the Applicant alleged before the Court that the violation of his right to a fair and impartial trial occurred as a result of: (i) violation of the principle of legal certainty (ii) lack of reasoning of the court decision; (iii) the Applicant's absence from the hearing session in the Court of Appeals.

The Applicant also requested the imposition of an Interim Measure before the Court.

First, regarding the Applicant's first allegation of violation of the principle of legal certainty, and which relates to his allegation of a violation of the *Reformato in Peius* principle by the Court of Appeals, which by Judgment PAKR. No. 328/19 of 20 August 2019, the deadline for compensation of the damage caused, is reduced from 6 months to 3 months, the Court found that this allegation was raised by the Applicant for the first time before the Court. Also regarding the allegation that the Applicant raised in the request for protection of legality before the Supreme Court, against the decisions of the lower instance courts, with the allegation that a violation of criminal law has been committed when it comes to the time of execution of the criminal offense, as an essential element of the figure of the criminal offense and erroneous application of the law, the Court found that the Supreme Court has clearly clarified this allegation of the Applicant, in the reasoning of Judgment PML. No. 380/2019 of 30 January 2020.

With regard to the allegation of not reasoning of the decision, the Court, based on its case law and that of the European Court of Human Rights, assessed that the Applicant has not proved and has not sufficiently substantiated his allegations that the proceedings before the courts were in some way unfair or arbitrary and that through the challenged Judgment the right to fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the European Convention on Human Rights, has been violated.

Thirdly, regarding the Applicant's allegation of the Applicant's absence from the hearing in the Court of Appeals, the Court found that his Applicant's allegation is ungrounded.

Therefore, the Court in accordance with Article 113.7 of the Constitution, Article 20 of the Law and Rules 39 (2) and 57 (5) of the Rules of Procedure decided to declare the Referral inadmissible as manifestly ill-founded on constitutional basis and to reject the request for interim measure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI71/20

Applicant

Etem Arifi

Constitutional review of Judgment Pml. No. 380/2019, of the Supreme Court of Kosovo, of 30 January 2020

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 Etem Arifi, who is represented by Kujtim Kërveshi, a lawyer from Prishtina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment Pml. No. 380/19 of the Supreme Court of Kosovo (hereinafter: the Supreme Court), of 30 January 2020. The challenged Judgment rejected as ungrounded the request for protection of legality of the Applicant filed against Judgment PKR. No. 740/2016 of the Basic Court in Prishtina of 20 April 2018 and Judgment PAKR. No. 328/19 of the Court of Appeals of Kosovo of 20 August 2019 [*Clarification: The Judgment of the Supreme Court which rejected the Request for Protection of Legality as ungrounded, the number of the Judgment of the Court of Appeals PAKR. No.*

328/19 of 20 August 2019, turns out to be incorrectly marked, referring to the first Judgment of the Court of Appeals PAKR. No. 328/2018 of 28 March 2019. This is noted by the content of the Judgment of the Supreme Court Pml. No. 380/2019, of 30 January 2020 as well as from the Request for Protection of Legality submitted to the Supreme Court by the Applicant].

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violates 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. At the same time, the Applicant requests the Court the imposition of an interim measure stating that: "*we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant*".

Legal basis

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

Proceedings before the Constitutional Court

6. On 27 April 2020, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 19 May 2020, the President of the Court appointed Judge Safet Hoxha, as Judge Rapporteur and the Review Panel composed of Judges: Selvete Gërxhaliu-Krasniqi, (Presiding), Bajram Ljatifi and Radomir Laban (members).

8. On 29 May 2020, the Court notified the Applicant's representative about the registration of the Referral. On the same date, the Court notified the Supreme Court about the registration of the Referral.

9. On 3 June 2020, the Court also notified the Basic Court in Prishtina about the registration of the case and requested them to submit the complete case file to the Court within seven (7) days.

10. On 5 June 2020, the Basic Court in Prishtina submitted the complete case file to the Court.

11. On 1 July 2020, the Applicant submitted to the Court "*Request to deal with urgency with the request for interim measure*".

12. On 23 September 2020, the Review Panel considered the report of the Judge Rapporteur, and by a majority, recommended to the Court the inadmissibility of the Referral.

13. On the same date, the Court voted by a majority, the inadmissibility of the Referral.

Summary of facts

14. On 9 December 2016, the Special Prosecution of the Republic of Kosovo, filed an Indictment PPS. No. 158/2014 against the Applicant on suspicion of having committed in co-perpetration the criminal offense "*Subsidy fraud*" under Article 336, paragraph 3 in conjunction with Article 31 of the Criminal Code of the Republic of Kosovo (hereinafter: the CCRK) as well as the criminal offense of "*Trading in influence*", under Article 431, paragraph 1 of the CCRK. With the same Indictment for the criminal offense "*Subsidy fraud*" under Article 336, paragraph 3 in conjunction with Article 31 of the CCRK, the person B.G was also charged with co-perpetration.

15. On an unspecified date, the Applicant filed a request for dismissal of the Indictment and the objection of evidence with the Basic Court in Prishtina, Department for Serious Crimes (hereinafter: the Basic Court), alleging that there is no sufficient evidence to substantiate the reasonable suspicion that the Applicant has committed the criminal offense he is charged with.

16. On 28 June 2017, the Basic Court, by Decision PKR. No. 740/16, rejected the Applicant's request for dismissal of the Indictment and objection of evidence.

17. On 18 September 2017, the Applicant filed an appeal with the Court of Appeals against Decision PKR. No. 740/16 of the Basic Court, alleging essential violation of the provisions of criminal procedure and violation of criminal law. The Applicant, *inter alia*, stated in the complaint that "*The* [Basic] *Court has bypassed the important fact presented in the indictment in question. The allegations of the Special Prosecution described in the indictment include the period from December 2012 to July 2013 within which the legal system in Kosovo has undergone radical reform. [...] it is very important to accurately determine the time and place of the commission of the criminal offense because they determine the offense, the criminal sanction and above all the application of the law".*

18. On 5 October 2017, the Court of Appeals by Decision PN. No. 779/2017 rejected as ungrounded the Applicant's appeal, considering that his allegations were not grounded. Regarding the above mentioned specific allegation of the Applicant, the Court of Appeals in Decision PN. No. 779/2017 reasoned as follows: "*the appealing allegations are ungrounded. The fact remains that the time of commission of the criminal offense and the place of commission are features of the criminal offense, but the allegations in this regard are unfounded because the enacting clause of the indictment states both the time and place of commission where the offenses have allegedly been committed. It is also evident that according to the indictment it is alleged that the defendant from December 2012 to July 2013 abused the subsidies received, but from this it cannot be concluded that the criminal law was applied incorrectly, because the latest actions were taken during 2013 (incriminating actions were taken from 20.12.2012 to 30.07.2013) and the criminal offense is classified according to the Criminal Code that entered into force in the same year* (2013), *while what law is more favorable in use remains the issue that the Court will assess [...]".*

19. On 20 April 2018, the Basic Court rendered Judgment PKR. 740/16, which found the Applicant guilty of committing, in co-perpetration, the criminal offense "*Subsidy fraud*" under Article 336.3 of the CCRK in conjunction with Article 31 of the CCRK. In that case, the Basic Court imposed on the Applicant a suspended sentence to imprisonment for a term of two (2) years, provided that within a period of three (3) years he does not commit any other criminal offense. The Basic Court also obliged the Applicant and the other convict to jointly compensate the damage caused: (i) 22,900 euro - to the Ministry of Labor and Social Welfare (hereinafter: the MLSW); and (ii) 2,749 euro - Office of the Prime Minister. Compensation was

ordered to be made in installments within a time period of six (6) months.

20. With regard to the accusation of committing the criminal offense of "*trading in influence*", under Article 431.1 of the CCRK, the Basic Court acquitted the Applicant on the grounds that "*it has not been proven that the accused committed the criminal offense which he is charged with*".

21. The Basic Court in the above-mentioned sentencing Judgment [PKR. 740/16] among others stated *"[…] Based on the preliminary agreement and co-operation, from December 2012 to July 2013, they used in violation of the law the subsidies received from the Ministry of Labor and Social Welfare for three projects for education and integration of the Roma, Ashkali and Egyptian community in the total amount of 22,900.00 as well as the subsidy from the Office of the Prime Minister for integration amounting to 2,749.00 € […] the defendant Etem Arifi* [the Applicant] *has influenced the officials of the Ministry of Labor and Social Welfare for granting subsidies, even though he knew that this NGO is a fictitious organization […].] Thus, based on the evidence provided by the application of convert measures registration of entry and exit and the contents of the SMS for the telephone numbers of the accused* [B.G] *and Etem Arifi it has been established that the accused Etem Arifi and* [BG] *have cooperated in receiving donations from MLSW and it has been established that the accused Etem Arifi has directly influenced with messages to MLSW officials to allocate these donations to the NGO […].*

22. On 19 June 2018, the Special Prosecution of the Republic of Kosovo filed an appeal with the Court of Appeals against the abovementioned Judgment of the Basic Court, alleging that regarding the incriminating part of the above-mentioned Judgment regarding the criminal sanction, "*The first instance judgment is ungrounded in terms of criminal sanctions imposed"* while regarding the acquittal part of the above Judgment, the Special Prosecution of the Republic of Kosovo, alleged essential violation of the provisions of criminal procedure.

23. On 26 June 2018, against the abovementioned Judgment of the Basic Court [PKR. 740/16], the Applicant filed an appeal with the Court of Appeals, alleging essential violation of the provisions of criminal procedure, violation of criminal law, erroneous and incomplete determination of factual situation and the decision on the criminal sanction. The Applicant in his appeal among others argued that: "*Mr. Arifi was not the person responsible for establishing and operating*

the budget of the NGO " Zëri i Ashkalinjëve " (ZAI) and the Court selectively made the assessment by trusting the witnesses (of its own choosing) and apparently leaving the impression that despite the evidence, testimonies and the law has supported the allegation of the Prosecution that Mr. Arifi MUST be convicted in this trial even though the Prosecution has not provided evidence to substantiate the well-founded suspicion because the accused did not have the role of founder, manager, authorized person, moreover he was never authorized to bank account opened in the name of ZAI and consequently could not even withdraw money from the latter".

24. On 28 March 2019, the Court of Appeals, by Judgment PAKR. No. 328/2018 decided to:

> "I. *the judgment of the Basic Court is modified [...] in the sentencing part regarding the decision on punishment and the obligation regarding the legal qualification of the criminal offense so that this Court [of Appeals] finds that in the actions of the accused Etem Arifi and* [BG] *described in the enacting clause I of the judgment are formed the elements of the criminal offense of subsidy fraud, from Article 336 par 3 in conjunction with paragraphs 2 and 1 of Article 31 of the CCRK and for this criminal offense sentences the accused with (1) year and (3) months imprisonment* [...] [The part on the property claim, the Court of Appeals states that it remains the same as in Judgment PKR. 740/16, of 20 April 2018, of the Basic Court].
> II. *Whereas, the above-mentioned judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the same Court for retrial.*
> *III. The appeals of the defendants' defence counsels are rejected as ungrounded*".

25. The Court of Appeals in its Judgment reasoned that, the Basic Court when imposing the sentence has taken into account the mitigating circumstances, but those circumstances cannot be considered of the nature that justify the suspended sentence, given the gravity of the criminal offense, the damage caused, and the fact that the Applicant is a member of the Assembly of the Republic of Kosovo. Regarding the acquittal part of Judgment PKR. 740/16, the Court of Appeals stated that this part is remanded for retrial as the Basic Court did not reason the fact why it acquitted the Applicant of the charge of committing the criminal offense "*trading in influence* ", under Article 431.1 of the CCRK.

26. On 14 May 2019, the Basic Court sent to the Office of Criminal Sanctions a proposal for the execution of the imprison sentence for the Applicant.

27. On 22 May 2019, the Applicant filed a request for protection of legality with the Supreme Court, against Judgment PAKR. No. 328/2018, of the Court of Appeals. In his request, the Applicant alleged that the above-mentioned Judgment of the Court of Appeals was rendered in violation of the provisions of the criminal procedure, as the judge who participated in the composition of the trial panel of the court of second instance participated in the composition of the Panel of the Court of Appeals when deciding according to Decision PN. no. 779/2017 of 5 October 2017, on the appeal regarding the request for dismissal of the indictment and objection of evidence. Also, the Applicant alleged erroneous determination of facts, stating that Judgment PAKR. No. 328/2018 is contradictory and alleged violation of criminal law.

28. On 20 June 2019, the Supreme Court, by Judgment Pml. No. 168/2018 approved the request for protection of legality, annulling Judgment PAKR. No. 328/2018 of the Court of Appeals and remanding the case for retrial. The basic reason on which the Supreme Court decided to approve the request for protection of legality as grounded was precisely the participation of the judge who should have been excluded, according to the Supreme Court and according to the Applicant. In this context, the Supreme Court noted that "it *has not assessed other alleged violations as the composition of the court was not in accordance with the law, namely that the judge who should have been excluded participated in rendering the judgment, which constitutes an essential violation of the provisions of criminal procedure under article 384 par.1 .1.2 of the CPCK and as such conditions the annulment of the judgment of the second instance court".*

29. On 20 August 2019, the Court of Appeals, acting on retrial, rendered Judgment PAKR. No. 328/19. By it, the Court of Appeals decided the following:

> I. *With the approval of the appeal of the Special Prosecution of the Republic of Kosovo, Judgment PKR.no.740116 of the Basic Court DSC in Prishtina is modified, of 20.04.2018 in the sentencing part regarding the decision on the sentence [...], and for this criminal offense [...] sentences the accused Etem Arifi to 1 year and 3 months imprisonment [...].*
> II. *The accused Etem Arifi and [BG], are obliged to compensate the Ministry of Labor and Social Welfare in the name of the*

damage caused the amount of € 22,900, while the Office of the Prime Minister of the Republic of Kosovo-Office for Communities the amount of € 2,749, all within 3 months.
III. With the approval of the appeal [s] of the SPRK, and ex officio, the judgment in the acquittal part regarding the accused Etem Arifi is annulled and the case is remanded to the Basic Court DSC in Prishtina for retrial.
IV. The appeals of the defense counsels and the accused are rejected as ungrounded".

30. With regard to the Applicant's other allegations, the Court of Appeals stated that "*the appealed judgment does not contain essential violations of the provisions of the criminal procedure alleged in the appeal of the accused Etem Arifi [...] nor other violations which this court takes care of ex officio, which would condition the annulment of the appealed judgment. The Court of Appeals considers that the first instance court in the appealed judgment has given sufficient and clear reasons on which it is based when resolving this legal matter, in particular when proving the existence of a criminal offense and criminal liability of the accused for which they have been announced and this court accepts as fair the reasons presented regarding the evidence administered in the court hearing".*

31. On 1 November 2019, the Basic Court sent again to the Office of Criminal Sanctions the proposal for the execution of the imprisonment sentence for the Applicant.

32. On 18 November 2019, the Applicant submitted his second request for protection of legality to the Supreme Court. In this case, he filed a request against the Judgment of the Basic Court PKR. No. 740/16 of 20 April 2018 and Judgment PAKR 328/19 of the Court of Appeals of 20 August 2019, alleging violation of the provisions of criminal procedure and violation of criminal law. In his second request for protection of legality the Applicant specifically claimed the following:

(i) The judgments which he challenges are incomprehensible and contradictory and that they are not reasoned and that the reasons have not been presented in relation to the decisive facts;

(ii) His actions do not in any way constitute a criminal offense because the Applicant was not at all an integral part of the NGO "Zëri i Ashkalinjëve për Integrim" nor did he seek, sign, use the benefits, etc. From the funds requested and benefited by the NGO "Zëri i Ashkalinjëve për Integrim" with the destination

defined by the request submitted to the MLSW, but the finding that it had a role based on material evidence is unrounded;

(iii) Decisions against which a request for protection of legality was filed have been rendered in violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense. In this respect, it was specifically claimed that "*the issue of determining the time of commission of a criminal offense is of special practical importance because it depends on this fact what law will be applied, namely to apply the most favorable law*". The Applicant alleged that the regular courts ignored the important fact presented in the indictment which "*includes the period December 2012 to July 2013 during which the legal system in Kosovo has undergone radical reform".* He further alleges that in the challenged judgments, there is no reference which would clearly define the time of the commission of the criminal offense and what law has been applied in the present case;

(iv) (iv) The Applicant in his request for protection of legality further stated "*The principle of legality known by the phrase "Nullum crimen sine lege, nulla poena sine lege" is a basic principle of the Constitution of Kosovo, the Criminal Code and encompasses the entire legal system of the country. Therefore, this principle should not be ignored by anyone* [...]";

33. On 27 December 2019, the State Prosecutor, by the submission KMLP. II. No. 263/2019, proposed to reject as ungrounded the request for protection of legality submitted by the Applicant.

34. On 30 January 2020, the Supreme Court by Judgment PML. No. 380/2019 rejected as ungrounded the request for protection of legality submitted by the Applicant.

35. First, the Supreme Court, in relation to the Applicant's allegation that his actions do not in any way constitute a criminal offense, held "*That the convict Etem Arifi was aware of all this, speaks the fact that he communicated by phone and in person throughout the period from December 2012 to July 2013, with the convict [BG], which is confirmed by transcripts of "sms" and from the statement of the witness [A.R] as well as by examining the list of banking transactions from the account of the NGO. The first instance and the second instance court, in this factual situation correctly determined, and*

rightly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud from Article 336 par.3 in conjunction with paragraphs 2 and 1 and Article 31 of the CCK, because to commit this criminal offense it is sufficient by falsely presenting facts about the NGO headquarters, staff and program, to be used for purposes for which they were not provided.

36. Secondly, regarding the Applicant's allegation that they were committed in violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense, the Supreme Court reasoned "*The Supreme Court, assessing the allegations from the request as well as based on the case file, finds that the enacting clauses of the judgments are clear, they do not contradict either themselves or their reasoning. In the reasoning of the judgment of the first instance and that of the second instance are presented all the necessary factual and legal reasons on the basis of which the meritorious decision has been taken and which is also approved by this court. Sufficient legal reasons are given in the reasoning regarding all the evidence administered in the court hearings, noting what facts and for what reasons it is proven or unproven and assessing the contradictory evidence in accordance with the provision of Article 370 par. 7 of the CPCK. The case file confirms that the convicts Etem Arifi and* [BG] *were found guilty of the criminal offense of subsidy fraud in co-perpetration under Article 336 par.3 in conjunction with Article 2 and Article 31 of the CCK, and that the latter from December 2012 until July 2013, after previously being in friendly relations, at the same time the convict Etem Arifi was a Member of the Assembly of Kosovo and President of the Ashkali Party, have decided to establish the NGO " Zëri i Ashkalinjeve për Integrim [...] The court of first instance and that of the second instance, in this factual situation, rightly proved, rightly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud in under Article 336 par.3 in conjunction with par. 2 and 1 and Article 31 of the CCK, because in order to commit this criminal offense, it is sufficient that the subsidies obtained by falsely presenting facts related to the headquarters, employees and the program of the NGO, be used for purposes for which they are not provided. Thus, the allegation that the criminal law was violated to the detriment of the convict when he was found guilty of the criminal offense of fraud in subsidies under Article 336 paragraph 3 in conjunction with paragraphs 2 and 1 and Article 31 of the CCK is not grounded. Also, this court finds that the Criminal Code of Kosovo was correctly applied, which entered into force on 01.01.2013, because the criminal offense was committed from December 2012 to July 2013. In criminal offenses which are*

committed in the following, as the time of committing the criminal offense is considered the last incriminated action, in accordance with Article 9 of the CCK, this is taken as a basis for determining what law will be applied. In this case, since the last action was committed in July 2013, the Criminal Code of Kosovo was rightly applied, which entered into force on 01.01.2013"

37. On an unspecified date, the Applicant filed with the Basic Court in Prishtina a request for postponement of the execution of the criminal sanction/prison sentence due to health problems.

38. On 4 March 2020, the Basic Court in Prishtina by Decision Ed. No. 2035/19, approved the Applicant's request and decided to postpone the commencement of the execution of the sentence against the Applicant, until 4 May 2020.

Applicant's allegations

39. The Applicant alleges that Judgment PML. No. 380/2019 of the Supreme Court of 30 January 2020, was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution, in conjunction with Article 6 (Right to a fair trial) of the ECHR.

40. The Applicant considers that the violation of his right to a fair and impartial trial occurred as a result of: (i) violation of the principle of legal certainty (ii) lack of reasoning of the court decision; (iii) the Applicant's absence from the hearing session in the Court of Appeals;

i) Regarding the violation of the principle of legal certainty

41. With regard to this allegation, the Applicant states that "*contrary to the principle Reformato in Peius, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/19 of 20.08.2019, reduces the deadline for compensation of damage caused from 6 months to 3 months. So in this case, legal remedy against the Judgment (with 6 months payment term) was filed only by Mr. Etem Arifi and after his Request for Protection of Legality was approved and the Court of Appeals modified the decision to his detriment*". The Applicant alleges that the Court of Appeals changed the sentence to his detriment, and according to the Applicant this course of action by the Court of Appeals violates the principle of legal certainty.

42. In support of his allegations regarding the violation of the principle of legal certainty, the Applicant refers to the case law of the ECtHR, namely the cases: *Beian v. Romania*, Judgment of 6 December 2007,

Lupeni Greek Catholic Parish and Others v. Romania, Judgment of 29 November 2016

ii) Regarding the lack of reasoning of the court decision

43. With regard to this allegation, first of all, the Applicant considers that in the challenged decision of the Supreme Court "*no clarification has been made between the findings on merit and the assessments regarding the evidence proposed by the State Prosecutor and the legal conclusions of the court on the other hand*".

44. More specifically, the Applicant alleges that the Supreme Court arbitrarily *"has ignored the allegations submitted by the Applicant's defense counsel in the Request for Protection of Legality pf 18.11.2019"*. According to him, the Supreme Court *"does not justify at all the allegations of the defense regarding the meaning of the expression "Subsidy"*.

45. He further states that the Supreme Court has not assessed the Applicant's allegations regarding the completion of the elements of the criminal offense which he was convicted with. This is because according to the Applicant, the CCRK provides that the criminal offense under Article 336 "Subsidy fraud" can be committed if the information he provides when applying for a subsidy is incorrect, conceals any information or misuses such a subsidy. According to the Applicant, these actions can be performed only by the person who carries out business activities. The Applicant emphasizes the fact that the Supreme Court does not distinguish between the expression subsidy and grant/transfer, an allegation which he claims to have raised in the previous regular courts.

46. The Applicant further alleges that the term "Subsidy" in the CCRK is not intended to include any type of funding made from public funds. The CCRK in Article 337, he stated, defines the criminal offense of Fraud related to the receipt of funds from the European Community, or in Article 335 defines the criminal offense of fraud. In this regard, the Applicant states that "*in this case, the criminal offense under Article 336 Subsidy fraud has a very specific purpose, namely to protect the category of Subsidies from possible misuse [...]*".

47. The Applicant adds that even if the Supreme Court in its decision argued on the issue of subsidies, he could not be the perpetrator of the criminal offense of subsidy fraud, as the latter did not apply for obtaining, continuing or modifying conditions for receiving the

subsidy, because this was done by the Director of the Non-Governmental Organization "Zëri i Ashkalinjëve për Integrim".

48. The Applicant further adds that he "*does not have and has not had any position within the NGO "Zëri i Ashkëlinjëve për Integrim" and the application was submitted by the director of this NGO [B.G]. Also the other elements of this criminal offense are completed by [B.G] as he is the person who submitted inaccurate or incomplete data and then did not disclose the data related to the transfer/grant expenditure [...]. Thus, in this case, the failure of the Supreme Court of Kosovo to reason the distinction of the elements of the criminal offense and the fact who may be the perpetrator of that criminal offense constitutes a violation of the right to a fair and impartial trial*".

49. In support of his allegations regarding the lack of reasoning of court decisions, the Applicant referred to the case law of the Constitutional Court, namely the cases: KI 146/17, 147/17, KI 148/17, KI 149/17 and KI 1590/17, Applicants *Isni Thaqi, Zeqir Demaku, Fadil Demaku, Nexhat Demaku and Jahir Demaku*, Judgment of 30 May, 2018; KI 135/14, Applicant *IKK Classic*, Judgment of 10 November 2015; KI172/12, Applicants *Veton Berisha and Ilfete Haziri*, Judgment of 5 December 2012. He further referred to the case law of the European Court of Human Rights (hereinafter: the ECtHR), namely the case *Tatishvili v. Russia*, Judgment of 22 February 2007; *Hiro Balani v. Spain*, Judgment of 9 December 1994; *Higgins and Others v. France*, Judgment of 19 February 1998; *Papon v. France*, Judgment of 7 June 2001.

ii) *Regarding the absence of the Applicant in the hearing session in the Court of Appeals*

50. With regard to this allegation, the Applicant emphasizes that the right to a fair trial in principle means the right of the parties to be present in person at the trial of their case.

51. He emphasizes that "*on the occasion of rendering Judgment PAKR. 328/2018 of 28.03. 2019, the Court of Appeals violated Article 390 of the CPCRK* [Criminal Procedure Code of the Republic of Kosovo] *as Etem Arifi was not invited to a session of the appellate panel at all. According to this decision, the suspended sentence was changed to an effective imprisonment sentence to Mr. Etem Arifi [...]*".

52. Based on his allegations regarding the non-presence of the Applicant in the review of his case in the Court of Appeals, the Applicant refers

to the case of this Court: KI104/16, Applicant *Miodrag Pavic*, Judgment of 21 October 2016; as well as the cases of the ECtHR: *Fredin v. Sweden*, Judgment of 23 February 1994; and *Ekbatani v. Sweden*, Judgment of 26 May 1988.

Allegations regarding interim measure

53. As noted above, in addition to the main request, the Applicant has also submitted a request for an interim measure to be imposed by the Court. Regarding the request for an interim measure, the Applicant states that taking into account "*that we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant".*

54. He further emphasized that the Court should also *"assess the status which the Applicant holds in the community as a deputy of the Republic of Kosovo for the fourth time in a row".* In this regard, he emphasizes that *"the implementation of this Judgment* [challenged of the Supreme Court] *rendered in violation of constitutional rights and freedoms, would cause him to lose his mandate as a deputy and would deprive the Applicant of his liberty for months and possibly even years, and consequently it would cause irreparable damage to the Applicant as no court decision could return the mandate of the deputy. Furthermore, the violations of the rights and freedoms of the Applicant are evident and are presented in the reasoning of the referral*".

55. Regarding the Applicant's request for imposition of an interim measure, he states that the Basic Court by Decision Ed. No. 2035/19 of 4 March 2020, taking into account the health condition of the Applicant, approved his request for postponement for another 2 months from the beginning of the execution of the sentence, specifically until 4 May 2020.

Applicant's final request to the Court

56. Finally, the Applicant requests the Court to decide the following:

> I. TO DECLARE THE REFERRAL ADMISSIBLE;
> II. TO FIND THAT there has been a violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo in conjunction with Article 6 (Right to a fair trial) of the European Convention on Human Rights;

III. TO DECLARE that Judgment PML. No. 380/2019 of 30.01.2020 of the Supreme Court of Kosovo and Judgment PAKR. No. 328/19 of 20.08.2019 of the Court of Appeals of Kosovo are invalid because these Judgments are not in compliance with Article 31 of the Constitution and Article 6 of the ECHR.
IV. TO REMAND the case to the Court of Appeals of Kosovo for reconsideration in compliance with the Judgment of the Constitutional Court
V. TO ORDER the Court of Appeals of Kosovo to inform the Constitutional Court as soon as possible, but not longer than 6 months, about the measures taken to implement the Judgment of this Court, in accordance with Rule 63 of the Rules of Procedure;
VI. TO REMAIN seized of the matter, pending compliance with that order;
VII. TO NOTIFY this decision to the parties;
VIII. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 24 (4) of the Law;
IX. TO DECLARE that this Judgment is effective immediately.

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.

Provisional Code of the Republic of Kosovo R 2003/25

Article 262

SUBSIDY FRAUD

Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.

Criminal Code No. 04 / L-082 of the Republic of Kosovo (CCRK)

Article 3
Application of the most favorable law

1. The law in effect at the time a criminal offense was committed shall be applied to the perpetrator.
[...]

Article 9

Time of commission of criminal offenses

A criminal offense is committed at the time the perpetrator acted or ought to have acted, irrespective of when the consequence occurred

Article 336
Subsidy fraud

1. *Whoever, in connection with the application for a grant, continuation, or modification of the terms of a subsidy, provides a competent authority with incorrect or incomplete information which is a condition for the granting, continuation or modification of a subsidy, or conceals such information in violation of an obligation to disclose such information to a competent authority, shall be punished by a fine or by imprisonment of up to five (5) years.*
2. Whoever uses such subsidy in violation of the law or for purposes other than those for which it was originally granted by the subsidy provider shall be punished by a fine or by imprisonment of up to five (5) years.
3. If the offense provided for in paragraphs 1 or 2 of this Article results in material gain or material damage exceeding twenty-five thousand (25,000) EUR, the perpetrator shall be punished by imprisonment of one (1) to eight (8) years.
4. A subsidy for the purposes of this provision means a benefit from public funds under the law of the Republic of Kosovo which, at least in part is granted without market related consideration and is aimed at stimulating the economy.

Article 435
Unlawful collection and disbursement

1. An official person who collects from another something that such person is not bound to pay or collects more than such person is bound to pay or who, in a payment or delivery pays or delivers less than what is required shall be punished by a fine or by imprisonment of up to one (1) year.
2. If the value of the payments or delivery, provided for in paragraph 1 of this Article, exceeds fifteen thousand (15,000) EUR, the perpetrator shall be punishment buy imprisonment up to three (3) years.
3. An attempt to commit the offense provided for in paragraph 1 of this Article shall be punishable.

Article 436

Unlawful appropriation of property during a search or execution of a court decision

An official person who, during a search of premises or a person or during the execution of a court decision, takes movable property with the intent of obtaining an unlawful material benefit for himself, herself or another person shall be punished by imprisonment of six (6) months to five (5) years.

Admissibility of the Referral

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

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

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

[...]

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

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

Article 47
[Individual Requests]

"1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.
2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

Article 48

[Accuracy of the Referral]

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

Article 49
[Deadlines]

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

60. With regard to the fulfillment of the abovementioned criteria, the Court finds that the Applicant is an authorized party. who challenges an act of a public authority, namely Judgment Pml. No. 380/19 of the Supreme Court, of 30 January 2020, after having exhausted all legal remedies provided by law. The Applicant has also clarified the fundamental rights and freedoms he claims to have been violated, in accordance with Article 48 of the Law and has submitted the Referral within the deadline set out in Article 49 of the Law.

61. However, in addition, the Court examines whether the Applicant met the other admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Specifically, Rule 39 (2) of the Rules of Procedure establishes 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."

62. The Court first recalls that the Applicant alleges that the challenged Judgment of the Supreme Court was rendered in violation of his fundamental rights and freedoms guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Article 6 (Right to a fair trial) of the ECHR.

63. In essence, the Applicant raises three key allegations related to the right to a fair and impartial trial. First, he alleges a violation of his rights guaranteed by Article 31 [Right to Fair and Impartial Trial], due to (i) violation of the principle of legal certainty, ii) lack of reasoning of the court decision, and (iii) his absence from the court hearing in the Court of Appeals.

64. Having said that, the Court will further elaborate on the abovementioned allegations in the light of the procedural guarantees guaranteed by Article 31 of the Constitution, in conjunction with Article 6 of the ECHR, which have already been interpreted in detail through the case law of the ECtHR, in accordance with which, the Court in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.

Regarding the allegation of violation of the principle of legal certainty

65. In this regard, the Applicant alleges that "*contrary to the principle Reformato in Peius, the Court of Appeals of Kosovo, by Judgment PAKR. No. 328/19 of 20.08.2019, reduces the deadline for compensation of the damage caused, from 6 months to 3 months*". The Applicant alleges that the Court of Appeals changed the sentence to his detriment, and according to the Applicant, this course of action by the Court of Appeals violates the principle of legal certainty.

66. The Court, after analyzing all the document in the case file and the complete case file, notes that the Applicant is raising this allegation for the first time before the Constitutional Court.

67. The Court notes that the Applicant's request for protection of legality submitted to the Supreme Court alleges violations of the provisions of criminal procedure and violations of criminal law. However, none of the allegations in question raises either formally or in substance issues related to the allegation of a violation of the principle *Reformatio in Peius*.

68. With regard to this specific allegation of the Applicant, the Court notes that in the request for protection of legality, regarding this allegation it was stated that "*Further confirms the second part of the paragraph under I of the Judgment of the Basic Court in Prishtina PKR. No. 740/16 of 20.04.2018 (first instance) regarding the obligation for joint compensation within (3) months".*

69. In this regard, the Court reiterates that, in accordance with the principle of subsidiarity, the regular courts should be given the opportunity to decide on the case before them. This means that an alleged constitutional violation should, in principle, not be allowed to reach the Constitutional Court without first being reviewed by the regular courts.

70. The Court reiterates that the exhaustion of legal remedies includes two 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) exhausting the remedy in a substantial aspect, which means reporting 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 the cases of the Constitutional Court, KI71/18, Applicants *Kamer Borovci*, *Mustafë Borovci and Avdulla Bajra*, Resolution on Inadmissibility of 21 November 2018, paragraph 57; KI119/17, Applicant *Gentian Rexhepi*, Resolution on Inadmissibility, of 3 May 2019, paragraph 73; and case KI154/17 and 05/18, cited above, paragraph 94).

71. Having regard to the circumstances, in which, according to the case file, it follows that these specific allegations of the Applicant have been filed for the first time before the Court, it concludes that the Applicant did not give the opportunity to the regular courts, specifically to the Supreme Court, to address these allegations and on that occasion, to prevent alleged violations raised by the Applicant directly before this Court without exhausting legal remedies in their substance. (See, *mutatis mutandis*, the case of the Court, KI118/15, Applicant *Dragisa Stojkovic*, Resolution on Inadmissibility of 12 April 2016, paragraphs 30-39).

72. Also, the Court, in relation to the Applicant's allegation raised in the request for protection of legality in the Supreme Court, against the decisions of the lower instance courts, alleging a violation of criminal law when it comes to the time of the commission of the criminal offense, as an essential element of the figure of the criminal offense and the erroneous application of the law, the Court recalls Article 9 of the CCRK, which establishes as follows:

Article 9
Time of commission of criminal offenses

A criminal offense is committed at the time the perpetrator acted or ought to have acted, irrespective of when the consequence occurred

73. In this regard, the Court considers that the Supreme Court has clearly specified in the reasoning of Judgment PML. No. 380/2019 of

30.01.2020, where among other things this Court finds and evidences that the Criminal Code of Kosovo that entered into force on 01.01.2013, has been correctly applied, because the criminal offense was committed from December 2012 to July 2013, and consequently in the ongoing criminal offenses, as the time of commission of the criminal offense is considered the last incriminating action, in accordance with Article 9 of the CCK, this action is taken as the time of commission of the criminal offense.

74. Therefore, in the light of the foregoing, with respect to this allegation, the Court considers that the Applicant has not substantiated his allegation.

75. The Court reiterates that it is the Applicant's obligation to substantiate his allegations and to submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see, case of the Constitutional Court No. KI19/14 and KI21/14, Applicants: *Tafil Qorri and Mehdi Syla*, Resolution on Inadmissibility of 5 December 2013)

Regarding the allegation of non-reasoning of the court decision

76. The Court first recalls the content of the relevant parts of Article of the Constitution and the ECHR which guarantee the right of every applicant to a reasoned court decision.

77. Article 31 of the Constitution provides:

> *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.*[...]

78. Article 6 paragraph 1 of the ECHR establishes that:

> *"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.[...]"

79. The Court recalls that the Applicant alleges that the Supreme Court did not address his allegations in the request for protection of legality regarding the completion of the elements of the criminal offense with which he was convicted. This is because, according to the Applicant, the CCRK provides that the criminal offense under Article 336 "*Subsidy fraud*" can be committed if the information he provides when applying for a subsidy is incorrect, conceals any information or misuses such a subsidy, and the latter can only be performed by the person conducting business activities. The Applicant alleges that the Supreme Court did not take into account the fact that the Applicant could not be the perpetrator of the criminal offense of subsidy fraud, as he did not apply for obtaining, continuing to modify the conditions for receiving the subsidy, but this was done by the Director of the Non-Governmental Organization "Zëri i Ashkalinjëve për Integrim". In this context, the Applicant underlines that the right to a fair and impartial trial includes the right to a reasoned decision.

80. In relation to this allegation, the Court refers to the case law of the ECtHR, which held that, although 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 ECtHR case *Hadjianastassiou v. Greece*, application no. 12945/87, Judgment of 16 December 1992, paragraph 33, see also case of the Court KI97/16, Applicant "*IKK Classic",* Judgment of 9 January 2018, paragraph 45, see case KI143/16, Applicant *Muharrem Blaku and others*, Resolution on Inadmissibility of 17 May 2018, paragraph 54).

81. In accordance with the case law of the ECtHR, this Court, in a number of cases stated that, although the courts are not obliged to address all the allegations put forward by the Applicants, they should nevertheless address the allegations central to the cases before them (see, *mutatis mutandis*, the abovementioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 53). In this regard, the right to obtain a court decision in compliance with the law includes the obligation for the courts to provide reasons for their decisions, at both procedural and substantive level (see, *mutatis mutandis*, the abovementioned case of the Court KI97/16, Applicant *IKK Classic*, Judgment of 9 February 2016, paragraph 54).

82. In the Applicant's case, the Court first notes that the Supreme Court rejected his request for protection of legality as ungrounded. The reasons for rejecting the Applicant's request for protection of legality, the Supreme Court based on the relevant provisions of the CCRK which it considered relevant in relation to the circumstances of the present case and in relation to the substantive allegations raised by the Applicant.

83. First, with regard to the Applicant's specific allegations that the Supreme Court did not address his allegations in the request for protection of legality regarding the completion of the elements of the criminal offense with which he was convicted, the Court refers to the relevant part. of the Judgment of the Supreme Court which reasons:

> "*From the case file it is confirmed that the convicts Etem Arifi and* [B.G] *are found guilty of the criminal offense of subsidy fraud in co-perpetration under Article 336 par.3 in conjunction with Article 2 and Article 31 of the CCK, and that the latter from December 2012 to July 2013, having previously been in friendly relationship, at the same time the convict Etem Arifi was a Deputy of the Assembly of Kosovo and President of the Ashkali Party, have decided to establish the NGO " Zëri i Ashkalinjeve për Integrim". […]*
> *At the moment that the Office of the Prime Minister requested a report on the expenditures of the received subsidies, the investigations for the misuse of these funds started. From the case file it is confirmed that the convict Etem Arifi and […],talked about the opening of this NGO and that the NGO was fictitious, since it had never functioned in accordance with its statute and moreover had no headquarters, there were no staff working, although the witness [A.R] and the convict's daughter, [A.A], were paid as workers of this NGO.*
>
> *That the convict Etem Arifi was aware of all this, speaks the fact that the latter had communicated by phone and in person throughout the period from December 2012 to July 2013, with the convict [B.G], which is confirmed by transcripts of "sms" and from the statement of the witness [A.R] as well as by examining the list of banking transactions from the NGO account.*
>
> *The first instance court and that of the second instance, in this factual situation, correctly determined, correctly concluded that in the actions of the convict Etem Arifi are formed the elements of the criminal offense of subsidy fraud under Article 336 par.3 in*

conjunction with par.2 and 1 and Article 31 of the CCK, because in order to commit this criminal offense, it is sufficient that the subsidies obtained by falsely presenting facts related to the headquarters, employees and the program of the NGO, be used for purposes for which they were not provided".

84. In addition, the Court also refers to Judgment PAKR. No. 328/19 of the Court of Appeals, through which it was found that the challenged Judgment of the Basic Court does not contain essential violations of the provisions of the criminal procedure nor other violations, for which the Court of Appeals takes care of *ex officio*. Also in its reasoning the Court of Appeals found that the Basic Court has given sufficient and clear reasons on which it has based the resolution of the case and that after the administration of evidence in the court hearing, it has correctly determined the factual situation. In particular with regard to the issue of proving the existence of a criminal offense and criminal liability, the Court of Appeals in the reasoning of the Judgment, *inter alia*, stated that: "*after analyzing and assessing all the evidence and in relation to each other, fully supports the fair and logical conclusion of the court of first instance for the correct and complete determination of the factual situation and the finding of the accused criminally liable for their actions for committing the criminal offense for which they were found guilty and reasons given in this regard, but it is necessary to find that the criminal law was erroneously applied when the accused by the appealed judgment were found guilty of the criminal offense of subsidy fraud from Article 336 par 3 in conjunction with Article 31 of the CCRK. This is due to the fact that as it results from the case file and the enacting clause of the appealed judgment, the accused Etem Arifi and [BG], the subsidies given on behalf of the NGO "ZAI", were not used them for the purposes for which they were given therefore , in their actions are fulfilled the essential elements of the criminal offense under Article 336 paragraph 3 in conjunction with paragraph 2 and 1 in conjunction with Article 31 of the CCRK, and not only of the criminal offense under Article 336 paragraph 3, for which the legal qualification had to be changed in accordance with the criminal law. Regarding the decision on the sentence, the Prosecution alleges that the first instance court, in determining the type and length of the sentence, assessed the aggravating and mitigating circumstances and in this case for the accused assessed as mitigating circumstances the fact that the accused were not previously convicted, family circumstances, their correct stay in court. However, the court in question did not justify the imposition of the sentence below the limit provided by law, namely the imposition of a suspended sentence, since the criminal offense of Subsidy fraud is punishable by*

imprisonment of 1 to 8 years, which indicates the intensity of danger of the offense for which the accused have been found guilty, in this case the danger of the offense committed is manifested by the capacity of the perpetrators of the criminal offense in society, the motive and manner of committing the criminal offense.

85. In the light of the foregoing, the Court concludes that Judgment Pml. No. 380/19, of the Supreme Court, of 30 January 2020 is clear and addresses the substantive allegations raised by the Applicant in his request for protection of legality. There is no substantive argument which the Supreme Court has set aside as unreasoned, as alleged by the Applicant.

86. Accordingly, the Supreme Court reached this conclusion after considering the reasoning given by the Basic Court, when it found the Applicant guilty of the committed criminal offense; his appeal to the Court of Appeals; the complaint of the Special Prosecution; the reasoning given by the Court of Appeal; as well as the Applicant's request for protection of legality, submitted to the Supreme Court.

87. Therefore, the Court considers that the conclusions of the Supreme Court were reached after a detailed examination of all the arguments submitted by the Applicant. Consequently, the Court notes that the reasoning given by the Supreme Court meets all the necessary standards of the ECtHR and the Court for a reasoned court decision.

88. In this regard, the Court recalls that in rejecting an appeal, or as in the present case, rejecting a request for protection of legality, the Supreme Court may, in principle, merely approve the reasons for rendering the decision of the lower instance courts, in this case the Court of Appeals and the Basic Court (see ECtHR cases*, Garcia Ruiz v. Spain*, cited above, paragraph 26; *Helle v. Finland*, application No. 20772/92, Judgment of 19 December 1997, paragraphs 59-60).

89. In this context, the Court also recalls that cases where a court of third instance court, as in the case of the Applicant, the Supreme Court, which confirms the decisions taken by the lower instance courts - its obligation to justify decision-making differs from cases where a court changes lower court decision-making. In the present case, the Supreme Court did not change the decision of the Court of Appeals or that of the Basic Court– by which the Applicant was found guilty but only proved their legality, as, according to the Supreme Court, there were no essential 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).

90. In this respect, the Court considers that, even though the Supreme Court may not have responded at every issue raised by the Applicant in his request for protection of legality, it has addressed the Applicant's substantive arguments as to the application of the substantive and procedural law (see, *mutatis mutandis*, the 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, see the case of the Court KI194/18, Applicants *Kadri Muriqi and Zenun Muriqi*, Resolution on Inadmissibility of 5 February 2020, paragraph 107). In doing so, the Supreme Court has fulfilled its constitutional obligation to provide a reasoned court decision, in accordance with the requirements of Article 31 of the Constitution in conjunction with Article 6 of the ECHR and the case law of the ECtHR and of this Court itself.

91. In the Applicant's case, the Court notes that in his allegations, submitted to the Court, mainly raise issues of legality.

92. In this regard, the Court reiterates that it is not its duty to deals with errors of fact or law allegedly committed by the regular courts (legality), unless and insofar as they may have violated the fundamental rights and freedoms protected by the Constitution (constitutionality). It may not itself assess the law which has led a regular court to adopt one decision rather than another. Otherwise, the Court would be acting as a court of "fourth instance", which would result in exceeding the limits set by its jurisdiction. In fact, it is the role of the regular courts to interpret and apply the pertinent rules of procedural and substantive law (See ECtHR case *Garcia Ruiz v. Spain*, Judgment of 21 January 1999, paragraph 28; and see, also case KI70/11, Applicant: *Faik Hima, Magbule Hima and Besart Hima*, Resolution on Inadmissibility of 16 December 2011).

93. With regard to the Applicant's allegations of violation of the right to fair and impartial trial, the Court notes that the Applicant's dissatisfaction with the outcome of the proceedings before the regular courts, cannot in itself raise an arguable claim of violation of the right to fair and impartial trial (see, *mutatis mutandis*, case *Mezotur - Tiszazugi Tarsulat v. Hungary*, ECtHR, Judgment of 26 July 2005, paragraph 21; see also, case KI56/17, Applicant *Lumturije Murtezaj*, Resolution on Inadmissibility, of 18 December 2017, paragraph 42).

94. Consequently, based on the abovementioned allegations raised by the Applicant and the facts presented by him, the Court, also based on the standards established in its case law in similar cases and the case law of the ECtHR, holds that the Applicant has not proved and has not sufficiently substantiated his allegations that the proceedings before the regular courts were in any way unfair or arbitrary and that his right to a fair and impartial trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR has been violated by the challenged Judgment.

Regarding the allegation that the Applicant was not present at the hearing session in the Court of Appeals

95. With regard to this allegation, the Court recalls the Applicant's claim that "*on the occasion of rendering Judgment PAKR. 328/2018 of 28.03. 2019, the Court of Appeals violated Article 390 of the CPCRK as Etem Arifi was not invited to a session of the appellate panel at all. According to this decision, the suspended sentence was changed to an effective imprisonment sentence to Mr. Etem Arifi*".

96. From the case file the Court notes that against Judgment PAKR No. 328/2018, of the Court of Appeals, of 28 March 2019, the Applicant submitted a request for protection of legality to the Supreme Court.

97. The Supreme Court by Judgment Pml. No. 1628/2018, approved the request for protection of legality submitted by the Applicant and annulled the PAKR, No. 328/2018 of the Court of Appeals, due to the composition of the trial panel.

98. Consequently, Judgment PAKR No. 328/2018 of the Court of Appeals was rendered invalid.

99. The Court notes that the Court of Appeals, acting on the retrial by Judgment PAKR. No. 328/19, of 20 August 2019, the Applicant was also present at the review session. At this point, the Court refers to Judgment PAKR. No. 328/19, of 20 August 2019 of the Court of Appeals where among other things it is stated that "*The Court of Appeals held the panel session on 20.08.2019 in which the accused Etem Arifi and the defense counsel Merita Stublla-Emini were present*".

100. In light of all that has been clarified above, from what follows from the case file, the Court notes that the Applicant was summoned and was present at the hearing session held at the Court of Appeals.

101. Consequently, the Court finds that the Applicant's allegation regarding his absence from the Court of Appeals in the review of his case is ungrounded.

102. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and must be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

Request for interim measure

103. The Court recalls that the Applicant also requested the Court to impose an interim measure, stating "*we are close to the date which is set for the Applicant to appear in the correctional facility for serving the sentence which is 04.05.2020, the imposition of an interim measure by the Constitutional Court is necessary and vital for the Applicant.*
It is also necessary to assess the status which the Applicant holds in the community as a deputy of the Republic of Kosovo for the fourth time in a row, we consider that the implementation of this Judgment [challenged of the Supreme Court] *rendered in violation of constitutional rights and freedoms, would cause him to lose his mandate as a deputy and would deprive the Applicant of his liberty for months and possibly even years, and consequently it would cause irreparable damage to the Applicant as no court decision could return the mandate of the deputy".*

104. However, the Court has just concluded that the Applicant's Referral is to be declared inadmissible on constitutional basis.

105. Therefore, in accordance with Article 27.1 of the Law and Rule 57 (4) (a) of the Rules of Procedure, the request for an interim measure must be rejected, as it cannot be considered because the Referral was declared inadmissible.

Conclusion

106. The Court found that the Applicant has not substantiated his allegations that the relevant proceedings followed by the regular courts were in any way unfair or arbitrary. He also did not substantiate his allegations that Judgment PML. No. 380/2019 of the Supreme Court violated the rights and freedoms guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

107. In this regard, the Court found that the Applicant's Referral does not meet the admissibility criteria set out in the Rules of Procedure, as the

Referral is manifestly ill-founded on constitutional basis. This is due to the fact that the presented facts do not in any way justify the allegation of violation of a constitutional right and that the Applicant has not sufficiently substantiated his allegation of the alleged constitutional violations.

108. Therefore, the Court concludes that the Referral is manifestly ill-founded on constitutional basis and as such is to be declared inadmissible, in accordance with Rule 39 (2) of the Rules of Procedure. In the same line of reasoning, the Court also rejected the request for an interim measure.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Article 20 of the Law, and in accordance with Rule 39 (2) and 57 (1) of the Rules of Procedure, on 23 September 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Safet Hoxha	Arta Rama-Hajrizi

KI88/20, Applicant: Football Club "Liria", Constitutional review of Decision 272/2 of the Executive Committee of the Football Federation of Kosovo of 2 June 2020

KI88/20, Resolution on inadmissibility, of 30 September 2020, published on 28 October 2020

Keywords: individual referral, non-exhaustion of legal remedies, principle of subsidiarity, inadmissible referral

The Applicant challenges Decision 272/2 of the Executive Committee of the Football Federation of Kosovo, of 2 June 2020, which allegedly violates the Applicant's fundamental rights and freedoms guaranteed by Articles 7 [Values] and Article 32 [Right to Legal Remedies] of the Constitution.

The Court noted that the Applicant submitted a constitutional referral and that it had not previously filed a complaint with the Sports Arbitration Commission (SAC) at the Kosovo Olympic Committee.

The Court noted that the Applicant's allegations are premature and that the Court, in accordance with the principle of subsidiarity, cannot assess these allegations without having been previously raised and assessed by the regular courts.

The Court also noted that the Applicant did not do everything that could reasonably be expected of it regarding the exhaustion of legal remedies or that there are special circumstances that exempt the Applicant from the obligation to exhaust all legal remedies.

The Court concluded that the Referral on constitutional basis due to non-exhaustion of all legal remedies is to be declared inadmissible, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI88/20

Applicant

Football Club "Liria"

Constitutional review of Decision 272/2 of the Executive Committee of the Football Federation of Kosovo, of 2 June 2020

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 Football Club "Liria" (hereinafter: the Applicant), which is represented by Robert Gjeraj.

Challenged decision

2. The Applicant challenges Decision 272/2 of the Executive Committee of the Football Federation of Kosovo, of 2 June 2020.

Subject matter

3. The subject matter is the constitutional review of the challenged Decision of the Executive Committee of the Football Federation of Kosovo, which allegedly violates the Applicant's fundamental rights

and freedoms guaranteed by Articles 7 [Values] and Article 32 [Right to Legal Remedies], of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraph 4, of Article 21 [General Principles] and paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), Articles 22 [Processing Referrals] and 47 [Individual Requests] of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Court

5. On 9 June 2020, the Applicant submitted by mail service the Referral to the Court.

6. On 12 June 2020, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur. On the same date, the President appointed the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.

7. On 16 June 2020, the Court notified the Applicant about the registration of the Referral. On the same date, the Court notified the Football Federation of Kosovo about the registration of the Referral and sent a copy of the Referral.

8. On 30 September 2020, the Review Panel considered the report of the Judge Rapporteur, and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts

9. On 27 May 2020, the Executive Committee of the Football Federation of Kosovo (hereinafter: the Executive Committee of FFK) decided to allow activities to continue the training process and to hold Super League football competitions. Also, the Executive Committee of the FFK banned the development of matches of the First League and other

football leagues, thus allowing only the development of Super League matches.

10. On 29 May 2020, the Applicant filed a complaint with the Executive Committee of FFK, against the abovementioned decision, reasoning that the latter has discriminated against the First League in relation to the Super League, thus violating the statute of FFK and competition regulation. The Applicant requested that the decision of 27 May 2020 of the Executive Committee of FFK be annulled and their appeal be approved, so that the First League championship can resume.

11. On 2 June 2020, the Executive Committee of FFK, by Decision 272/2, rejected the Applicant's appeal and upheld the preliminary decision of 27 May 2020.

12. In the reasoning of its Decision, the Executive Committee of FFK reasoned that:

> *"[...] The Ministry of Health, on 18.05.2020, based on the recommendations of the NIPHK issued Decision no. 495/2/V/2020, with protocol number 05-2698/2, by which it decided to allow activities for the continuation of the training process of the teams of the Super League of the Football Federation of Kosovo, and obliged the Football Federation of Kosovo, to comply with the Provisional Guidelines for the application of measures to prevent and combat COVID-19 in public and private institutions. By Decision No. 495/2/V/2020, protocol number 05-2698/2, of 18.05.2020, the Ministry of Health, annulled Decision No. 495/v/2020, with protocol number 05-2698 of 17.05.2020. Setting from this factual situation, the Executive Committee concluded that the Decision challenged by the Complainant is a lawful decision, and it does not contain any violation of legal provisions. The competence of the Executive Committee to decide on the issue of competitions and the calendar of competitions in the Republic of Kosovo, as provided by Article 34 point b of the Statute of FFK, which provides that: 'The Executive Committee approves the competition system and calendar of competitions for Kosovo that should be in line with the calendar of FIFA and UEFA".*

13. At the end of the reasoning, the Executive Committee of FFK advised the Applicant as follows:

"Against this Decision, the dissatisfied party may file, within 15 days a complaint with the Sports Arbitration Commission (SAC) at the Kosovo Olympic Committee".

Applicant's allegations

14. The Applicant alleges that Decision 272/2 of the Executive Committee of FFK, of 2 June 2020, was rendered in violation of the fundamental rights and freedoms established in Article 7 [Values] and Article 32 [Right to Legal Remedies] of the Constitution.

15. In this regard, the Applicant alleges that the Executive Committee of FFK by Decision of 27 May 2020 violated Article 7 [Values] and Article 32 [Right to Legal Remedies] of the Constitution, *"discriminating against First League football players against Super League players. The FFK decision does not see us as equal, continuing only the Super League matches, while it prevents the First League matches for no reason and violating our rights. Also, the Football Federation of Kosovo violated Article 32 of the Constitution of the Republic of Kosovo. Article 32 states: Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law. Here, the decision of FFK of 27.05.2020 does not recognize the right of legal remedy, namely appeal. The decision of FFK leaves no room for appeal, in violation of one of the human rights, namely Article 32 of the Constitution of the Republic of Kosovo".*

Admissibility of the Referral

16. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and foreseen by the Rules of Procedure.

17. The Court refers to paragraphs 1 and 7 of Article 113 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".

18. The Court also refers to paragraph 4 of Article 21 [General Principles] of the Constitution, which states:

"4. Fundamental rights and freedoms set forth for in the Constitution are also valid for legal persons, to the extent applicable".

19. Initially, the Court notes that the Applicant (as a legal person) has the right to file a constitutional complaint, referring to alleged violations of its fundamental rights and freedoms, applicable both to individuals and to legal persons (see, case of the Constitutional Court No. KI41/09, Applicant *AAB-RIINVEST University L.L.C.*, Resolution on Inadmissibility of 3 February 2010, paragraph 14).

20. The Court also refers to the admissibility criteria, as provided by Law. In this regard, the Court first refers to Article 47 [Individual Requests], which establishes:

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".

21. The Court also refers to Rule 39 (1) (b) of the Rules of Procedure, which specifies:

"(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."

22. The Court recalls that the rule on exhaustion of legal remedies, in accordance with Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges natural and legal persons wishing to bring their case to the Constitutional Court to first make use of the effective legal remedies that are available, against a challenged judgment or decision.

23. In this way, the administrative authorities and regular courts are given the opportunity to prevent or put right the alleged constitutional violations, through regular administrative and judicial procedures, before the case is submitted to the Constitutional Court. The rule is based on the assumption that the Kosovo legal order provides legal effective remedies for the violation of constitutional rights. This is an important aspect of the subsidiary nature of the constitutional justice machinery (see*, inter alia*, cases of the Court: KI67/19, Applicant *Hajrije Rina Zhitija Ajeti*, Resolution on Inadmissibility, of 30 September 2019, paragraph 34; KI09/19, Applicant *Leutrim Hajdari*, Resolution on Inadmissibility of 16 March 2020, paragraph 36; KI30/17, Applicant *Muharrem Nuredini*, Resolution on Inadmissibility of 7 August 2017, paragraph 35; and KI94/14, Applicant *Sadat Ademi*, Resolution on Inadmissibility of 17 December 2014, paragraph 24).

24. In this respect, the Court notes the consistent position that the machinery of protection of the constitutional rights established with the Constitutional Court is subsidiary, in relation to the regular system of judiciary (see, case of the Constitutional Court no. KI15/16, Applicant *Ramadan Muja,* Resolution on Inadmissibility of 16 March 2016, paragraph 42).

25. In this regard, the Court notes that in accordance with Article 113.7 of the Constitution, the Applicant should have the opportunity to use the legal remedies which are available and sufficient to ensure the possibility to put right the alleged constitutional violations. The existence of such legal remedies must be sufficiently certain not only in theory but also in practice, and if this is not so, those legal remedies will lack the requisite accessibility and effectiveness. This is also in line with the case law of the ECtHR, regarding the obligation of the Applicants to exhaust legal remedies (see, *inter alia, Vernillo v. France,* paragraph 27 of the ECtHR Judgment of 20 February 1991, and *Dalia v. France*, paragraph 38 of the ECtHR Judgment of 19 February 1998).

26. Therefore, the Court should examine whether the legal remedies have been exhausted and, if not, whether the Applicant had effective legal remedy, available in theory and practice. Thus, the Court must ensure that the legal remedy was accessible, and that it could redress the constitutional violations alleged by the Applicant before the Constitutional Court (see also the abovementioned case of the Court No. KI41/20, Applicant *Shaqir Krasniqi*, paragraph 23; and see, *inter alia, Civet v. France* paragraphs 42-44, of the ECtHR Judgment of 28 September 1999).

27. However, when a legal remedy is provided by law, it is up to the Applicant to prove that the legal remedy provided by law has in fact been exhausted or that for any reason it was not available and effective in the particular circumstances of the case, or that there have been special circumstances due to which the Applicant is exempted from the requirements of exhaustion of legal remedies.

28. In the present case, the Court notes that against the challenged Decision of the Executive Committee of FFK, 272/2, of 2 June 2020, there is a possibility to file an appeal, as an effective legal remedy. Thus, the Court notes that the challenged Decision, in the legal remedy, clarifies that *"against this Decision, the dissatisfied party may file a complaint within 15 days to the Sports Arbitration Commission (SAC) at the Kosovo Olympic Committee"*.

29. The Court notes the Applicant's claim that *"the FFK Decision leaves no room for appeal in violation of one of the human rights, namely Article 32 of the Constitution"*.

30. However, the Court notes that the Applicant has not substantiated that the legal remedy referred to in the challenged Decision - namely the appeal to the Sports Arbitration Commission of the Kosovo Olympic Committee - was not accessible and effective in its case.

31. Therefore, the Court concludes that the Applicant's Referral is to be declared inadmissible, as the Applicant has not exhausted all legal remedies in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure.

#

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 20 and 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, on 30 September 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Bekim Sejdiu	Arta Rama-Hajrizi

KI232/19, Applicant: Xhemajl Bajraktari, Request for interpretation of article 35 points 8 and 9 of the Collective Agreement of Education of Kosovo

KI232/19, Decision on Inadmissibility adopted on 11 November 2020, published on 7 December 2020

Keywords: *individual referral, abstract interpretation, unauthorized party, inadmissible referral*

In the circumstances of the present case, the Applicant requested an interpretation of Article 35, points 8 and 9 of the Kosovo Collective Education Agreement concluded between the Ministry of Education and Technology and the United Trade Union of Education, Science and Culture.

The Court emphasized that the Constitution does not provide for the possibility for individuals to appeal to the Constitutional Court, *in abstracto*, for the unconstitutionality of a Law. Individuals may file a constitutional referral regarding the actions or inactions of public authorities, only within the scope defined by Article 113 (1) and (7) of the Constitution, which requires the Applicants to prove that they are: (1) authorized parties, (2) directly affected by the concrete act of a public authority or inaction of the public authority, and (3) that they have exhausted all legal remedies provided by law.

The Court found that the Applicant is not an authorized party, and pursuant to Article 113 (1) and (7) of the Constitution, Article 47.1 of the Law and Rule 39 (1) (a) of the Rules of Procedure, the Referral was declared inadmissible.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI232/19

Applicant

Xhemajl Bajraktari

Request for interpretation of Article 35 points 8 and 9 of the Collective Agreement on Education in Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Bajram Ljatifi, Deputy President
Bekim Sejdiu, Judge
Selvete Gërxhaliu, 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 Mr. Xhemajl Bajraktari from Ferizaj (hereinafter: the Applicant).

Challenged decision

2. The Applicant does not challenge any concrete decision of any public authority within the meaning of paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo.

Subject matter

3. The subject matter is the Applicant's request for interpretation of Article 35, points 8 and 9 of the Collective Agreement on Education of Kosovo (hereinafter: the Collective Agreement) concluded between the Ministry of Education and Technology (hereinafter: MEST) and the

United Trade Union of Education, Science and Culture (hereinafter: SBASHK).

Legal basis

4. The Referral is based on Article 113 (1) and (7) of the Constitution, Article 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 16 December 2019, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

6. On 20 December 2019, the President appointed Judge Nexhmi Rexhepi as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha.

7. On 23 January 2020, the Court notified the Applicant about the registration of the Referral.

8. On 11 November 2020, the Review Panel considered the report of the Judge Rapporteur, and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

9. On 18 April 2017, MEST and SBASHK signed the Collective Agreement.

10. The Collective Agreement is applicable to all employees in all public and private institutions of Pre-University Education and higher education institutions throughout the territory of the Republic of Kosovo, which are members of SBASHK.

Applicant's allegations

11. The Applicant does not refer to the violation of any constitutional provision in particular, but claims that his constitutional rights have been "*seriously violated*", because his rights are restricted due to the obligation to join the SBASHK.

12. The Applicant alleges: "*Membership in the Education Union of Kosovo is voluntary and not mandatory. Based on the wording of Article 35, points 8 and 9, there are tendentious elements of the obligation of teachers to join and pay the membership fee, to then have guaranteed the rights provided in the cited article*".

13. The Applicant addresses the Court with a request "*With my referral, I seek an INTERPRETATION and information on my rights, more specifically, will I also enjoy my rights as a teacher, after I retire, since some of the rights listed in Article 35 point 8 and 9, are supplemented after retirement and other rights, which are decisively listed in Article 35 point 8 and 9*".

Admissibility of the Referral

14. The Court first examines whether the Applicant has fulfilled the admissibility requirements established by the Constitution, and further specified by the Law and the Rules of Procedure.

15. In this respect, the Court refers to Article 113 (1) and (7) 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".*

16. The Court also refers to Articles 47.1 [Individual Requests] and 48 [Accuracy of the Referral] of the Law, which stipulate:

[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".

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".

17. In this regard, the Court refers to Rule 39 (1) (a) [Admissibility Criteria] of the Rules of Procedure, which specifies:

"(1) The Court may only deal with Referrals if:
[...]
(a) the referral is filed by an authorized party".

18. In the assessment whether the Applicant meets the constitutional and legal criteria for the constitutional review of his Referral, the Court recalls that under Article 113 of the Constitution, 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. The same criterion is also set out in Article 47 of the Law.

19. In the circumstances of the present case, the Court notes that the Applicant does not challenge any act of a public authority that may have resulted in a violation of his fundamental rights and freedoms. Moreover, the Applicant has not accurately clarified what rights and freedoms have allegedly been violated by any act of public authority, as required by Article 48 of the Law.

20. In fact, the Applicant requests the interpretation *in abstracto* of the Collective Agreement regarding his rights as a "*teacher after retirement*" and whether he can enjoy "*some of the rights listed in Article 35 point 8 and 9"* of the Collective Agreement.

21. However, the Court, based on paragraph 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, has jurisdiction to decide only on cases referred to it in a legal manner by an authorized party.

22. In this regard, the Court notes that the individuals (natural and legal persons), within the meaning of Article 113, paragraph 7 of the Constitution, have no right to address directly the Constitutional Court and to request it to assess *in abstracto* the constitutionality of a legal norm, or to raise before it hypothetical questions of interpretation of the laws for which they are not authorized pursuant to Article 113, paragraph 7 of the Constitution (see, *mutatis mutandis*, the Constitutional Court cases, KI60/17, *Applicant*: *KRU "Radoniqi" Gjakova*, Resolution on Inadmissibility, of 24 October 2017, paragraph 30*;* KI21/19 *Applicant Pjetër Boçi,* Resolution on Inadmissibility, of 27 May 2019, paragraph 25).

23. In this regard, the Court recalls its consolidated case law, regarding the interpretation of Article 113 of the Constitution, which states that persons, natural or legal, have no right to challenge *in abstracto* normative acts of a general nature (See cases of the Constitutional Court: KI05/17 Applicant *Osman Sylanaj*, Resolution on Inadmissibility of 20 November 2017; KI102/17 *Applicant Meleq Ymeri*, Resolution on Inadmissibility of 10 January 2018; KI196/18 *Applicant Dardan Bunjaku*, Resolution on Inadmissibility of 23 April 2019 and KI113/19 *Applicant Islam Qerimi*, Resolution on Inadmissibility of 9 July 2020).

24. Thus, according to the case law of this Court, the Constitution does not provide for a possibility that individuals can complain *in abstracto* in the Constitutional Court for an unconstitutionality of a Law. The individuals may file constitutional referral regarding actions or failure to act by public authorities only within the scope provided by Articles 113 (1) and 113 (7) of the Constitution, which requires the Applicants to show that they are: (1) authorized parties, (2) directly affected by a concrete act or failure to act by public authorities, and (3) that they have exhausted all legal remedies provided by law (See KI113/19 *Applicant Islam Qerimi*, cited above, paragraph 29 and references mentioned therein).

25. Therefore, the Court reiterates that the referrals that basically raise issues of legality, such as the present case, as a rule, fall within the jurisdiction of the regular courts. In fact, it is not the task of the Constitutional Court to deal with the allegation and interpretation of the relevant legislation to determine whether the Applicant, as a "*teacher, after retirement, can enjoy his rights based on the relevant provisions of the Collective Agreement*" (see, KI21/19, *Applicant Pjetër Boçi*, cited above, paragraph 26; and also see, case of the

Constitutional Court KI27/17, *Applicant Maliq Zeqiri*, Resolution on Inadmissibility, of 13 November 2017, paragraph 24).

26. The Court may interfere only where the allegations of violation of the rights guaranteed by the Constitution are substantiated on constitutional basis and fall within its jurisdiction as provided by the Constitution, after all the formal and procedural criteria required by the Constitution, the Law and the Rules of Procedure elaborated above have been met (see KI27/17, *Applicant Maliq Zeqiri*, cited above, paragraph 25).

27. Therefore, the Court considers that the Applicant is not an authorized party to challenge the constitutionality of the Collective Agreement *in abstracto* nor to seek its interpretation, and, consequently, his Referral is to be declared inadmissible.

28. For the reasons above, the Court finds that the Applicant is not an authorized party as provided by Article 113 (1) and (7) of the Constitution, Article 47.1 of the Law and Rule 39 (1) (a) of the Rules of Procedure.

#

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113 (1) and (7) of the Constitution, Article 47.1 of the Law and Rule 39 (1) (a) and 59 (2) of the Rules of Procedure, in the session held on 11 November 2020, unanimously

DECIDES

I. TO DECLARE the Referral inadmissible;

II. TO NOTIFY this Decision to the Parties;

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

IV. This Decision is effective immediately.

Judge Rapporteur	**President of the Constitutional Court**
Nexhmi Rexhepi	Arta Rama-Hajrizi

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