Prishtina, on 22 March 2023
Ref. no.:MK 2147/23

CONCURRING OPINION

of Judge

RADOMIR LABAN

case no. KI36/22

Applicant

"MATKOS GROUP" L.L.C.

Constitutional review of Judgment ARJ. no. 116/2021 of the Supreme Court of Kosovo of 28 October 2021

Expressing from the beginning my respect and agreement with the opinion of the majority of judges that in this case there has been violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) in conjunction with Article 6 (Right to a fair trial) of the European Convention for the Protection of Human Rights (hereinafter: the ECHR), I as a judge of the Constitutional Court, consider that there has been another violation of the Applicant's human rights guaranteed by the Constitution and which relates to the violation of the rights guaranteed by Article 46 [Protection of Property] in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR, which I will try to reason in a text below.

As a judge, I agree with the factual situation as stated and presented in the judgment and accept the same factual situation as correct. I also agree with the way the Applicant's allegations were stated and presented in the judgment.

For the above, and in accordance with Rules 62 and 63 of the Rules of Procedure of the Constitutional Court, I will present My concurring opinion in writing. In order to follow as easily and clearly as possible the reasoning of My concurring opinion, I will **(I)** repeat the allegations of the Applicant regarding the alleged violations of the Applicant's rights guaranteed by Article 46 [Property Protection] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR; **(II)** assess the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the

ECHR; **(III)** present the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(IV)** reason the basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR; **(V)** apply the abovementioned basic principles in the present case; **(VI)** draw a conclusion regarding the alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol No. 1 of the ECHR.

(I) Applicant's allegations regarding alleged violations of the Applicant's rights guaranteed by Article 46 [Protection of Property] of the Constitution in conjunction with Article 1 [Protection of property] of Protocol no. 1 of the ECHR

1. The Applicant alleges that the challenged judgment of the Supreme Court, which postponed the execution of the MEE decision constitutes interference with the right to property.

2. The Applicant claims that taking into account all legal acts and the imperative fundamental norms they contain regarding the right to property, and especially the determination of the Constitution regarding this right, it is clear that the right to property is fundamental and inviolable human right. This can be seen from the fact that in the Constitution, the right to property is included in the part where fundamental human rights and freedoms are found.

3. The Applicant further refers to the case law of the ECtHR, noting that concept does not only include property and the right to it, in the material and classical meaning of the word, but also includes a wide range of monetary rights arising, among the other, from licenses as well as the rights arising from running a business. In addition, the Applicant adds that, "Even going further, in Pressos Compania Naviera SA et al v. Belgium, the ECtHR concluded that even a claim for compensation can be considered a property - in the sense of property and enjoys protection under Article 1, Protocol 1, of the ECHR - when it is sufficiently proven by the party that there is a legitimate expectation that such a claim can be realized".

4. When it comes to legitimate expectation, the Applicant states, "Therefore, in accordance with the ECtHR case law, obtaining a water permit in itself refers to the right to obtain an electricity production license from ERO for the performance of this economic activity according to the prescribed legal requirements (in this case according to the criteria provided in the relevant legislation) represents goods in terms of property resulting from the performance of economic activity. Bearing in mind the legitimate expectations - because they had a legitimate expectation to operate in accordance with the Law since the state itself guaranteed them that, in the event that they meet the legal requirements (be licensed), they will be guaranteed uninterrupted activity - then this legitimate expectation enjoys protection under Article 46 of the Constitution in conjunction with Article 1 of Protocol 1 of the ECHR".

5. The Applicant emphasizes that the water permit granted to the Applicant by the ERO is of essential importance for the activity of this company, because at the moment of execution of the court decision which temporarily prohibits business based on that license, the company is forced to entirely suspend its activity until resolution on merits of the case by the court, whereby, considering the overload of the courts with cases, the decision on the merits of the matter in question is expected to be made after more than 3 (three) years.

6. In the following, the Applicant adds: "In order to determine the damage that will be unfairly caused to the Applicant, it is enough to look at the production of electricity from renewable energy sources for the period 2019-2020, which it produced. According to KOSTT reports, the electricity produced by the Applicant and introduced into the grid, for 2019 amounts to 3, 672.5 MWh of electricity out of total of 191, 700 MWh produced from renewable sources in Kosovo. Also, in 2020, (as a year of pandemic), the Applicant produced 4, 389.32 MWh clean electricity. These data prove that, due to the impossibility of producing electricity great damage will be caused".

7. The Applicant claims that the damage, apart from being large in monetary terms, is also irreparable. The Applicant emphasizes that with multinational corporations, the financing structure and financial instruments for financing investment projects are complicated. In this regard, the Applicant states that if the return of the invested funds is not started in a long period of time, it will result in the financial impossibility of survival and the Applicant would be seriously threatened with liquidation.

8. Furthermore, the Applicant, referring to the ECtHR case of Sporrong and Lönnroth v. Sweden, no. 7151/75 7152/75, judgment of 23 September 1982, the ECtHR established three (3) basic principles, which apply to the intervention/restriction of property rights and they are as follows: (i) principle of legality; (ii) the principle of the existence of a legitimate goal in the protection of the public interest and (iii) the principle of a fair balance between the protection of the public interest and the right to property of a certain person (proportionality).

9. Referring to the ECtHR case Capital Bank AD v. Bulgaria Applicant further adds: "The ECtHR in case Capital Bank AD v. Bulgaria, no. 49429/99, found that the criterion of legality assumes, among other things, that the domestic law must provide a mechanism for protection against arbitrary interference by public authorities. The Court further emphasizes that "the concept of legality and the rule of law in a democratic society requires that measures that affect human rights can be subject to review by independent judicial bodies." Therefore, according to the ECtHR, "any interference with the peaceful enjoyment of property must be accompanied by procedural guarantees that enable individuals or legal entities to present their case before the responsible authorities in order to seriously challenge the steps by which the rights guaranteed under this provision have been interfered".

10. The Applicant also alleges that the Supreme Court violated Article 119 (4) [General Principles] of the Constitution, which obliges the Republic of Kosovo to support welfare and sustainable economic development because, "Taking into account the existing energy capacities of the Republic of Kosovo, and the fact that in addition to the significant lack of production capacities, we have the global energy crisis, and the enormous increase in import prices, the Judgment of the Supreme Court is in direct contradiction with Article 119, paragraph 4, since this Judgment discourages sustainable economic development".

11. The Applicant states that due to the erroneous application of procedural law and the lack of a convincing reasoning by the Supreme Court, there have been not sufficient guarantees in relation to the arbitrariness of the Supreme Court, which resulted in a violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

(II) Assessment of the application of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

12. First I will assess whether the water permit no. 5784/18, issued by the Ministry of Economy and Environment (hereinafter: the MEE) represents "property" within the meaning of these provisions, in order to determine whether Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR applicable in the circumstances of the present case, that is, whether the Applicant's allegations of violation of these provisions are *ratione materiae* compatible with the Constitution and the ECHR, as established in Rule 39 (3) of the Rules of Procedure of the Court.

13. I recall that the subject of the assessment of the Applicant's referral is the suspension or postponement of the execution of the decisions on granting of a water permit no. 5784/18, of 18 September 2020. Also, I recall that the Applicant also has a production license of energy issued by ERO, however, the applicants/proposers did not ask for the suspension of that license and as such it is not the subject of the assessment of this referral. However, I emphasize that the Applicant's business activity for the production of energy from renewable sources cannot be carried out without a water permit. As a result, I note that water permit is necessary for the continuation of the Applicant's business activities.

14. In order to determine whether the water permit constitute property within the meaning of Article 46 of the Constitution, in conjunction with Article 1 of Protocol no. 1 ECHR, I refer to the case law of the ECtHR.

15. The ECtHR, through its case law, in principle reiterates that the concept of "possessions" within the meaning of Article 1 of Protocol no. 1 of the ECHR has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law. In this regard, the ECtHR stated that it should be determined whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest, which is guaranteed by this provision (see *Brosset-Triboulet and others v. France* [GC] no. 34078/02, judgment of 29 March 2010, paragraph 65).

16. When it comes to business activity that is subject to a request for obtaining a permit or license, the Court in the case of *Malik v. United Kingdom* (application no. 23780/08, judgment of 13 March 2012) performed on the basis of permits or licenses:

> *"91. In cases concerning the grants of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business (see Fredin v. Sweden (no. 1), 18 February 1991, § 40, Series A no. 192, in respect of an exploitation permit for a gravel pit; and mutatis mutandis, Tre Traktörer AB v. Sweden, 7 July 1989, § 53, Series A no. 159, concerning a licence to serve alcoholic beverages in a restaurant. See also Rosenzweig and Bonded Warehouses Ltd. v. Poland, no. 51728/99, § 49, 28 July 2005, which involved a licence to run a bonded warehouse). In this regard, the Court observed in particular in Tre Traktörer AB that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had had adverse effects on the goodwill and value of the restaurant (at paragraphs 43 and 53 of the Court's judgment).*
> *[...]*
> *94....[in] cases involving the suspension or revocation of licences and permits or the refusal to enrol a person on a list of individuals entitled to practise a particular profession, the Court has tended to regard as a "possession" the underlying business or professional practice in question. Restrictions placed on registration, licences or permits connected to the work carried out by the*

business or the practice of the profession are generally viewed by the Court as the means by which the interference with a business or professional practice has taken place".

17. Bearing in mind the fact that in the circumstances of the present case the water and permit was not withdrawn but suspended, it must consider whether the suspension of such a permit also constitutes "property", namely whether Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR, applicable in the Applicant's circumstances. I also refer to the relevant case law of the ECtHR, which refers to the circumstances in which the use of a certain permit or license is temporarily suspended or prohibited.

18. With regard to the latter, I note that the ECtHR in case *O'Sullivan McCarthy Mussel Development Ltd v. Ireland* (No. 44460/16, judgment of 8 October 2018) found that a license on mussel seed fishing, which related to the applicant's primary business activity of aquaculture, was considered "*property"* within the meaning of Article 1 of Protocol no. 1 of the ECHR. In that case, the ECtHR emphasized:

> *"88. In line with the above, the Court considers that the present case concerns a "possession", namely the underlying aquaculture business of the applicant company. It is true, as the Government pointed out, that all of the various licences and authorisations held by the applicant company retained their validity in 2008. In this respect, the case differs from cases previously decided by the Court, which involved the cancellation or revocation of a licence or permit, putting an end to a commercial activity (see among many others Tre Traktörer AB, cited above, where the applicant company's licence to serve alcoholic drinks was withdrawn leading to the closure of the establishment shortly afterwards; see also Vékony v. Hungary, no. 65681/13, § 29, 13 January 2015, involving the statutory cancellation of applicant's licence to sell tobacco, followed shortly afterwards by the closure of his business). The Court observes, however, that it has also found that Article 1 of Protocol No. 1 applied even where the licence in question was not actually withdrawn, but was considered to have been deprived of its substance (Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], no. 38433/09, §§ 177-178, ECHR 2012).*
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> *89. Mindful of the need to look behind appearances and investigate the realities of the situation complained of in the present case, the Court considers that the temporary prohibition on mussel seed fishing that applied during the periods in question in 2008 is properly to be regarded as a restriction placed on a permit – the mussel seed authorisation issued to it for 2008 – connected to the usual conduct of its business.*
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> *90. For the Court, the facts of the case thus disclose an interference by the domestic authorities with the applicant company's right to the peaceful enjoyment of its possessions, including the economic interests connected with the underlying business. However, the fact that the impugned interference consisted of a temporary prohibition of part of the applicant company's activities under licence or permit, that the authorisation was not withdrawn or revoked, and that in any event the authorisation by virtue of which the applicant company conducted its business was subject to conditions, will all form part of the Court's analysis of the nature and extent of that interference. It is within this limited and particular context that the Court's analysis must be understood (see, mutatis mutandis, Malik, cited above, § 95 and further below).*

91. It follows that this complaint is not incompatible ratione materiae with Article 1 of Protocol No. 1".

19. Based on the above-mentioned principles, I note that in the circumstances of the present case, the water permit represents "property" because they are related to the business activity of the Applicant for the use of the hydroelectric power plant for the production of energy from renewable sources. In the circumstances of the present case, the water license was suspended, and the consequence of that is that its primary activity of energy production from renewable sources was also suspended until a decision on merits was rendered by the regular courts.

20. Applying the findings above to the circumstances of the present case, I consider:

i. that the water permit represent property within the meaning of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR;
ii. that the suspension of the water permit resulted in a temporary restriction for an indefinite period of the Applicant's business activity; and
iii. that this restriction may result in interference with the right to the peaceful enjoyment of the Applicant's property, including economic interests related to the basic business.

21. Therefore, I determine that in the circumstances of the Applicant, as the circumstances in which the procedure refers to the suspension of these two permits pending the adoption of a decision on merits, Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 ECHR is applicable (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 18-33, also see the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 13-22).

(III) Content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

22. In this regard, I first recall the content of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR.

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 1 [Protection of property] of protocol no. 1 of 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.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property

in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

(IV) Basic principles of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR

23. The content of Article 1 of Protocol no. 1 of the ECHR and its application, have been interpreted by the ECtHR through its case law, as noted above, the Court will refer to the interpretation of the Applicant's allegations of violation of Article 46 of the Constitution in conjunction with Article 1 of Protocol no. 1 of the ECHR.

24. As for the rights guaranteed and protected by Article 46 of the Constitution, the Court first assesses that the right to property according to paragraph 1 of Article 46 of the Constitution guarantees the right to possess property; paragraph 2 of Article 46 of the Constitution defines the way of using the property, clearly specifying that its use is regulated by law and in accordance with the public interest; and, in paragraph 3, guarantees that no one can be deprived of property arbitrarily, also defining the conditions under which property can be expropriated (see case of the Court, KI50/16, Applicant Veli Berisha and others, Resolution on Inadmissibility of 10 March 2017, KI 67/16, Applicant Lumturije Voca, Resolution on Inadmissibility, of 6 December 2016).

25. I recall that based on paragraph 2 of Article 46 of the Constitution, the right to property can be limited by law. In this case, I consider that the Assembly, as a legislative body, has the right to regulate by law the use of property, in accordance with the public interest.

26. As for the rights guaranteed and protected by Article 1 of Protocol no. 1 of the ECHR, I note that the ECtHR has established that the property right consists of three different rules. The first rule, which is defined in the first sentence of the first paragraph and which has a general nature, reflects the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, includes deprivation of property and subjects it to certain conditions. The third rule, which is included in the second paragraph of this article, recognizes the states, among others, the right to control the use of property in accordance with the general interest, with the implementation of those laws that they consider necessary for this purpose (see ECtHR case, Sporrong and Lönnroth v. Sweden, nos. 7151/75, 7152/75, Judgment of 23 September 1982, paragraph 61; and Court case, KI86/18, Applicant Slavica Đordević, Judgment of 3 February 2021, paragraph 140).

27. However, all the above rules are not “distinct” of being unconnected. The second and third rules are concerned with particular instances of interference with the right to the peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see ECtHR cases Bruncrona v. Finland, of 16 February 2005, Application No. 41673/98, paragraph 65; Anheuser-Busch Inc v. Portugal, of 11 January 2007, Application No. 73049/01, paragraph 62; James and Others v. the United Kingdom, No. 8793/79, Judgment of 21 February 1986, paragraph 37, Beyeler v. Italy, No. 33202/96, Judgment of 5 January 2020, paragraph 98, and see Court case KI129/16, applicant “KOSBAU GmBH”, Resolution on Inadmissibility of 13 November, 2017, paragraph 35).

28. The above provisions, however, shall not in any way diminish the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. (see ECtHR cases, The former King of Greece and others v. Greece, no. 25701/94, Judgment of 23 November 2000, paragraph 50).

29. However, the interference must meet certain requirements: it must comply with the principle of legality and pursue a legitimate aim in a way that is reasonably proportionate to the aim sought to be achieved (see case Beyeler v. Italy, cited above, paragraphs 108 - 114).

30. This approach represents the structure of the method that the Court uses to examine cases where it is convinced that Article 46 of the Constitution and Article 1 of Protocol no. 1 are applicable. It consists of a series of successive steps in which the following questions are resolved: Has there been any interference with the Applicant's right to the peaceful enjoyment of his "property"? If so, does that interference constitute a deprivation of property? If not, is it about controlling the use of the property? If the measures that affected the rights of the Applicant cannot be considered either deprivation or control of the use of property, the Court interprets the factual situation of the case in the light of the general rule respecting the peaceful enjoyment of "property" (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 35-42, further, see the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 24-31, also see the dissenting opinion of judge Radomir Laban in case KI159/20 of 9 December 2022 paragraphs 72-79)

(V) Application of the above-mentioned basic principles in the present case

31. To examine the Applicant's allegations regarding the violation of Article 46 [Protection of Property] of the Constitution and Article 1 of Protocol no. 1 of the ECHR, the Court must first apply a test that consists of 4 (four) steps, namely it must determine; **(1)** if there have been obstacles or interference in the peaceful enjoyment of property and what type of interference exists in the present case; **(2)** was the obstacle or interference in the peaceful enjoyment of property prescribed by law; **(3)** whether the obstruction or interference with the peaceful enjoyment of the property had a legitimate aim; and **(4)** whether the obstacle or interference with the peaceful enjoyment of the property was proportionate.

(1) whether there have been obstacles or interference with the peaceful enjoyment of the property and what kind of interference exists in the present case

32. I note that the Applicant was granted the relevant permits for carrying out his business activities, and that by the decisions on granting water permit no. 5784/18, issued by MEE). Subsequently, the ERO also granted a license to the Applicant for the production of renewable energy. However, I would like to remind you that this license is not the subject of the claimants'/proposers' proposal to postpone its execution in the proceedings conducted before the regular courts.

33. It follows from the case file that the claimants/proposers, the Group for Legal and Political Studies (hereinafter: GLPS) and the GAIA Organization, filed a lawsuit against the MEE with the Basic Court on 26 February 2021, with a proposal (i) that the lawsuit be approved in its entirety as grounded; (ii) to annul the decision of the MEE on the water permit for HPP Brezovica; (iii) to approve the request for interim measure; (iv) that the Applicant suspend the construction of hydroelectric power plants and their supporting structures in the municipality of Shterpce, HPP Brezovica, HPP Shterpce, HPP Vica and HPP Sharri, until the final decision of the court; as well as (v) to approve the request for postponement of execution of decisions.

34. As for the procedural chronology conducted before the regular courts, as previously explained, I recall that the last decision rendered in the procedure based on the proposal to postpone the execution of two decisions of the competent Ministry is the challenged judgment [ARJ no. 116/2021] of the Supreme Court, of 28 October 2021, by which it approved as grounded the claimants' request for an extraordinary review of the court decision, annulled the decision [AA. no. 665/21] of the Court of Appeals and upheld the decision [A. no. 472/2021] of the Basic Court.

35. I further recall that on 17 June 2021, the Basic Court by the decision [A. no. 472/2021], in the repeated retrial, approved as grounded, the proposal of the claimants and postponed the execution of the decision of the MEE, namely the decision on the approval of water permit no. 5784/18, until the court renders a final decision on the lawsuit of the claimants. I conclude that this decision of the Basic Court was upheld by the challenged decision of the Supreme Court.

36. Based on the above, it follows that the execution of the water permit which was issued by a public authority for an indefinite period of time was suspended or delayed to the Applicant, and which suspension directly affected the performance of his business activity.

37. I reiterate that in accordance with the case law of the ECtHR, in addition to revocation or suspension of valid business licenses, the temporary revocation or suspension represents the interference with enjoyment of property guaranteed by Article 1 of Protocol no. 1 of the ECtHR, and that interference represents control of the use of property, which is considered under second paragraph of Article 1 of Protocol No. 1 (see, mutatis mutandis, case of the ECtHR O'Sullivan McCarthy Mussel Development Ltd v. Ireland, cited above, paragraph 104).

38. Consequently, based on the above, I consider that the final decision rendered in this procedure, namely, the challenged decision of the Supreme Court, the suspension or postponement of the execution of the decisions on issuing water permit for an indefinite period of time, which resulted in interference with the right to peaceful enjoyment of the Applicant's property, namely control of use of the Applicant's property, and as a result the Applicant is immediately prevented from carrying out economic activity and is prevented from carrying out his business activity for which it had valid permits (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 44-56, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 33-38, also see the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 81-103).

39. However, I recall that despite the fact that the challenged judgment of the Supreme Court resulted in interference with the right to peaceful enjoyment of the Applicant's property, the latter should continue with consideration of the question of whether the interference was prescribed by law (see ECtHR case Megadat.com SRL v. Moldova, cited above, paragraph 66).

(2) was the obstacle or interference with the peaceful enjoyment of property prescribed by law

40. In order to carry out this step of the test, namely to determine whether the obstruction or interference with the peaceful enjoyment of property was foreseen by law, I will first describe **(a)** General principles of the ECtHR indicated in the case law regarding the expression prescribed by law and then carry out **(b)** Application of the general principles prescribed by law.

(a) *General principles of the ECtHR presented in the case law regarding the expression „prescribed by law"*

41. Any interference with the rights protected by Article 1 of Protocol no. 1 must be in accordance with the presumption of legality (see ECtHR cases Vistiņš and Perepjolkins v. Latvia, no. 71243/01, judgment of 25 October 2012, paragraph 95; Béláné Nagy v. Hungary, no. 53080/13, judgment of 13 December 2016, paragraph 112). The expression "*under the conditions provided by law*" which refers to any interference with the right to the peaceful enjoyment of "property" should be interpreted in the same way as the expression "*in accordance with the law*" under Article 8 of the ECHR in relation to the interference with the rights protected by that provision or the term "prescribed by law' which refers to the interference with the rights protected under Articles 9, 10 and 11 of the ECHR.

42. The principle of legality is the first and most important requirement from Article 1 of Protocol no. 1. The second sentence of the first paragraph allows interference with "property" only "under the conditions provided by law", and the second paragraph recognizes the right of states to control the use of property by applying "laws". In addition, the rule of law, one of the fundamental principles of a democratic society, is part of all articles of the ECHR (see the ECtHR cases Iatridis v. Greece, judgment of 25 March 1999, application no. 31107/96, paragraph 58; The former King of Greece and others v. Greece, cited above, paragraph 79. Broniowski v. Poland No. 31443/96, Judgment of 22 June 2004, paragraph 147).

43. The existence of a legal basis in domestic law is not sufficient in itself to satisfy the principle of legality. In addition, the legal basis must have a certain quality, that is, to be in accordance with the rule of law and provide guarantees against arbitrariness. In this regard, it should be noted that when speaking about the "law", Article 1 of Protocol no. 1 alludes to the same concept that the ECHR refers to in other articles when it uses that expression, a concept that includes laws and case law (see ECtHR cases, Špaček, s.r.o., v. Czech Republic, no. 26449/95, Judgment of 9 November 1999, paragraph 54; Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 96).

44. The principle of legality also implies that the applicable provisions of domestic law are sufficiently accessible, precise and predictable in their application (see ECtHR cases, Beyeler v. Italy, cited above, paragraph 109; Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, no. 60642/08, judgment of 16 July 2014, paragraph 103; Centro Europa 7 S.R.L. and DI Stefano v. Italy, cited above, paragraph 187).

45. With regard to availability, the term "law" should be interpreted in its material sense, not in its formal sense. Therefore, the fact that certain rules related to the exercise of rights protected by Article 1 of Protocol no. 1 have not been published in official gazettes in the form provided by the law for the adoption of legislative or regulatory instruments that bind citizens and legal entities in general, does not prevent these regulations from being considered law, if the Court is convinced that the public is aware of them in another way (see ECtHR cases, Špaček, s.r.o., v. Czech Republic, cited above paragraphs 57 - 60).

46. Furthermore, the Court recalls that when examined based on Article 1 of Protocol no. 1, the laws with retrospective application which were found to represent legislative interference were nevertheless in accordance with the requirement of legality from Article 1 of Protocol no. 1 (see ECHR cases, Maggio and others v. Italy, no. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, judgment of 31 August 2011,

paragraph 60, Arras and others v. Italy, no. 17972/07, judgment of 14 May 2012, paragraph 81).

47. The use of control measures implemented on the basis of laws issued after the occurrence of the facts leading to the interference, as such, are not unlawful (see ECtHR case, Saliba v. Malta, no. 4251/02 , judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. Neither the Convention nor its protocols prevent legislative intervention in existing contracts with retroactive effect (Mellacher and others v. Austria, nos. 10522/83, 11011/84; 11070/84, judgment of 19 December 1989; paragraph 50; Bäck v. Finland, no. 37598/97, judgment of 20 October 2004, paragraph 68).

48. However, in certain circumstances, the retrospective application of legislation which has the effect of depriving a person of existing "property" which was part of his "ownership" may constitute an interference which may infringe the fair balance between the requirements in the general interest on the one hand and the protection of the peaceful enjoyment of the right to "property" on the other (see ECtHR cases, Maurice v. France, no. 11810/03, judgment of 6 October 2005, paragraphs 90 and 93).

49. The principle of legality also includes the duty of the state or other public authority to comply with court orders or decisions taken against it (see ECtHR case, Belvedere Alberghiera S.r.l. v. Italy, no. 31524/ 96, judgment of 30 October 2000, paragraph 56).

50. Finally, in the case of Aliyeva and others v. Azerbaijan, the ECtHR also concluded that when manifestly contradictory decisions, and in particular decisions of the Supreme Court, where judgments that contained contradictory assessments of the same situation in the applicants' cases were rendered and in cases initiated by other persons, represent interference with the right to the peaceful enjoyment of property, unless a reasonable explanation is given for the differences, such interference cannot be considered lawful for the purposes of Article 1 of Protocol no. 1 of the Convention because they lead to inconsistency of their procedures (see ECtHR case, Aliyeva and others v. Azerbaijan, no. 66249/16 66271/16 75978/16 77309/16 77691/16 1038/17 52821/17, judgment of 21 December 2021, paragraphs 130-135, see also concurring opinion of judge Radomir Laban in case KI202/21 of 15 November 2022 paragraphs 59-68, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 41-50, see also the dissenting opinion of Judge Radomir Laban in Case KI159/20 of 9 December 2022, paragraphs 106-115)

(b) *Application of general principles "prescribed by law"*

51. In relation to this criterion, I first note that the right to peaceful enjoyment of property was interfered with by the decision [A. no. 472/2021] of the Basic Court of 17 June 2021, which, in a repeated trial, approved as grounded, the claimants' proposal and postponed the execution of the decision of the MEE, namely, the decision on the approval of water permit no. 5784/18, until the court renders a final decision on the claim of the claimants.

52. In the reasoning of the decision of the Basic Court, it was stated that the requirements from paragraph 6 in conjunction with paragraph 2 of Article 22 of the LAC for postponement of the execution of the challenged decision until the final resolution of the case, have been met. In this respect, the Basic Court assessed that the claimants/proposers submitted reliable arguments, photos of citizens' protests over the years, photos of nature damage, reports of various organizations related to the construction of hydroelectric power plants, which confirmed that the execution of the

decisions the actions planned for the residents to operate these hydroelectric plants will cause damage that can hardly be repaired.

53. In addition, the Basic Court assessed by its decision that water resources and access to water for drinking and irrigation, the water quality, negative impacts on flora and fauna, represent the general state interest and that the postponement of the execution of the challenged decision until the final resolution of the case is in the public interest and so that it would not cause more damage to the opposing party, namely, to the interested parties.

54. Therefore, when delaying the execution of the decisions of the respondents and suspending the execution of the water permit for an indefinite period, the Basic Court referred to Article 22, paragraph 2 of Law no. 03/L–202 on administrative conflicts (LAC) and Article 6 of Law no. 03/L-202 on administrative conflicts (LAC) citing them as a legal basis for postponement of the execution of the decisions of the respondents and suspended the execution of the water permit for an indefinite period until the Court decides by a final court decision regarding the claim of the claimants.

55. This reasoning is supported by the judgment [ARJ no. 116/2021] of the Supreme Court which reasoned; *"In the opinion of this court, the claimants-proposers, by the lawsuit and the request for an extraordinary review of the final court decision, provided reliable evidence that the execution of the decision of the responding authority before its legality is assessed will cause damage that can be difficult to repair and that it would be in the public interest that the decision of the respondent body is postponed. Also, the panel assesses that in this case it is a matter of material investment through the construction of a hydroelectric power plant and that in the event that by the decision on the merits is decided otherwise, it would be difficult to compensate for the damage and eliminate the damage. Therefore, the postponement of the execution of the decision of the respondent until the final decision on merits is not against the public interest, on the contrary, it has not been proven that greater or irreparable damage would be caused to the opposing party or the interested party. On the other hand, possible consequences would be avoided no matter what is decided on the merits when assessing the legality of the decision that the claimants challenge by a lawsuit at the end of the court process."*

56. Based on the above, I conclude that the interference with the peaceful enjoyment of the Applicant's property was a result of the decisions of regular courts, namely the Supreme Court, based on the applicable law, namely Law no. 03/L - 202 on Administrative Conflicts, which was adopted by the Assembly of the Republic of Kosovo and which was legally binding at the time of the decision.

57. The principle of legality also means that provisions of the domestic law are sufficiently accessible, precise and predictable in their implementation, in the present case we are dealing with the law voted in a public session of the Assembly, which is published in the official gazette, which is available online on the web. Therefore, the Court concludes that the laws were available to the Applicant and that the norms were precise and predictable.

58. The use of control measures implemented on the basis of laws issued after the appearance of the facts leading to the intervention, as such, are not unlawful (see ECtHR case, Saliba v. Malta, no. 4251/02 , judgment of 8 February 2006, paragraphs 39 - 40) unless those laws were enacted specifically to influence the outcome of an individual case. In the present case, I note that the challenged law has a general effect and does not intend to affect the individual case of the Applicant, but had *erga omnes* effect and aimed to regulate the rules of administrative procedure in entirety.

59. I conclude that the measures to control the use of property, namely the measure delaying the execution of the decisions of the respondents and suspending the execution of licenses for an indefinite period, were adopted on the basis of Articles 6 and 22 of Law no. 03/L – 202 on Administrative Conflicts. Also, it is obvious that the provisions of Articles 6 and 22 of Law no. 03/L – 202 on administrative conflicts are generally applicable, that they were valid and effective, that the latter were available and predictable for the applicant.

60. For all what was said above, I find that the provisions of the Law were predictable because they were formulated with the necessary clarity and precision. Therefore, the Court comes to the conclusion that the interference with the Applicant's right to the peaceful enjoyment of the property, which was as a result of the challenged decisions of the regular courts in this case, was done on the basis of the law (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 69-78, see further the concurring opinion of Judge Radomir Laban in Case KI143/22 of 24 January 2023, paragraphs 51-56, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 116-124)

(3) have the obstacle or interference with the peaceful enjoyment of property had a legitimate aim (public interest)

61. According to the ECtHR, any interference with the rights and freedoms guaranteed by the Convention must have a legitimate aim. Likewise, in cases involving a positive duty, there must be a legitimate justification for the state's inaction. The very principle of "fair balance" inherent in Article 1 of Protocol no. 1 presupposes the existence of a general interest of the community. Moreover, it must be reiterated that the various rules contained in Article 1 are not distinct, in the sense of incoherence, and that the second and third rules refer only to special cases of interference with the right to the peaceful enjoyment of property. One of the effects of this is that the existence of the "public interest" required in the second sentence, or the "general interest" in the second paragraph, are in fact a consequence of the principle defined in the first sentence, so that interference with the exercise of the right to the peaceful enjoyment of property within the meaning of the first sentence of Article 1 must also have an aim in the public interest (see, ECtHR cases, Broniowski v. Poland, cited above, paragraph 148; Könyv-Tár Kft and others v. Hungary, no. 21623/13, judgment of 16 March 2018, paragraph 45, Beyeler v. Italy, cited above, paragraph 111).

62. The list of purposes for which interference would fall within the scope of the concept of public interest is extensive and may include various new purposes that are subject to public policy considerations in different factual contexts. Specifically, the decision to enact a law confiscating property or social security compensation usually involves consideration of political, societal and social issues (see ECtHR cases, The former King of Greece and Others v. Greece, cited above , paragraph 87; Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 106).

63. According to the system of protection established by the Convention, the national authorities should carry out an initial assessment of the existence of a problem of public interest that requires measures of deprivation of property or interference with the peaceful enjoyment of "property". And in this, as in other areas covered by the safeguards of the Convention, national bodies enjoy a wide margin of appreciation. For example, the margin of appreciation enjoyed by the legislature in the application of social and economic rules is wide and the Court will respect the legislature's assessment of what is "in the public interest" unless that assessment is manifestly

without a reasonable basis (see ECtHR case, Béláné Nagy v. Hungary, cited above, paragraph 113).

64. Furthermore, the concept of "public interest" is necessarily broad (see ECtHR cases Vistiņš and Perepjolkins v. Latvia, cited above, paragraph 106; R.Sz. v. Hungary, no. 41838/11, judgment of 4 November 2013, paragraph 44; Grudić v. Serbia, no. 31925/08, judgment of 24 September 2012, paragraph 75). The Court usually respects states' claims that the intervention it examines was in the public interest, and its review in this regard is of the lowest intensity. Therefore, the Applicant's claim that a particular measure in reality served a different purpose than that invoked by the respondent state in the context of a particular case before the Court rarely has a serious prospect of success. In any case, it is sufficient for the Court that the intervention is in the public interest, even if this interest is different from the interest expressed expressly by the State in the proceedings before the Court. In some cases, the Court even found the aim *ex officio* (see ECtHR cases, Ambruosi v. Italy, no. 31227/96, judgment of 19 January 2001, paragraph 28; Marija Božić v. Croatia, 50636/09, judgment of 24 April 2014, paragraph 58).

65. As a result of this respect for the assessment of domestic authorities, there are rare examples of situations in which the Court has not found that there is a public interest that would justify interference (see ECtHR cases, S.A. Dangeville v. France, no. 36677/97, judgment of 16 July 2002, paragraphs 47 and 53 - 58 – non-refund of prepaid tax; Rosenzweig and Bonded Warehouses Ltd. v. Poland, cited above, paragraph 56 - cancellation of the applicant's business permit without referring to any reasons of public interest by the authorities in authoritative decisions).

66. Returning to the present case, I first note that the right to peaceful enjoyment of property was interfered with by decision [A. no. 472/2021] of the Basic Court of 17 June 2021, which approved as grounded the request of the claimant to postpone the execution of the decisions of the respondents and suspended the execution of water permit for an indefinite period until the Court decides by a final court decision regarding the lawsuit of the claimants.

67. I note that in Decision [A. no. 472/2021] the Basic Court, when reasoning the public interest stated the following

> *" Therefore, at the retrial, the lawsuit, the claimant's proposal, the case file and the evidence submitted by the claimant with the lawsuit were re-examined. Based on the provisions of Article 22, paragraph 2 and 6, of LAC, considering the request for postponement of the execution of challenged decisions, the court assessed that the claimants/proposers provided sufficient reliable arguments, namely photographs*
>
> *Of the protests by citizens over the years regarding the non-construction of hydropower plants, photos of natural damage, reports of organizations related to the construction of hydropower plants, which confirm the fact that the execution of the decision would cause damage to the residents of the area where these hydropower plants are expected to work, damage that is difficult to repair. Also, the court found that postponing the execution of the decision until the case is decided on merits, is not in contradiction and would not cause any great damage to the opposing party, namely the interested parties.*
>
> *Since water sources, access to drinking water and water for irrigation as well as water quality, negative impacts on all natural values, on flora and aquatic and terrestrial fauna, on landscapes, represent the general state interest, the court*

assessed that postponing the execution of the challenged decision until it is decided regarding the claimant's lawsuit, is in the public interest and that the postponement would not cause great damage to the opposing party, in this case the ministry, and also to the interested party, the company „Matkos Group", because in this case, for the latter, the delay in execution implies only a delay profit for later. This would avoid possible consequences that would be caused in the future, if the challenged decision of the respondent, at the end of the court proceedings, turns out to have been rendered in violation of the law.

In this respect, the court assessed that the requirements from Article 22, paragraph 6, in conjunction with paragraph 2, of the LAC, for postponement of the execution of challenged decisions, until the final decision on the case were met.."

68. This reasoning was supported by the Judgment [ARJ. no. 116/2021] of the Supreme Court, which reasoned: "*According to the opinion of this court, the claimants-proposers, by the lawsuit and the request for an extraordinary review of the final court decision, provided reliable evidence that with the execution of the decision of the respondent, before its legality is assessed, damage will be caused that can hardly be repaired and it would be in the public interest to postpone the decision of the respondent authority. Also, the panel assesses that in this case it is not a question of material investment with the construction of hydropower plants, and if it were decided otherwise with decision on merits of the case, it would be difficult to recover and avoid damage. Therefore, the postponement of the execution of the decision of the respondent authority until the decision on merits by the final decision is rendered, is not against the public interest, on the contrary, it is not proven that it will not cause great or irreparable damage to the opposing party or the interested party. While on the other hand, the possible consequences will be avoided, no matter what is decided on the merits during the assessment of the legality of the decision challenged by a lawsuit of the claimant at the end of the court proceedings.*"

69. Based on the above, I note that the regular courts, that is, the Basic Court and the Supreme Court, in their reasoning, tried to reason that the decisions on postponing the execution of the decisions of the respondents and suspending the execution of water permit for an indefinite period until the Court renders a final decision regarding the lawsuit of the claimants, tried to bring with the reasoning that they were protecting the public interest and trying to avoid irreparable damage that could be caused.

70. I recall that the state authorities enjoy a wide margin of appreciation both in terms of the choice of enforcement means and in terms of ascertaining whether the consequences of enforcement are justified by the general interest to achieve the purpose of the given law (see, the case of the ECtHR , Beyeler v. Italy, cited above, paragraph 112).

71. In the end, I conclude that based on the reasoning of the Supreme Court, it can be concluded that the regular courts followed a legitimate aim and tried to justify the protection of the public interest with possible irreparable damage that may occur to the claimants. Therefore, I conclude that the regular courts followed a legitimate aim when rendering the challenged decisions. (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 79-89, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 57-67, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 125-133)

(4) was the obstacle or interference with the peaceful enjoyment of the property proportional, namely in fair balance

72. In order to be in accordance with the general rule defined in the first sentence of the first paragraph of Article 1 of Protocol no. 1, the interference with the right to the peaceful enjoyment of "property", in addition to being foreseen by law and in the public interest, must result in a "fair balance" between the requirements of the public interest of the community and the requirements to protect fundamental rights of the individual (see ECtHR cases, Beyeler v. Italy, cited above, paragraph 107; Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia, cited above, paragraph 108).

73. In other words, in cases involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden. In assessing compliance with that requirement, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". In that context, it should be stressed that uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct (see the ECtHR case, Broniowski v. Poland, cited above, paragraph 151)

74. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 of Protocol No. 1 (see ECtHR cases, Sporrong and Lönnroth v. Sweden, cited above, paragraph 69; Brumărescu v. Romania, no. 28342/95, judgment of 28 October 1999, paragraph 78; Saliba v. Malta, cited above, paragraph 36).

75. The issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question served the public interest, satisfied the requirement of lawfulness and was not arbitrary (see cases of the ECHR, Iatridis v. Greece, cited above, paragraph 58; Beyeler v. Italy, cited above, paragraph 107).

76. The issue is most often decisive for the determination of whether there has been a violation of Article 1 of Protocol No. 1. The Court conducts normally an in-depth analysis of the proportionality requirement, unlike the more limited review of whether the interference pursued a matter of public interest.

77. The purpose of the proportionality test is to establish first how and to what extent the applicant was restricted in the exercise of the right affected by the interference complained of and what were the adverse consequences of the restriction imposed on the exercise of the applicant's right on his/her situation. Subsequently, this impact is balanced against the importance of the public interest served by the interference (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 90-95, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 68-73, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 134-139)

78. Numerous factors are taken into consideration by the ECtHR in this examination. There is no fixed list of such factors. They vary from case to case, depending on the facts of the case and the nature of the interference concerned. The factors and facts that the court takes into account during the test can be as follows; **a)** Procedural factors, **b)** Choice of measures **c)** Substantive issues relevant to the fair balance test,

d) Aspects concerning the Applicant **e)** Compensation for interference with ownership as an element of fair balance, and **f)** Conclusion about the fair balance.

a) Procedural factors

79. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, it has been construed to mean that persons affected by a measure interfering with their "possessions" must be afforded a reasonable opportunity to put their case to the responsible authorities for the purpose of effectively challenging those measures, pleading, as the case might be, illegality or arbitrary and unreasonable conduct (see ECtHR cases, G.I.E.M. S.R.L. and others v. Italy, no. 1828/06, judgment of 28 June 2018, paragraph 302; AGOSI v. the United Kingdom, no. 9118/80, judgment of 24 October 1986, paragraphs 55 and 58 - 60).

80. It is also relevant that the main arguments presented by the applicants were carefully examined by the authorities (see ECtHR cases, Megadat.com SRL v. Moldova, paragraph 74; Bistrović v. Croatia, no.25774/05, judgment of 31 August 2007, paragraph 37).

81. As for the procedural factors, the Court notes that the Applicant had the opportunity to challenge the decision of the Basic Court, first before the Court of Appeals and later also before the Supreme Court so that the Applicant had a reasonable opportunity to present his arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or that they constitute arbitrary and unreasonable conduct (see ECtHR case, G.I.E.M. S.R.L. and others v. Italy, cited above, paragraph 302).

82. However, I note that it is obvious that the main explanations are missing regarding the interpretation and application of Article 22 of the LAC in relation to the circumstances of this case because: (i) the Supreme Court did not weigh the balance between irreparable damage that could be caused on the claimant in relation to irreparable damage that could be caused to the applicant, considering his investment in the infrastructure of hydropower plants; (ii) why delaying the execution of the decisions of MEE and ERO is in the protection of the public interest, and not in the protection of the public interest if the execution of the decisions of the MEE and ERO would be allowed considering that hydro power plants produce and provide renewable electricity for a part of citizens in the municipality of Decani; (iii) there is a lack of reasoning with explanation why the right of GIPS and GAIA Organization to protection against irreparable damages overrides the Applicant's right also to protection against irreparable damage; and, (iv) why the interest of the claiming party is also the public interest and why the same does not apply to the applicant.

83. In addition, I assess that, except for the description of the relevant legal provisions on the postponement of the execution of an act as prescribed in Article 22 of the LAC, the Supreme Court did not present any evidence or argument in support of the fulfillment of the legal requirements for the postponement of the execution of the decisions of the MEE (see the Court cases KI75/21, cited above, paragraph 86 and KI202/21, Applicant *"KELKOS Energy"* L.L.C., judgment of 29 September 2022).

84. I note that the Applicant obtained a water permit from the competent authorities of the Republic of Kosovo and that the latter continuously suffers damage every day that it is not allowed to carry out activity based on the permit it has legally obtained from the competent authorities of the Republic of Kosovo. In addition, I therefore assess that the Applicant is under constant supervision by the MEE in terms of compliance

with the conditions of the permit and its cancellation if the Applicant does not comply with them.

85. I recall that the ECtHR in its consolidated case law has determined that courts with appellate jurisdiction do not need to provide a detailed reasoning in cases where they agree with the reasoning given by the courts of first instance, despite the fact that they must also be sufficiently reasoned (see the case of the ECtHR *Garcia Ruiz v. Spain*, cited above, paragraph 31).

86. I recall that the Supreme Court has quashed the Decision of the Court of Appeals, which means that the Supreme Court had the obligation to provide explicit reasoning for all the central allegations raised by the Applicant and elaborated by the Court of Appeals, and not to ignore them in their entirety or to address some of them only with a brief and generalized reasoning (see the ECtHR case *Lindner and Hammermayer v. Rumania*, no. 35671/97, Judgment of 3 December 2002, paragraph33 and case of the Court KI202/21, cited above, paragraph 135). Therefore, I reiterate that that the Supreme Court could not only answer the essential questions with a brief reasoning, but had the obligation to answer all the essential questions presented by the applicant, which did not happen in the circumstances of the present case (see ECtHR case *Hiro Balani v. Spain*, cited above, paragraph 28).

87. I consider that the Supreme Court did not present in the reasoning of its judgment: (i) what is the damage caused to the claimant by the execution of the challenged act and why is this damage irreparable; (ii) what evidence was assessed in order to establish that delaying the execution of the decision of the MEE is not against the public interest; (iii) why greater or irreparable harm is not caused to the applicant.

88. Given that the Applicant has not received a specific answer to the specific and essential allegations, I consider that the Judgment of the Supreme Court does not provide the guarantees embodied in Article 31 of the Constitution and Article 6 of ECHR that contain the obligation for courts to give sufficient reasons for their decisions (see, the ECtHR case *H. V. Belgium*, cited above, paragraph 53; and see also cases of the Court KI202/21, cited above, KI230/19, Applicant *Albert Rakipi,* cited above, paragraph 139 and KI87/18, Applicant *IF Skadiforsikring,* cited above, paragraph 44).

89. From all of the above, I conclude that throughout the entire procedure before the regular courts, the Applicant did not receive adequate and reasoned answers to the main issues that the Applicant stated throughout the procedure, the regular courts did not examine with due diligence the Applicant's main allegations which have been set out in detail above (see ECtHR case, Megadat.com SRL v. Moldova, cited above, paragraph 74; Bistrović v. Croatia, cited above , paragraph 37).

90. Therefore, I conclude that in terms of procedural factors, that the Applicant had a reasonable opportunity to present its arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are unlawful or constitute arbitrary and unreasonable conduct. However, during the procedure, the regular courts, and especially the Supreme Court, did not examine with sufficient care the Applicant's main allegations (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 97-106, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 75-80, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 141-158).

b) Choice of measures

91. One of the elements of the fair balance test is whether other, less intrusive measures existed that could reasonably have been resorted to by the public authorities in the pursuance of the public interest. However, their possible existence does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way (see ECtHR case, James and others v. United Kingdom, cited above, paragraph 51; Koufaki and Adedy v. Greece, no. 57657/12, decision of 7 May 2013, paragraph 48).

92. It may also be relevant whether it would have been possible to achieve the same objective by less invasive interference with the applicant's rights and whether the authorities examined the possibility of applying these less intrusive solutions (see ECtHR cases, OAO Neftyanaya Kompaniya Yukos v. Russia, no. 14902/04, judgment of 8 March 2012, paras 651-654; Vaskrsić v. Slovenia, no. 31371/12, judgment of 25 July 2017, paragraph 83).

93. In the case before me, I consider that the interference with the peaceful enjoyment of property, namely the measure of controlling the use of the property was momentary, which required the termination of the applicant's business activity and that there were no other alternative measures, because after the decision to postpone the execution of the respondents' decisions and suspend the execution of water permit for an indefinite period, the Applicant was forced to terminate his economic activity with immediate effect, facing a heavy and disproportionate burden.

94. Therefore, I conclude that there were no other alternative measures, such measures that are less intrusive, which the public authorities could reasonably implement in pursuit of the public interest. I consider that the same objective could have been achieved by a less invasive interference with the Applicant's rights, and that the authorities did not consider the possibility of implementing those less intrusive solutions. (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 107-110, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 81-84, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 159-162)

c) Substantive issues relevant for the fair balance test

95. In certain cases the fair balance test includes a question whether the special circumstances of the case were sufficiently taken into consideration by the State, including the question of whether the measures controlling the "property" or part of the property affected the value or benefit of the part that is not covered by the measures pertaining to the Applicant (see ECHR cases, Azas v. Greece, no. 50824, judgment of 21 May 2002, paragraphs 51-53; Interoliva ABEE v. Greece, no. 58642/00, judgment of 10 October 2003, paragraphs 31 - 33).

96. I note that in the present case, we are dealing with the control measure of "property", taking into account that the applicant's valid water permit was suspended, but there has been no confiscation of property, such as hydro power plants or their equipment, as well as the applicant's business premises.

97. Therefore, the Court concludes that despite the fact that there has been no confiscation of the property, but only a control measure of the "property", by the decision to postpone the execution of the decisions of the respondents for an

indefinite period of time, the value of parts of the Applicant's property that were not covered by the measures was reduced, because the latter lost their basic function that they had while the license existed. (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 111-113, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 85-87, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 163-165).

d) Issues concerning the Applicant

98. One of the significant factors for the balancing test under Article 1 of Protocol No. 1 is whether the applicant attempted to take advantage of a weakness or a loophole in the legal system (see the cases of National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom, no. 117/1996/736/933-935, judgment of 23 October 1997, paragraph 109). Similarly, in the case of G.I.E.M. S.R.L. and others v. Italy, cited above, paragraph 301), the Court noted that the degree of culpability or negligence on the part of the applicant or, at the very least, the relationship between their conduct and the offence in question may be taken into account in order to assess whether a confiscation was proportionate.

99. Regarding this factor, from the case file the Court has no information either from the competent state authorities or from the regular courts that the Applicant has violated any norm, has been punished or has tried to take advantage of any weakness or a loophole in the legal order. (see ECtHR case, OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and others v. France, no. 42219/98 et 54563/00, judgment of 27 August 2004, paragraphs 69 and 71).

100. Therefore, I conclude that the Applicant did not attempt to take advantage of any weakness or a loophole in the legal order, that the Applicant was not found culpable or negligent in using the license in illegal manner, so that the Court can assess that it was necessary to control the use of the property. (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 114-116, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 88-90, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraphs 166-168).

e) Compensation for the interference with property as an element of fair balance

101. Compensation terms are material to the assessment of fair balance and, notably, whether the contested measure does not impose a disproportionate burden on the applicants (see ECtHR cases, Holy Monasteries v. Greece, nos. 13092/87 and 13984/88, judgment of 9 December 1994, paragraph 71; Platakou v. Greece, No. 38460/97, judgment of 5 December 2001, paragraph 55). The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.

102. What is reasonable will depend on the circumstances of a given case, but a wide margin of appreciation is applicable to the determination of the amount of compensation. The Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain (see ECtHR case, James and others v. the United Kingdom, cited above, paragraph 54). The Court will respect the legislature's judgment as to the compensation due for interference with peaceful enjoyment of „property" unless it is

manifestly without a reasonable foundation (see ECtHR case, Lithgow and others v. the United Kingdom, no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, judgment of 8 July 1986, paragraph 122).

103. In the present case, I note that the property control measures took place without any compensation for the Applicant. Measures of control of property without payment of an amount reasonably related to its value will usually constitute unreasonable interference and a complete lack of compensation may be considered justified under Article 1 of Protocol no. 1 only in exceptional circumstances.

104. I note that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justified only in exceptional circumstances that are not relevant to the present purposes. As regards Article 1 (P1-1), the protection of property rights it provides would be largely illusory and ineffective in the absence of any equivalent principle (see ECtHR case, Lithgow and others v the United Kingdom, cited above, paragraph 122).

105. Therefore, I find that the interference with the peaceful enjoyment of the Applicant's property occurred without the payment of any compensation to the Applicant, therefore a "fair balance" was not struck between the requirements of the general interest of the community and the requirements of the protection of fundamental rights of the individual. (see concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraphs 117-121, see further concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 91-95, see also dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022 paragraphs 169-173).

f) Conclusion about fair balance

106. Therefore, I as an individual judge regarding the factors that are taken into account to determine whether there has been a proportionality in the interference with the right to the peaceful enjoyment of the Applicant's property, reach the conclusion:

a) that in terms of procedural factors the Applicant had a reasonable opportunity to present its arguments before the competent authorities in order to effectively challenge these measures, claiming, depending on the case, that they are illegal or that constitute arbitrary and unreasonable conduct. However, during the procedure, the regular courts, especially the Supreme Court, did not consider with due diligence the main allegations of the Applicant.

b) that there were no other alternative measures, less intrusive measures that the public authorities could have reasonably implemented for the realization of the public interest. I consider that the same objective could have been achieved by a less invasive interference with the Applicant's rights, and that the authorities did not consider the possibility of implementing those less intrusive solutions.

c) that despite the fact that there was no confiscation of property, but only a control measure of "property", the decisions on postponing the execution of the decisions of the respondents and suspending the execution of water permit for an indefinite period, have led to the reduction in the value of the parts of the property that were not included in the measures, because they have lost their basic function that they had while the license existed.

d) that the Applicant has not attempted to take advantage of any weakness or a loophole in the legal order, that the Applicant has not been found culpable or negligent in the use of the water permit in illegal manner, so that the court can assess that the measure control of the use of the property was necessary.

e) that the interference with the peaceful enjoyment of the Applicant's property occurred without paying any compensation to the Applicant, therefore a "fair balance" between the requirements of the general interest of the community and the requirements for the protection of fundamental rights of the individual was not struck.

107. I recall the ECtHR case, Megadat.Com SRL v. Moldova, where the ECtHR assessed that the measure taken by the state authorities against the company that provided Internet services was so severe that the company in question was forced to close its business and to sell all its assets within a very short time (see ECtHR case, Megadat.com SRL v. Moldova, cited above, paragraph 69).

108. Finally, I note that the decision to postpone the execution of the respondents' decisions and to suspend the execution of the water permit for an indefinite period was immediate and did not foresee any compensation or transitional period that would allow the Applicant to continue to carry out its economic activity.

109. From all the above, I conclude that in the light of the prevailing circumstances of the case and the assessments described previously, the interference with the peaceful enjoyment of the property in the case of the Applicant was not proportionate because the latter had legitimate expectations that during the period in which it has a valid water permit, it will be able to exercise its economic activity and peacefully enjoy its property.

110. Therefore, I conclude that by the challenged judgment [ARJ. no. 116/2021] of the Supreme Court and decision [A. no. 472/2021] of the Basic Court of 17 June 2021, whereby the decision on postponement of execution of the respondents' decisions and suspension of the execution of the water permit for an indefinite period was rendered, the Applicant's right to peaceful enjoyment of property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR has been violated (see the concurring opinion of Judge Radomir Laban in case KI202/21 of 15 November 2022, paragraph 126, see further the concurring opinion of Judge Radomir Laban in case KI143/22 of 24 January 2023, paragraphs 100-101, see also the dissenting opinion of Judge Radomir Laban in case KI159/20 of 9 December 2022, paragraph 183).

(VI) Conclusion regarding the alleged violations of the Applicant's rights

111. Based on the above, and taking into account the consideration of the Applicant's allegations in its referral:

I. I AGREE with the opinion of majority that the Applicant's allegations that the Judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 violated the right to fair and impartial trial guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR as reasoned in the judgment, are grounded.

II. I CONSIDER as grounded the Applicant's allegations that by the challenged judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 and decision [A. no. 472/2021] of the Basic Court of 17 June 2021, whereby the decision on postponement of execution of the respondents' decisions and suspension of the execution of the water permit for an indefinite period was rendered, the Applicant's right to peaceful enjoyment of property, guaranteed by Article 46 of the Constitution and Article 1 of Protocol no. 1 of the ECHR has been violated.

III. I AGREE with the opinion of majority TO DECLARE Judgment [ARJ. no. 116/2021] of the Supreme Court of 28 October 2021 invalid.

IV. I CONSIDER THAT Decision [A. no. 472/2021] of the Basic Court of 17 June 2021 should have been DECLARED UNCONSTITUTIONAL.

Concurring Opinion is submitted by Judge;

Radomir Laban, Judge

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On 19 January 2023 in Prishtina