REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, on 5 April 2023
Ref. no.: AGJ 2152/23

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JUDGMENT

in

cases no. KO100/22 and KO101/22

Applicants

of Referral KO100/22 Abelard Tahiri and 10 other deputies of the Assembly of the Republic of Kosovo;
of Referral KO101/22 Arben Gashi and 10 other deputies of the Assembly of the Republic of Kosovo

Constitutional review of Law No. 08/L-136 on Amending and Supplementing Law no.06/L-056 on Kosovo Prosecutorial Council

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge, and
Enver Peci, Judge

Applicants

1. Referral KO100/22 was submitted by Abelard Tahiri, Elmi Reçica, Ganimete Musliu, Enver Hoxhaj, Ferat Shala, Blerta Deliu-Kodra, Bekim Haxhiu, Floretë Zejnullahu, Isak Shabani, Rashit Qalaj dhe Hajdar Beqa, deputies of the Assembly of the Republic of Kosovo (hereinafter: the Assembly), of the parliamentary group of the Democratic Party of Kosovo (hereinafter: PDK), who are represented by Faton Fetahu, lawyer.

2. Referral KO101/22 was submitted by Arben Gashi, Armend Zemaj, Avdullah Hoti, Agim Veliu, Rrezarta Krasniqi, Besian Mustafa, Hykmete Bajrami, Vlora Dumoshi, Valentina Bunjaku, Anton Quni dhe Marigona Geci, also deputies of the Assembly, of the parliamentary group of the Democratic League of Kosovo (hereinafter: LDK), who are represented by deputy Armend Zemaj (hereinafter jointly referred to as the Applicants).

Contested Law

3. The Applicants in Case KO100/22, challenge the constitutionality of Articles 13, 16, 18 and 20 of Law No. 08/L-136 on Amending and Supplementing Law no. 06/L-056 on Kosovo Prosecutorial Council (hereinafter: the Contested Law), adopted by the Decision of the Assembly [no. 08-V-309] of 23 June 2022. Whereas, the Applicants in Case KO101/22 challenge the constitutionality of the Contested Law in its entirety.

Subject matter

4. The subject matter of the referrals is the constitutional review of provisions of the Contested Law, which, according to the Applicants' allegations are not compatible with Articles: 4 [Form of Government and Separation of Power], 16 [Supremacy of the Constitution], 24 [Equality Before the Law], 32 [Right to Effective Remedies], 45 [Freedom of Election and Participation], 54 [Judicial Protection of Rights], 109 [State Prosecutor] and 110 [Kosovo Prosecutorial Council] of the Constitution of the Republic of Kosovo (hereinafter: Constitution).

5. In addition, the Applicants request the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) to impose an interim measure to suspend *ex lege* the entry into force and implementation of the Contested Law, until the final decision on the referrals by the Court.

Legal basis

6. The referrals are based on paragraph 5 of Article 113 [Jurisdiction and Authorized Parties] and paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, Articles 22 (Processing Referrals), 27 (Interim Measures), 42 (Accuracy of the Referral) and 43 (Deadline) of Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: Law), and Rules 32 [Filing of Referrals and Replies] and 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure of the Court, no. 01/2018 (hereinafter: Rules of Procedure).

Proceedings before the Court

7. On 1 July 2022, the Applicants submitted the referrals to the Court.

8. On 4 July 2022, the President of the Court, by the Decision [No. GJR. KSH KO100/22], for case KO100/22, appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel, composed of: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi (members). On the same date, the President, for case KO101/22, by the Decision [No. GJR. KSH KO101/22], appointed Judge Radomir Laban, as Judge Rapporteur and the Review Panel composed of: Selvete Gërxhaliu-Krasniqi (Presiding), Safet Hoxha and Nexhmi Rexhepi (members).

9. On 4 July 2022, the President, in accordance with paragraph (1) of Rule 40 [Joinder and Severance of Referrals] of the Rules of Procedure, by Order [KO100/22 and

KO101/22], ordered the joinder of Referral KO101/22 with Referral KO100/22. Based on paragraph (3) of the aforementioned rule on the joinder of referrals, the Judge Rapporteur and the composition of the Review Panel remain in the same composition, as assigned for the first referral, namely KO100/22.

10. On the same date, the Court notified about the registration of the referrals initially: (i) the President of the Republic of Kosovo (hereinafter: the President); (ii) the President of the Assembly, who was asked to notify the deputies that they can submit their comments regarding the Applicants' referrals, if they have any, until 18 July 2022; as well as (iii) the General Secretary of the Assembly, who was asked to take into account the requirements of paragraph 2 of Article 43 of the Law, which defines: "*In the event that a law or decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, Paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with* modalities *determined in the final decision of the Constitutional Court on this contest*". The Court, based on the aforementioned provision of the Law and its case law, recalled that this provision means that the challenged Law cannot be decreed, enter into force, or produce legal effects until the final decision of the Court regarding the case filed before it.

11. On 5 July 2022, the Court notified about the registration of the referrals and the Order for their joinder: (i) the Applicants; (ii) the Prime Minister of the Republic of Kosovo (hereinafter: the Prime Minister); (iii) the Institution of the Ombudsperson of the Republic of Kosovo (hereinafter: the Ombudsperson); (iv) Ministry of Justice of the Republic of Kosovo (hereinafter: Ministry of Justice); and (v) the Prosecutorial Council of the Republic of Kosovo (hereinafter: KPC or the Council). On the same date, regarding the decision on joinder of referrals, the Court notified: (i) the President; (ii) the President of the Assembly; and (iii) the General Secretary of the Assembly, who were notified in advance about the registration of referrals, namely on 4 July 2022.

12. On the same date, the Court also notified the interested parties about the respective deadlines for submitting comments regarding the referrals. More precisely: (i) for the President and President of the Assembly, who received the notifications about the registration of referrals on 4 July 2022, this deadline ended on 18 July 2022; whereas (ii) for the Prime Minister, the Ombudsperson, the Ministry of Justice and the KPC, who received the notifications on 5 July 2022, the deadline ended on 19 July 2022.

13. On 13 July 2022, the Chamber of Advocates of the Republic of Kosovo (hereinafter: the Chamber of Advocates), addressed the Court with a request for its inclusion as an interested party to the proceedings, to provide comments regarding the Contested Law.

14. On 14 July 2022, the Assembly submitted to the Court all the relevant documentation regarding the Contested Law.

15. On 15 July 2022, the KPC submitted its comments regarding the Contested Law.

16. On 19 July 2022, the Ministry of Justice also submitted its comments regarding the Contested Law.

17. On 25 July 2022, the Court notified the Chamber of Advocates of the approval of its request for inclusion in the procedure as an interested party, and was asked to submit their comments to the Court on 9 August 2022.

18. On 25 July 2022, the Court received a request from the Ombudsperson, by which this institution requested the extension of the deadline for submitting comments regarding the Contested Law.

19. On 29 July 2022, the Court approved the request of the Ombudsperson for the extension of the deadline for submitting comments regarding the contested Law. On the same date, the Ombudsperson submitted to the Court his comments regarding the Contested Law.

20. On 9 August 2022, the Chamber of Advocates submitted comments regarding the Contested Law.

21. On 15 August 2022, the Court, a copy of the comments of the KPC, the Ministry of Justice, the Chamber of Advocates and the Ombudsperson, was sent to the Applicants, the President of the Assembly, the Secretary of the Assembly, the Ombudsperson, the Ministry of Justice, the KPC and the Chamber of Advocates, who were given a deadline to submit answers to the comments until 29 August 2022. On the same date, the Court sent a copy of the aforementioned comments to the President and the Prime Minister.

22. On 29 August 2022, the Ombudsperson submitted a response to the comments submitted by the KPC, the Ministry of Justice and the Chamber of Advocates.

23. On the same date, the Ministry of Justice submitted a response to the comments of the KPC, the Ombudsperson and the Chamber of Advocates.

24. On 5 September 2022, the Court notified the Applicants about the comments received from the Ombudsperson, KPC and the Ministry of Justice.

25. On 28 September 2022, the Review Panel considered the report of the Judge Rapporteur regarding the admissibility of the referrals and unanimously recommended to the Court the admissibility of the referrals and their review on merits.

26. On 16 December 2022, Judge Enver Peci took the oath in front of the President, in which case his mandate at the Court began.

27. On 24 March 2023, the Court unanimously held that (i) the referral is admissible; and (ii) item 1.3.2 of paragraph 1 of Article 6 and Article 8, namely Article 10/A of the contested Law are not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 10 of Article 65 [Competencies of the Assembly] and Article 132 [Role and Competencies of the Ombudsperson] of the Constitution; (iii) paragraph 2/a of Article 13 of the contested Law is not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power] and paragraph 1 of Article 110 [Kosovo Prosecutorial Council] of the Constitution; (iv) paragraph 5 of Article 16 of the contested Law is not compatible with paragraph 1 of Article 24 [Equality Before the Law] of the Constitution; (v) Article 18, respectively 23/A of the contested Law is not compatible with Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution; and (vi) paragraph 3 of Article 11 and Article 20 of the contested Law are not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights], and paragraph 1 of Article 110 [Kosovo Prosecutorial Council] of the Constitution.

Summary of facts

28. Based on the case file, the initiative to amend and supplement Law no. 08/L-156 on the KPC (hereinafter: Basic Law), was preceded by the process of the Functional Review of the Rule of Law Sector, which resulted in the Strategy for the Rule of Law 2021-2026, which aimed at "*increasing the accountability of the judicial and prosecutorial system",* among other things, through *"the implementation of the foreseen measures, starting with legal changes in the composition of the KJC and the KPC".*

29. On 26 October 2021, the Ministry of Justice, after drafting the draft law to amend and supplement the Basic Law, addressed the Venice Commission, to obtain a relevant opinion, whether the draft law in question was drafted in accordance with European and international standards.

30. On 18 and 19 November 2021, the representatives of the Venice Commission visited the Republic of Kosovo and met the relevant authorities to obtain the necessary information regarding the draft law compiled by the Government of the Republic of Kosovo (hereinafter: the Government).

31. On 13 December 2021, the Venice Commission published Opinion no. 1063/2021, CDL-AD(2021)051 approved at the 129th plenary session (hereinafter: First Opinion), on the draft amendments to the draft law on amending and supplementing the Basic Law.

32. After the first Opinion of the Venice Commission, in February 2022, the Government drafted and approved the second draft of the draft law on amending and supplementing the Basic Law.

33. On 25 February 2022, the Government requested a second Opinion from the Venice Commission, to ensure whether the final draft of the draft law on amending and supplementing the Basic Law, had addressed the observations and recommendations of the first Opinion.

34. On 9 March 2022, the Government, by Decision [no. 02/67], approved the draft law on amending and supplementing the Basic Law.

35. On 11 March 2022, the Government, in accordance with the aforementioned Decision of 9 March 2022, forwarded the draft law on amending and supplementing the Basic Law to the Assembly for first reading and approval, according to the provisions of Rules of Procedure of the Assembly).

36. On 23 March 2022, the Venice Commission published Opinion no. 1080/2022, CDL-AD(2022)006 approved in the 130th plenary session (hereinafter: Second Opinion), regarding the final draft of the draft law on amending and supplementing the Basic Law.

37. On 5 April 2022, the Functional Committee on Legislation, Mandates, Immunities, Rules of Procedure of the Assembly and the Oversight of Anti-Corruption Agency (hereinafter: the Functional Committee), distributed the second Opinion of the Venice Commission to all deputies of the Assembly.

38. On 14 April 2022, the Assembly, after the first reading procedure, in the presence of seventy-nine (79) deputies, with sixty-three (63) votes for and sixteen (16) against, approved in principle the draft law on amending and supplementing the Basic Law,namely the contested Law.

39. On the same date, the Assembly charged the Functional Committee, the Committee for Budget and Finance, the Committee on European Integration and the Committee on

Rights and Interests of Communities and Returns (hereinafter: Standing Committees), that in accordance with the deadline provided by the Regulation of the Assembly, to review the draft law on amending and supplementing the Basic Law and to present the report with recommendations to the Assembly.

40. On the same date, the functional Committee approved its report regarding the draft law on amending and supplementing the Basic Law, proposing thirteen (13) amendments to the said draft law.

41. On 17 May 2022, the Functional Committee reviewed the draft law on amending and supplementing the Basic Law and on the same date forwarded the report with amendments to the standing committees for further consideration.

42. On 25 and 26 May 2022, the standing committees reviewed the report of the Functional Committee, regarding the proposed amendments. However, according to the case file, the Committee on Rights and Interests of Communities and Returns had not reviewed the draft law with the amendments proposed by the functional Committee, within the deadline set by paragraph 8 of Article 57 (Review of a Draft-Law by Committees) of the Rules of Procedure of the Assembly.

43. On 31 May 2022, the final report of the Functional Committee, together with the proposed amendments, was distributed to all deputies of the Assembly, with the recommendation that this draft law on amending and supplementing the Basic Law, together with the proposed amendments, be approved, since its implementation it does not require additional budget costs.

44. The Assembly, after receiving the final report from the Functional Committee, notified and invited the deputies for the next plenary session, where, among other things, as an item on the agenda was the second review of the draft law on amending and supplementing the Basic Law.

45. On 23 June 2022, the Assembly, after the second reading, with sixty (60) votes in favor, none against and one (1) abstention, adopted the contested Law.

Applicants' allegations in Referral KO100/22

46. The Applicants of this referral allege that articles 13, 16, 18 and 20 of the contested Law are not compatible with Articles: 4 [Form of Government and Separation of Power], 24 [Equality Before the Law], 32 [Right to Legal Remedies], 45 [Freedom of Election and Participation], 54 [Judicial Protection of Rights], 109 [State Prosecutor] and 110 [Prosecutorial Council of Kosovo] of the Constitution.

47. In the following, the Court will summarize the allegations of applicants of Referral KO100/22 regarding the incompatibility of the aforementioned articles of the contested Law with the aforementioned articles of the Constitution, namely the allegations of incompatibility of: (I) Article 13 of the contested Law with articles 4, 109 and 110 of the Constitution; (II) Article 16 of the contested Law with Articles 24 and 54 of the Constitution; (III) Article 18 of the contested Law with Articles 31, 32 and 54 of the Constitution; and (iv) Article 20 of the contested Law with Articles 32, 45 and 54 of the Constitution.

(I) Allegations of incompatibility of Article 13 of the contested Law with Articles 4, 54, 109 and 110 of the Constitution

48. In the following, the Court will summarize the allegations of the Applicants KO100/22 regarding the incompatibility of Article 13 of the contested Law with: (i) Article 110 of the Constitution; and (iii) Articles 109 and 4 of the Constitution.

(i) Allegations of incompatibility of Article 13 of the contested Law with Article 110 of the Constitution

49. The Applicants in this Referral, among other things, emphasize that paragraph 4 of Article 110 of the Constitution establishes that *"The composition of Kosovo Prosecutorial Council, as well as provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be determined by law"*. According to them, this fact was sufficient for the Government to propose and the Assembly to approve the contested Law, which, among other things, changes the composition of the KPC and the number of its members, from thirteen (13), as it was until now, to seven (7). Meanwhile, according to the Applicants, the only justification for this substantial change in the number of members of the KPC, in the concept document that preceded that change, was summarized in a single and short sentence, namely "*for the purposes of efficiency of the work of the KPC*".

50. The Applicants of this referral further allege that Article 13 of the contested Law, in a completely unfounded manner, affects two key segments of the organization and independence of the work and decision-making of the KPC, emphasizing that on the one hand, the already established quorum by five (5) members out of seven (7), presents one "*very high legal requirement*", based on which, the role of non-prosecutor members, "*not only is it important, but it directly represents a decisive responsibility for decision-making, which consequently makes any important decision in the KPC impassable without at least one vote of the non-prosecutor member, which, in essence , represents a direct blow to the constitutional guarantees embodied in the constitutional principles of the KPC, such as independence and impartiality*". On the other hand, the Applicants point out that in addition to the necessary quorum requirement of five (5) members, the contested Law stipulates the qualified majority of decision making, according to which no less than five (5) votes are required from the full composition of the KPC, two (2) of them must be from the ranks of non-prosecutor members for important votes, such as: (i) the position of the Chief State Prosecutor and the Chief Prosecutors of the respective Prosecutor's Offices; (ii) approval of sub-legal acts regulating the appointment of chief prosecutors; and (iii) appointment, transfer, discipline and promotion of prosecutors, "*constitutes a direct interference and violation of the independence of the work of the KPC by the non-prosecutor members, two (2) of whom are elected by a simple majority by the Assembly, while the third member is appointed (delegated) on the basis of appointment and not of choice by the Ombudsperson*".

51. Therefore, the Applicants of this Referral emphasize that the ninth amendment (9), which was aimed at implementing one of the main observations and recommendations of the first Opinion and the second Opinion of the Venice Commission, did not address the issue of violation of the international standard, of non-violation of the independence of the KPC from political and external influence. In this dispute, the Applicants allege that the way of determining the qualified decision-making and of "*double voting*" on the one hand, and stipulating that in case of failure of this voting method, to apply the procedure that requires voting with a majority of 2/3 of all members of the KPC, at the next meeting, after failure to fulfill the first criterion:"*... basically, it represents a minimization of the work and decision-making of the KPC, making both in the first case, and in the second case, the vote of the external non-prosecutor member to be many times more powerful than that of the member prosecutors and therefore, not equal to it*". As a result, the Applicants of this referral claim that such a structure of the

KPC, with this way of participation quorum, decision-making quorum, qualified majority voting and double majority voting, constitutes a direct violation of the constitutional guarantees embodied in Article 110 of the Constitution.

52. The Applicants of this referral further claim that the contested Law reduced the number of prosecutor members and did not reduce the number of non-prosecutor members, which was three (3) members, with the Basic Law and also three (3)) non-prosecutor members with the contested Law. Moreover, the Applicants emphasize that the issue of quorum and decision-making:"*... have never been blocked before due to delays in the election of non-prosecutor members, while with the contested Law, politics takes a decisive role in the KPC, because according to the current* composition*, the quorum for decision-making is proposed to be 5 (five) votes, which votes will have the following effects: the first, it has to do with the fact that if the non-prosecutor members are not proposed and elected in time, the work and function of the KPC would be completely blocked; and the second, that the non-prosecutor members take a decisive role in every decision of the KPC, which, according to them, would extremely politicize not only the work of the KPC, but also the proposal of future candidates for prosecutors or leaders of prosecution offices. Practically, according to the Applicants of this referral, the KPC turns into a political instrument, dependent and biased*". As a result, according to the Applicants, the empowerment of non-prosecutor members up to the level of a qualified vote and a double majority makes the KPC subject to and violates its constitutional and institutional independence, because the requirement for a qualified majority, effectively provides the "veto right" to non-prosecutor members. This, according to the Applicants, proves even more the fact that the purpose of the contested Law is to dismiss certain members of the KPC in order to create the possibility for the government to influence the election of the new Chief State Prosecutor.

53. The Applicants of this referral further point out that even independent powers can be subject to mutual control, which in this case is ensured by the presence of non-prosecutor members in the KPC. However, according to them, this control can never result in superimposition of controlling power over independent power. According to them: "*The request for a qualified majority has this result. The non-prosecutor members, with the effective right of veto, supersede the prosecutor members of the KPC, by blocking decision-making*".

(ii) allegations of incompatibility of Article 13 of the contested Law with Articles 109 and 4 of the Constitution

54. Regarding the allegations of incompatibility of Article 13 of the contested Law with Articles 109 and 4 of the Constitution, the Applicants of this referral emphasize that Article 110 of the Constitution cannot be applied and interpreted separately from Articles 109 and 4 of the Constitution, and even nor from Article 108 (Kosovo Judicial Council) of the Constitution, when it comes to the implementation of the constitutional principles of independence and impartiality, regarding which the KPC has constitutional responsibility based on the principle of separation of powers and control and balance between them. The Applicants emphasize that *"judicial power is unique, independent and exercised by the courts",* and that this principle is appropriately applicable in relation to the State Prosecutor and the KPC, insofar as prosecutorial functions and responsibilities are independent and impartial and fall within the framework of Chapter VII, namely the "Justice System" of the Constitution, and as such, are separate and independent from the executive and legislative power.

55. Such a legal position, according to the Applicants of this referral, is based and embodied in the system of the constitutional values promoted by the Constitution, which are also argued with the jurisprudence of the Constitutional Court, which in the case of assessing

the constitutionality of certain articles of Law no. 06/L-114 on Public Officials, by the Judgment in the case KO203/19, in paragraphs 101 and 102, expressly determines that the Constitution of Kosovo intended to provide the prosecutorial system. namely the KPC and the State Prosecutor, with the same independence to exercise its functions, as much as the judicial system. It is further emphasized that the paragraphs of this Judgment clearly argue the fact of equal treatment that the Constitution has guaranteed to the judicial and prosecutorial system, which together build the justice system as a power separated from the executive and legislative power, and above all, independent, impartial, unique and apolitical.

(iii) allegations of incompatibility of Article 13 of the contested Law with Article 54 of the Constitution

56. Regarding this allegation, the Applicants of this referral argue that the contested Law arbitrarily terminates the mandate of the current members of the KPC, and creates a blocking mechanism of institutional decision-making on important issues of the KPC, as well as implementing qualified majority, violates the constitutional guarantees of the right to "*judicial protection of prosecutors*", as well as legitimizes the double standard of dismissal of members of the KPC, without providing them with equal judicial protection.

(II) Allegations of incompatibility of Article 16 of the contested Law with Articles 24, 32 and 54 of the Constitution

57. The Applicants of the referral, in relation to this allegation, among other things, emphasize that "*by Article 16 of the contested Law, Article 19 of the Basic Law has been reformulated in its entirety*", not recognizing the right to appeal against dismissal of non-prosecutor members, as the same provision recognizes this right to prosecutor members.

58. In this context, according to the Applicants of this referral: "*...justifying the* deprivation *of non-prosecutor members from the right to legal remedies from Article 32 of the Constitution, according to which, "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",* the independence of their work is undeniably violated, because such a determination by the contested Law*: "...will enable the submission of the latter (non-prosecutors) to external (political) pressure or specifically by the parliamentary majority) that elects them, but also towards the prosecutor members of the KPC*".

59. As above, the Applicants of this referral emphasize that the fact of non-recognition by the contested Law of the right to appeal against the decision on dismissal by the Assembly, for the two non-prosecutor members and one dismissed non-prosecutor member by decision of the Ombudsperson, confirms the allegations of this referral, that by paragraph 5 of Article 19 of the Basic Law as amended by Article 16 of the contested Law:"*... unequal treatment among council members, whose duties, responsibilities and functions* are *the same (within the scope of the KPC) is justified, therefore, in this way, the constitutional guarantees established in Article 24 (Equality Before the Law) and Article 54 (Judicial Protection of Rights), of the Constitution are also violated (...)*".

(III). Allegations of incompatibility of Article 18 of the contested Law with Articles 31, 32 and 54 of the Constitution

60. In relation to the allegations regarding the incompatibility of Article 18 of the contested Law with Articles 31, 32 and 54 of the Constitution, respectively, the Applicants of this referral, among other things, emphasize that by the new Article 23A, the principle of legal certainty in relation to with articles 32 and 54 of the Constitution is violated, since, on the one hand, the prosecutors are given the right to file a direct appeal with the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court), against the decisions of the KPC, regarding the dismissal, the evaluation of performance of the prosecutors and the discipline of the prosecutors, which as a consequence have the demotion of the prosecutors, even though the procedure for disciplinary decisions, in a complete and clear manner, is dealt with and regulated in the current Law no. 06/L-057 on Disciplinary Liability of Judges and Prosecutors (hereinafter: Law on Disciplinary Liability of Judges and Prosecutors), where in accordance with Article 15 (Complaint against disciplinary decisions), it is expressly defined as follows: *"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. 2. The complaint against the decision of the Council shall have a suspension effect and shall prohibit the implementation of such decision, until the complaint is reviewed. […], 5. The Supreme Court, within a trial panel composed of three (3) members elected by the President of the Supreme Court shall, within thirty (30) days, review and decide on the complaint. If the President of the Supreme Court is the subject of the* Council's *decision, then the oldest judge of the Supreme Court will elect the members".*

61. In this regard, the Applicants of this referral allege that Article 18 of the contested Law establishes a parallel appeal procedure for prosecutors, so that they can challenge the decisions of the KPC in the Supreme Court, as well as against the disciplinary decisions of the KPC. Such a legal solution, according to them, not only creates legal uncertainty for prosecutors in terms of the parallel procedure that they can follow in cases of objections to KPC disciplinary decisions, but also in terms of the ninety (90) day deadline within which the Supreme Court must decide, in addition to the parallel term defined in paragraph 5 of Article 15 of the Law on Disciplinary Liability of Judges and Prosecutors.

62. On the other hand, the Applicants of this referral emphasize that paragraph 6 of Article 109 of the Constitution expressly determines that: *"6. Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties".* As a result, Article 18 of the contested Law not only violates the principle of legal certainty, but also violates the constitutional guarantees from Article 31 of the Constitution, because it creates two different/parallel procedures and two different deadlines, regarding the decision for the same issues, namely appeals against disciplinary decisions and/or those related to dismissal.

(IV). Allegations of incompatibility of Article 20 of the contested Law with Articles 32, 45 and 54 of the Constitution

63. In the following, the Court will summarize the allegations of the Applicants of this referral regarding the incompatibility of Article 20 of the contested Law with Articles 32, 45, and 54 of the Constitution, namely the allegations of incompatibility of Article 20 of the contested Law with: (i) Articles 32 and 54 of the Constitution; and (ii) Article 45 of the Constitution.

(i) allegations of incompatibility of Article 20 of the contested Law with Articles 32 and 54 of the Constitution

64. The Applicants of this referral, in relation to this allegation, among other things, point out that Article 20 of the contested Law terminates the mandate of the current members of the KPC, linking this termination with the moment of: (i) the election of two non-prosecutor members to be chosen by the Assembly and one non-prosecutor member to be chosen by the Ombudsperson, as well as (ii) drawing lots for two (2) members from the current members from the basic prosecution offices, as well as one (1) member from the Appellate Prosecution or the Special Prosecution of the Republic of Kosovo. Therefore, in this context, the Applicants argue that: "*The termination of the mandate of KPC members in an arbitrary and premature manner is ungrounded, due to the fact that the applicable legal criteria from Article 13 of the Law in force are exceeded, according to which the termination of the mandate of the current members can occur for these causes; death; loss of capacity to act; continued failure to participate in KPC activities for longer than 3 (three) months without proven reason; the termination of the status on which the appointment is based; expiration of the mandate and resignation, notifying the KPC in advance*".

65. The Applicants of this referral further emphasize that, in the recommendations of the first Opinion of the Venice Commission, it is expressly stated that: "*Replacement of the current sitting members with the new ones may be exceptionally justified only if it leads to a major improvement in the current system, (in particular, its depoliticization*)". In this regard, the Applicants claim that: "*The termination of the mandate of the members of the KPC can be done in a natural way or if any of the above-mentioned criteria are met and this arbitrary termination of the mandate is also contrary to the jurisprudence of the Constitutional Court, which, in cases KO29/12 and KO48/12 on the issue of the mandate of the holders of constitutional positions, namely according to paragraph 268 it is emphasized that "the mandate is inviolable so as to ensure adherence to the principle of the Separation of Powers and to preserve certainty in the legal and constitutional order". Based on this Judgment, the shortening of the mandate reduces the rights and freedoms defined in Chapter II of the Constitution*". According to the Applicants, this way of terminating the mandate is also contrary to the European Convention on Human Rights (hereinafter: ECHR) and the case law of the European Court of Human Rights (hereinafter: ECtHR), but also to Article 25 of the International Covenant on Civil and Political Rights.

66. The Applicants of this referral further argue that, by Article 20 of the contested Law:"... the *goal is predetermined that, through a special law, a certain composition of the KPC will be changed, and that before a major decision - the election of the new Chief State Prosecutor*". According to them, this is the reason why, in unconstitutional manner, the mandate of the current members is being prematurely terminated. This law, according to them, aims at a specific result, namely the influence on the election of the Chief State Prosecutor. In this regard, the applicants refer to Article 1.9 of the Constitution of the United States of America, which prohibits such laws, which are called *Bill of Attainder*, namely laws that aim at prejudicial results, excluding judicial review. For this issue, the Applicants refer to the decision of the US Supreme Court, namely *Chevron Oil v. Huson, 404 U.S. 97* and a decision of the Constitutional Court of the Czech Republic, for non-retroactive application of new laws outside the criminal field.

67. Moreover, the Applicants of this referral claim that the termination of the mandate without the possibility of exercising legal remedies is contrary to Article 32 of the Constitution. On the other hand, according to them, the Basic Principles of the United Nations on the Independence of the Judiciary, regarding the issue of mandate, expressly define: *"Regarding the issue of tenure, according to the UN Basic Principles on the Independence of the Judiciary, judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists"*. This international principle should apply to all prosecutor and non-prosecutor members

who have won this mandate. In addition, the "Bangalore Principles" and the measures for their implementation, expressly determine, among other things, that: "*...further point 49 stipulates that the security of the term of office and the impossibility of removal from office are key elements of the independence of judges. According to point 50, it is recommended that the permanent mandate can be terminated only due to serious violations of a disciplinary or criminal nature, clarified by law, or when the judge cannot perform judicial functions "* Likewise, the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2010) 12, among other things, in point 49, determines that: "*The security of tenure and non-removal are key and accepted elements of the independence of judges*". The Applicants also refer to the basic principles for the independence of the judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, from 26 August to 6 September 1985 and approved by resolutions 40/32 of General Assembly of 29 November 1985 and 40/146, of 13 December 1985, which, among other things, emphasize that: *"The independence of the judiciary is guaranteed by the state and sanctioned in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect the independence of the judiciary"*.

68. Further, the Applicants in this referral, in support of the allegations related to the termination of the mandate of the current members of the KPC, refer to the cases of the ECtHR, *Baka v. Hungary*, no. 20261/12, where the European Court found a violation of Article 6.1 (Right of access to court) of the ECHR and *Grzeda v. Poland*, no. 43572/18, where the European Court also found a violation of Article 6 and Article 13 (Right to an effective remedy) of the ECHR, due to the premature termination of the judge's mandate. The applicants also refer to Opinion no. 81 1/2015 of the Venice Commission on draft amendments to the Law on Prosecutors of Georgia, regarding the status of members of the Prosecutorial Council, the Opinion, among other things, emphasized:*"... it should not be easy to remove a member of the Council from his/her position. While early removal should always be possible in cases of gross misconduct or incompatibility, such decisions should at all times be based on specific grounds enumerated in the Draft Law, and should be confirmed by the majority of the members of the Council itself*". In the end, the Applicants emphasize that the termination of the mandate by lot does not ensure gender equality and the ethnic inclusion of under-represented communities, even less since the law provides for secret voting.

(ii) allegations of incompatibility of Article 20 of the contested Law with Article 45 of the Constitution

69. The Applicants in this referral, moreover, consider that the termination of the mandate by Article 20 of the contested Law, has as a consequence the violation of the right to elect and to be elected, as guaranteed by Article 45 of the Constitution, because the members of the KPC have been elected to the positions from which they will be dismissed according to this law. This right is violated when the conditions under which the members have elected and were elected before the end of the mandate for which this right was exercised. The applicants also point out that: "*The political assessments or the Government's perceptions of the work and image of the KPC cannot be transformed into legal norms and the mandate of the majority of the current prosecutorial members of the KPC (including the current non-prosecutor member) can be terminated without reason, because this would constitute an extremely dangerous practice for the constitutional, institutional and functional independence of the KPC, as it would serve any new government and parliamentary majority, the intervention in the structure, composition and decision-making of this institution, according to its assessment and perception of KPC*".

Allegations of the Applicants of Referral KO101/22

70. The Applicants in Case KO101/22 claim that the contested Law, in its entirety, is not in compliance with articles: 4 [Form of Government and Separation of Power], 16 [Supremacy of the Constitution], 24 [Equality Before the Law], 109 [State Prosecutor] and 110 [Kosovo Prosecutorial Council] of the Constitution.

71. In this context, the Applicants of this referral, present specific allegations with respect to Articles 6, 13 and 20 of the Contested Law, among others, emphasizing that: (i) the new composition of the KPC members does not guarantee sufficient representation of prosecutors within the KPC system; (ii) the election of one (1) KPC member by the Ombudsperson is contrary to the constitutional authorizations that the Ombudsperson has; (iii) the election of two (2) non-prosecutor members by simple majority of votes in the Assembly, increases the risk that the members of the KPC appointed by the Assembly are persons who potentially represent the policies of the majority in the Assembly and not persons with authority and integrity who receive the comprehensive trust of the people's representatives to exercise independently their constitutional and legal duties; (iv) the right of "*special majority or the right of veto*" of non-prosecutor members in important processes in the KPC, violate the independence, professionalism and impartiality of this completely independent institution in performing its constitutional and legal functions; and (v) the lot for terminating the mandate of the current members is unconstitutional.

72. In general, the Applicants of this referral allege that the Government and the parliamentary majority proceeded the relevant draft law arbitrarily in the Assembly, "*without the Venice Commission completing its work*", because on 15 March 2022 the draft law was reviewed and approved in principle by the functional Committee, while the Venice Commission was organizing a public hearing on 18 March 2022 on this topic. According to the Applicants of this referral, the final comments, namely the second Opinion of the Venice Commission, was submitted to the Government on 23 March 2022, and to the members of the Assembly on 5 April 2022, whereas the respective draft-law was adopted in the first reading on 14 April 2022. The Applicants of this referral further emphasize that regarding the draft law, in the capacity of the parliamentary group have presented their concerns in the functional Committee, then in the plenary session, drawing attention to the fact that the provisions of the draft law may be unconstitutional, but that the parliamentary majority did not take their remarks into account.

73. In the following, the Court will summarize the allegation of Applicants in Case KO101/22 regarding the incompatibility of the aforementioned articles of the contested Law with the aforementioned articles of the Constitution, namely the allegations of incompatibility of: (I) Article 6 of the contested Law with articles 4, 16 and 110 of the Constitution; (II) Article 13 of the contested Law with Articles 4, 6 and 110 of the Constitution; and (III) Article 20 of the contested Law with Articles 4, 6 and 110 of the Constitution.

(I) Allegations of incompatibility of Article 6 of the contested Law with Articles 4, 16 and 110 of the Constitution

74. The Applicants of this referral allege that Article 6 of the contested Law is not in compliance with Article 4 of the Constitution, as well as Article 110 of the Constitution, as the current composition of the KPC, an institution that administers the entire prosecutorial system of Kosovo, has minimally larger number than the non-prosecutor members, namely 4 (four) to 3 (three).

75. The Applicants of this referral further emphasize that according to the Basic Law, the composition of the KPC had thirteen (13) members, of which 10 (ten) were prosecutor members, representing all levels of the state prosecution office and never before the representation in large numbers of the KPC was considered a problem, by the member prosecutors, therefore according to their assessment: "*The problems in the prosecutorial system of Kosovo, do not have their genesis in the way of representation of this institution so far, but in the interventions, including the political one in the work of this institution.*" Therefore, the latter allege that: "*The new composition paves the way for the parliamentary majority, through non-prosecutor members, to intervene in important processes in the administration of the state prosecutor's office every time.*" The Applicants further note that by the provisions of the contested Law, the composition of the KPC, in relation to the non-prosecutor members, is only 1 (one) more member. Therefore, 3 (three) prosecutor members who are selected by their colleagues within the prosecutorial system and 3 (three) members who are elected outside the prosecutorial system. According to them: "*The participation of the Chief State Prosecutor in an ex-officio manner does not represent or is not considered a majority and the latter is not elected by their colleagues directly, but takes this task ex-officio*".

76. Therefore, in this context, the Applicants of this referral claim that this new composition of the KPC, determined by the contested Law:"*... not that it does not guarantee the institutional* independence *of the KPC, on the contrary, it undermines this independence, thus jeopardizing the processes of administration and advancement in the prosecutorial system of Kosovo, because the process of checking the integrity, performance, and disciplining of prosecutors will be carried out by a body, which in half of its composition will consist of non-prosecutor members*".

77. In the following, the Court will summarize the allegations of the Applicants of this referral regarding the incompatibility of Article 6 of the contested Law with Articles 4, 16 and 110 of the Constitution, namely the allegations related to: (i) the election of one (1) KPC member by the Ombudsperson; and (ii) the election of two (2) non-prosecutor members by the Assembly.

(i) Election of a non-prosecutor member by the Ombudsperson

78. In relation to this, the Applicants of this referral allege that the provisions of the contested Law, which determine the election of a non-prosecutor member in the KPC by the Ombudsperson, are contrary to the constitutional and legal authorizations regarding the Ombudsperson, because neither with the Constitution nor with Law no. 05/L-019 on Ombudsperson (hereinafter: the Law on the Ombudsperson), according to them: "*This institution is not authorized to have the right to appoint, such is this, a member of the Kosovo Prosecutorial Council*". In this regard, according to them, the granting of additional powers to this institution by the contested Law is contrary to the Constitution, the act which:, „*has defined the powers of this institution and no other body, in this case neither the Assembly of Kosovo cannot give it other powers, beyond those defined by the Constitution, because as defined by the following article [Article 16] of the Constitution, the entire governing power originates from the Constitution*".

79. Moreover, the Applicants of this referral also emphasize that the nature of the scope of the Ombudsperson: *"...is in conflict of interest on several levels, taking into account his role in relation to the protection of rights and human freedoms and its role provided by law, in some processes within the prosecutorial system of our state*". According to them, the only institution from which they can originate, namely appoint persons to the positions of independent constitutional institutions, are from the internal competitive procedures of the respective institutions and from the Assembly, as a body, representative of the people of Kosovo.

80. In this regard, the Applicants of this referral, assert that the Constitutional Court should not: "*...allow this precedent of such an appointment, because this would pave the* way *for any parliamentary majority in the future, with laws, that are adopted by a simple majority, may elect representatives of another independent constitutional institution, thus endangering the legal and constitutional order, the supremacy of the institutions and underestimating the constitutional role of the Assembly of the Republic, as a representative body of the people of Kosovo and as a body where the heads and members of other constitutional institutions come from (are elected*)".

81. The Applicants of this referral also point out that: "*The source of state authorizations can be transferred vertically, in this case by the Assembly, but not horizontally, because the latter is unconstitutional and disrupts the balance and separation of powers*". Based on this logic, according to the Applicants, both the Auditor General and the Governor of the Central Bank can receive authorizations by other laws, outside of their constitutional and legal mandate from where they exercise public authorizations, for appointments in relevant institutions of the constitutional nature and therefore, these would create legal uncertainty, as well as affect the independence and authority of independent institutions.

82. As mentioned above, the Applicants of this referral note that the method of selection, appointment and dismissal of the member of the KPC is not the same as the election of a non-prosecutor member appointed by the Ombudsperson, therefore, this contradicts the principle of "*equality before the law*" because for the same position, in the same institution, aggravating or favorable measures are defined for some members in relation to other members. Having said this, the Applicants assess that the new composition of KPC members does not guarantee sufficient representation of prosecutors within the KPC system.

(ii) Election of two (2) non-prosecutor members by the Assembly

83. Regarding the election of two (2) non-prosecutor members, the Applicants of this Referral claim that the provisions of the contested Law that determine the election of two (2) non-prosecutor members by a simple majority of votes in the Assembly: "*... increases the risk that the members of the KPC appointed by the Assembly are persons who potentially represent the policies of the majority in the Assembly and not persons with authority and integrity who receive the comprehensive trust of the people's representatives"*. According to the Applicants, in the manner how the election of two (2) non-prosecutor members from the Assembly is determined, these members can easily be appointed with only thirty-one (31) votes of deputies, which is the minimum representation for the appointment of persons in this important constitutional institution.

84. In this regard, the Applicants of this referral assess that the election of these members of the KPC should be done by law, and with the votes of at least sixty-one (61) deputies or two-thirds (2/3) of deputies who vote in the procedure of their election by the Assembly. This, according to the Applicants, would be a guarantee for the appointment of personalities with reputation and professional integrity, as this important constitutional institution that includes an important pillar of the justice system deserves. Therefore, the Applicants of this referral note that voting by simple majority, namely by the majority of deputies who are present and who vote, violates the independence and integrity of this independent constitutional body, thus giving each parliamentary majority a great opportunity to political influence and control over lay members in the KPC.

(II) Allegations of incompatibility of Article 13 of the contested Law with Articles 4, 16 and 110 of the Constitution

85. In the assessment of the Applicants of this Referral, the right of "*special majority or the right of veto*" of non-prosecutor members is unconstitutional and as such blocks the main decision-making processes in the KPC and gives decision-making power to the non-prosecutor members who are elected by the Assembly with a simple majority, namely by the parliamentary majority. In addition, the Applicants in question, among other things, claim that*"the right of veto"* of two (2) non-prosecutor members, in important processes within the KPC, makes them unequal to the prosecutor members of this institution. The Applicants further emphasize that taking into account the fact that the three (3) non-prosecutor members are elected by the Assembly, with a simple majority and the Ombudsperson, by his decision-making, the independence of this institution is violated and it is impossible for the latter to exercise the constitutional powers independently, as provided by the Constitution, namely: *"KPC shall ensure that the State Prosecutor is independent, professional, impartial and reflects the multi-ethnic nature of Kosovo and the principles of gender equality"*.

(III) Allegations of incompatibility of Article 20 of the contested Law with Articles 4, 16 and 110 of the Constitution

86. The Applicants of this referral, in relation to this allegation, emphasize that "*The arbitrary termination of the mandate by drawing lot of the members of a constitutional body, contradicts the Constitution of the country, because in an independent constitutional institution, the mandate obtained cannot to terminated to its members without fulfilling the conditions required by the law by which they were elected*". According to the Applicants, based on the premise that each person who is appointed to a position creates a working relationship and taking into account that the conditions and criteria of appointment and termination of the employment relationship and/or dismissal are defined by law, any legal changes, related to the new conditions defined by law, must begin to be implemented from the moment when the rights and obligations of the appointed members end, according to the criteria that were valid at the time of establishment of the employment relationship. In this context, the Applicants of this referral note that only in this way is the principle of legal certainty, as a basic principle of constitutional justice, is protected. According to the Applicants: *"...neither the Constitution nor the law recognizes the criteria for the employment relationship to be established by lot, therefore, its termination is not done on the basis of the lot*".

87. In the end, Applicants of this referral request the Court to: (i) declare the referral admissible for review on the merits; (ii) to declare the contested Law incompatible with Articles 4, 16, 24, 109 and 110 of the Constitution; and (iii) to declare the contested Law invalid, in its entirety.

(IV) Allegations regarding the request for an interim measure

88. Regarding the imposition of an interim measure, the Applicants of this referral claim that: (i) the non-imposition of the interim measure, in this case, would have unpredictable consequences, because the termination of the mandate of the current members and the appointment of new members of the KPC would begin, by the contested Law, therefore taking into account the powers that this institution has, respectively and among others, to recruit, propose, advance, transfer and discipline prosecutors in the manner regulated by law, would affect directly in the creation of rights and obligations between KPC and other natural persons; (ii) the selection process of the Chief State Prosecutor by the KPC is in the assessment procedure at the Constitutional Court and depending on this epilogue, it depends on whether this will

require a new appointment process, therefore, any change in the KPC, without deciding on the merits of the Referral for the contested Law, it would seriously damage the entire state prosecution system; (iii) the termination of the employment relationship of the current members and the creation of a new employment relationship for the new members of the KPC, according to the contested Law, without deciding on the merits of the referral, it would have irreparable consequences, because it would violate their fundamental rights and freedoms guaranteed by the Constitution.

Comments submitted by KPC on 15 July 2022

89. On 15 July 2022, KPC, in the capacity of the party affected by the contested Law, submitted its comments to the Court. The KPC, through these comments, also notified the Court that in relation to this issue, on 28 June 2022, submitted a request to the Ombudsperson, through which it requested that, in the capacity of the authorized party, to send the contested Law to the Constitutional Court for its constitutional review.

90. In the following, the Court will summarize the comments of the KPC regarding the allegations of the Applicants and the contested Law, including those related to: (i) the independence of the KPC according to the Constitution; (ii) the composition and election procedure of the KPC members; (iii) the method of election and voting of non-prosecutor members of the KPC by the Assembly and the Ombudsperson, respectively; (iv) quorum and decision-making; (v) termination of the mandate of the current members of the KPC; (vi) the advancement of prosecutors after the end of their mandate in the KPC; and (vii) judicial protection of non-prosecutor members of the KPC.

(i) independence of the KPC according to the Constitution

91. Regarding the independence of the KPC according to the Constitution, the KPC alleges to be an independent constitutional institution and in this respect, it refers to paragraph 5 of Article 4 of the Constitution, which establishes: "*The judicial power is unique, independent and is exercised by courts*", within the framework of which paragraph, according to the KPC, the KPC also falls and due to the fact that this is how the Constitutional Court has defined it with Judgment KO203/19, Applicant the Ombudsperson. Referring in particular to paragraphs 101 and 102 of this Judgment, KPC emphasizes that: "*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"* and *"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 contested 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".*

92. In this context, the KPC alleges that: "*the undertaking of unilateral actions by the Ministry of Justice to amend Law no. 06/L-056 on Prosecutorial Council of Kosovo, without starting with the other changes in the basic laws of the justice system as foreseen by the Rule of Law Strategy, there has been a tendency to interfere in the independence of our institution*".

(ii) the composition and election procedure of the KPC members

93. The KPC further alleges that Article 6 of the contested Law contradicts Article 4 of the *Constitution*, because by this article, the composition of the KPC is fundamentally changed from the composition that it had previously with the Basic Law, as well as the composition of the Judicial Council of Kosovo (hereinafter: KJC), which composition has ten (10) judges, and where only three (3) of the members are non-judges. The KPC notes that in the case of the contested Law, the composition of the KPC in relation to the non-prosecutor members is only with one member more than the system, therefore three (3) prosecutor members who are selected by their peers and three (3) members who are elected from outside the prosecutorial system. According to the KPC, the participation of the Chief State Prosecutor, *ex-officio*, does not represent or is not considered a majority because he is not selected by his peers directly, but is represented in the KPC *ex-officio*. According to the KPC, this composition is contrary to the Constitution because it does not consist of a majority of prosecutor members, selected by the prosecutorial system, itself as is the case with the KJC. Consequently, according to the KPC, the contested Law: "*... contradicts the judgment of the Constitutional Court No. ref.: AGJ 1583/20 of 9 July 2020 which has guaranteed the equality of the prosecutorial system, like the judicial one*."

94. Moreover, the KPC also alleges that Article 6 of the contested Law also contradicts paragraph 2 of Article 110 of the Constitution, where it is emphasized: *"The Prosecutorial Council of Kosovo will recruit, propose, advance, transfer, discipline prosecutors in the manner regulated by law. The Council will give priority to the appointment of members of underrepresented communities as prosecutors in the manner defined by law. All candidates must meet the criteria established by law"*. In this case, the KPC claims that the discipline, advancement, but also the performance of the prosecutors, which is regulated by law, will be administered by a body that does not constitute the majority of the judicial-prosecutorial power. In this context, according to the KPC, the composition of the KPC in this way provided for by the contested Law also contradicts Articles 3, 4, 7, 21, 22, 24, 32 and 110 of the Constitution.

(iii) the method of election and voting of non-prosecutor members of the KPC by the Assembly and the Ombudsperson

95. According to the KPC, the contested Law is contrary to Article 4 of the Constitution, as it does not provide for the unique way of electing the members of the Council, because in this composition, one of the members is appointed by the Ombudsperson and this contradicts with the equality of election of other members of the Council, who are elected by the Assembly or by the community of prosecutors. KPC further adds that this law gives legal authorizations to the Ombudsperson, who is obliged to protect the rights and freedoms of the members of the prosecutorial system, thus citing Article 132 of the Constitution, which defines: "*1. The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities".*

96. In this context, the KPC argues that paragraph 12 of Article 7 of the contested Law provides that non-prosecutor members, after the completion of all procedures, are elected by the Assembly by secret ballot with a majority of the votes of the deputies present and voting. According to the KPC, this way of voting is very simple and does not ensure the independence and inclusiveness necessary for a constitutionally independent institution. In addition, the KPC emphasizes that paragraph 2 of Article 8 of the contested Law provides the criteria for the election of the non-prosecutor member from among the ranks of the Ombudsperson institution, namely only the obligation of the Ombudsperson to consult with civil society regarding his election as a KPC member.

KPC emphasizes that this legal provision does not foresee any criteria that candidates must meet in order to be elected as members of the Council.

97. The KPC further emphasizes that the appointment of a non-prosecutor member from the institution of the Ombudsperson in the KPC represents a conflict of interest, based on the competence of the Ombudsperson according to the Law on Disciplinary Liability of Judges and Prosecutors to initiate disciplinary cases against judges and prosecutors. Therefore, according to the KPC: *"...the proposal for the appointment of a non-prosecutor member from among the ranks of the Ombudsperson institution is completely unacceptable*".

98. The KPC also emphasizes that this competence of the Ombudsperson, which is not foreseen by the Constitution, cannot be determined by law, moreover, the dismissal of a member of the KPC from the Institution of the Ombudsperson is not regulated by the contested Law. Also, the KPC points out, this provision also contradicts equality before the law, since the procedure for dismissing non-prosecutor members is not the same, while the dismissal of non-prosecutor members is done with the majority of votes, while the dismissal of a certain non-prosecutor member appointed by the Ombudsperson, is done only by decision of the Ombudsperson, which contradicts his constitutional powers. Likewise, according to the KPC: "*Article 10/a of the contested Law is in contradiction with itself, since it is stated in the title of this article: "The non-prosecutor member appointed by the Ombudsperson" while in the same article, in paragraph 3, it is stated: "When the mandate of the member from paragraph 1 of this article ends prematurely, as defined by this Law, the Ombudsperson elects the member, with a full mandate, within thirty (30) days from the day of remaining the position vacant*".

(iv) quorum and decision-making

99. Regarding the quorum and decision-making, KPC claims that point 2/a of the contested Law provides for qualified majority voting, of five (5) votes, where two (2) of them must be from non-prosecutor members, resulting in the right of veto and consequently jeopardizing the substantive functioning of the KPC in the main issues such as: (i) the election of the Chief State Prosecutor, the chief prosecutors of the prosecution offices of the Republic of Kosovo; and (ii) the procedures for disciplining, transferring and advancing prosecutors. KPC also emphasizes that even though this provision foresees that in case of insufficient votes at the next meeting, a second vote is held and decision-making is subject to two-thirds (2/3) of the votes of KPC members, this way of decision-making again may cause problems and delays in completing these processes. According to the KPC, this legal provision conflicts with the constitutional provisions, specifically with Article 4 and 110 of the Constitution, due to the fact that the KPC as a constitutional category is prevented from functioning independently, every time without (3) non-prosecutor members, for any political or personal purpose, decide not to participate in the meeting or vote, block the decision-making of the KPC.

100. According to the KPC, the contested Law makes it impossible for the KPC to fulfill its constitutional mandate provided for in paragraph 2 of Article 110 of the Constitution, because, based on the provisions of the contested Law, the majority of decisions will be blocked and not functional. Moreover, according to the KPC, blocking decision-making within the KPC would create situations that could only be resolved between illegal compromises. Also, even though the members of the KPC are equal in decision-making according to the Constitution, if this law will come into force, it will result in a constitutional violation because a certain proposed regulation of the KPC could not come into force if even a non-prosecutor member does not have the vote and this contradicts the principles of independence of the KPC. According to the KPC, the

members of the Council are equal and their votes should not be distinguished or required for any process as special. According to them, the Magna Carta of Judges of 2010 in its fundamental principles, among other things, determines that: *"In order to ensure the independence of judges, each state shall establish a Council for the Judiciary or another specific body, independent of the legislative and executive power, endowed with broad powers on all matters related to their status, as well as the organization, the functioning and image of the judicial institution. The council will consist exclusively of female judges or a significant majority of female judges elected by their colleagues".*

(v) Completion of the mandate of the current members of the KPC

101. KPC alleges that the contested Law foresees the early termination of the mandate of the current members of the KPC and relates this termination to the moment of: (i) the election of two (2) non-prosecutor members who will be elected by the Assembly and one (1) by the Ombudsperson; as well as (ii) drawing lots for two (2) members from the current members from the basic prosecutor's offices, as well as one (1) member from the Appeals Prosecutor's Office or the Special Prosecutor's Office of the Republic of Kosovo. This proposal, according to the KPC, represents a great danger for a pillar of judicial power, in this case the prosecutorial system. Moreover, according to the KPC, the selection and termination of the mandate by lot, does not ensure the gender and ethnic equality of the KPC, guarantees that are defined by the Constitution.

(vi) The advancement of prosecutors following completion of their mandate in the KPC

102. In relation to advancement after the end of the mandate, KPC, among other things, emphasizes that based on Article 6 of the contested Law, namely paragraph 5/a, it is foreseen that the advancement for two (2) years of prosecutor members of KPC - after the end of the mandate, and that such a ban on the advancement of members of the KPC two (2) years after the end of the mandate would unfairly penalize the prosecutor members of the KPC, as the Opinion of the Venice Commission points out, in point the 66th. According to the KPC, the principle of the separation of powers also means guaranteeing the exercise of power independently and without interference, and that the limitation should be based on the balance of powers and only to the extent allowed by the Constitution and the powers of each power respectively.

(vii) Judicial protection of non-prosecutor members of the KPC

103. Regarding the judicial protection of rights, the KPC emphasizes that Article 23/a of the contested Law stipulates that the prosecutor has the right to submit an appeal directly to the Supreme Court, against the decisions of the KPC - regarding dismissal, performance evaluation as well as disciplinary decisions that the consequence may be the dismissal of the prosecutors, specifying that: "*The Supreme Court, within ninety (90) days from the time of receipt of the complaint, must decide on the merits, unless otherwise provided by law*". This provision, according to the KPC: "*... contradicts the Judgment of the Constitutional Court [KO203/19] since the evaluation of the performance of the prosecutors is a mandate of the Council and by this provision this right is transferred to the Supreme Court*". Therefore, from what was said above, KPC considers that the referrals of the Applicants are grounded and the contested Law "*should be annulled in its entirety*".

Comments submitted by the Ministry of Justice on 19 July 2022

104. On 19 July 2022, the Ministry of Justice submitted to the Court its comments on the allegations of the Applicants, where it initially emphasized that the submitted referrals are "*ungrounded in entirety"*. Further, regarding the initiative to amend the Basic Law, the Ministry of Justice, among other things, emphasized that the Rule of Law Strategy 2021-2026 results in findings regarding the functioning of the KPC, starting from: "*...the composition, where there are* restrictive *criteria for the membership of persons outside the prosecution system and that especially the number of prosecutors in the KPC is quite large, implying that the legal criteria allow non-qualitative representation and not necessarily independent of politics".*

105. In the following, the Court will summarize the comments of the Ministry of Justice regarding the Applicants' referrals and the contested Law, including those related to: (i) the new composition of the members of the KPC; (ii) appointment of a non-prosecutor member by the Ombudsperson; (iii) election of two (2) non-prosecutor members by a simple majority of votes in the Assembly; (iv) the right of "*special majority or right of veto*" of non-prosecutor members in important processes of the KPC; (v) the lot for the early termination of the mandate of the current members; and (vi) judicial protection of rights.

(i) New composition of KPC members

106. The Ministry of Justice, referring to the composition of the KPC determined according to the Basic Law, among other things, emphasizes that: "*...the composition of 13 members, unbalanced between prosecutor and non-prosecutor members, creates a risk of corporatization within the KPC*". Moreover, according to the Ministry of Justice, the KPC has functioned with a total of eleven (11) members out of the thirteen (13) provided for in the Basic Law, and that nine (9) of them have been prosecutors and two (2) of the non-prosecutor members, did not manage to be elected.

107. Regarding the reduction of the number of members of the KPC, the Ministry of Justice alleges that through the changes provided for by the contested Law, *"...the risk of corporatization of the KPK*" is eliminated, and a balanced representation is achieved in order to ensure the efficiency of the KPC in the exercise of its powers. The Ministry of Justice also refers to the findings of the Opinion of the Venice Commission, emphasizing that according to the Venice Commission: "*...prosecutors must have substantial representation, but not necessarily a majority".*

(ii) Appointment of a non-prosecutor member by the Ombudsperson

108. The Ministry of Justice in this context, first emphasizes that there is a misunderstanding on this point by the Applicants, because according to them, Article 8 of the contested Law does not provide, as claimed by the Applicants, that the member appointed by the Ombudsperson is elected by civil society, but according to Article 8 of this contested Law which adds Article 10/A, "*the Ombudsperson appoints a member to the Council who meets the legal criteria and does so before holding a substantive consultative meeting with civil society organizations that are active in the field of the prosecutorial system in Kosovo" and that "this does not mean that that representative must it must be from civil society or from the Ombudsperson*". Further and in relation to the allegation of the Applicants, that the Ombudsperson does not have the competence to propose a member of the KPC, the Ministry of Justice points out what has forced it for such a proposal, namely Article 132 of the Constitution, which defines the Ombudsperson as an independent institution and consequently, according to them, the Ombudsperson can appoint one (1) of the three (3) non-prosecutor members in order to achieve "*pluralism"* of the members of the KPC.

109. Furthermore, the Ministry of Justice emphasizes that the first Opinion also suggested that a number of non-prosecutor members be reserved for representatives of Independent Institutions, such as the Ombudsperson, while regarding the allegation of the Applicants that the appointment of such competence of the Ombudsperson results in a violation of Article 16 of the Constitution, the Ministry of Justice emphasizes that the power of the Ombudsperson originates precisely from the Constitution and "*in the exercise of his powers as an independent body he has the right to make such appointments*". Regarding the allegation of the Applicants, the Ombudsperson is in conflict of interest, the Ministry of Justice adds that this allegation: "*... is vague and does not provide further details (...)*".

(iii) Election of two non-prosecutor members by a simple majority of votes in the Assembly

110. Regarding the Applicants' allegations that the election of two non-prosecutor members by a simple majority by the Assembly violates the constitutional independence of the KPC, the Ministry of Justice emphasizes that Article 80 [Adoption of Laws] of the Constitution expressly states that laws, decisions and other acts are approved by the Assembly with the majority of votes of the deputies present and voting, except when otherwise provided by the Constitution. Therefore, according to them, any other way of voting would be contrary to the Constitution.

(iv) Right of "special majority or right of veto" of non-prosecutor members in important processes of the KPC

111. Regarding the allegations of the Applicants that the way of voting within the KPC and which is conditioned by the vote of non-prosecutor members violates the constitutional independence of the KPC, the Ministry of Justice emphasizes that the purpose of the mandatory inclusion of at least one (1) non-prosecutor member in certain decisions, is the elimination of the risk of "*corporatization in the KPC*", making it impossible for decisions to be taken only by prosecutors and ensuring that *"... this body really functions as a pluralist body, where for important decisions it is necessary to find consensus*". Moreover, even if this consensus is not reached, the Ministry of Justice emphasizes that the possibility of blocking by two members elected by the Assembly has been eliminated according to the proposal of the Venice Commission to find an unblocking mechanism in case the members of the KPC appointed by the Assembly vote against, since the approved draft of the Law, all decisions can be approved with the votes of one of the non-prosecutor members who in this case can be the member appointed by the Ombudsperson.

(v) Lot for termination of term of current members

112. According to the Ministry of Justice, the mandate of the members of the KPC is not a constitutional but a legal category, and according to the assessment of the Venice Commission, the principle of "*holding the mandate*" is not absolute and that such a thing can be justified if "*it leads to evident progress of the system in general*". According to the Ministry of Justice, this measure is proportional in order to achieve "*independence, impartiality and professionalism of the prosecutorial system*".

113. Moreover, according to the comments, all this is a function of the evident progress of the prosecutorial system and that even from the assessment of the Venice Commission, interpreting the first Opinion, this is supported by the fact that the new composition of the KPC would eliminate: "*...non-proportional representation of the level of prosecutions in the KPC (where currently there is a much greater representation of*

basic prosecutions and a small number of representatives from higher prosecutions) and would ensure a balancing of representation." The Ministry of Justice emphasizes that *"the premature termination of the mandate of some of the current members of the KPC does not violate Article 110 of the Constitution. On the contrary, the continuation of the current composition of the KPC with the risk of 'corporatization' and with an imbalance of 10 prosecutor members and only 1 non-prosecutor member - prosecutor for another 4 years, would prevent the KPC from implementing its constitutional powers".*

(vi) Disciplinary procedures for Council members/Judicial protection of rights

114. Regarding the Applicants' argument that non-prosecutor members of the KPC are not provided judicial protection and, as a result, equality before the law is violated compared to prosecutor members, the Ministry of Justice emphasizes that the procedure for appointing non-prosecutor members in this case is different, therefore the dismissal procedure is also different. According to the Ministry of Justice, the contested Law has not prohibited judicial protection for non-prosecutor members in case of dismissal, but the Ministry of Justice has assessed that: *"...this issue is sufficiently covered by other applicable laws in Kosovo*". Furthermore, it is emphasized that the non-prosecutor members can challenge the decisions on dismissal in regular courts through the administrative conflict procedure or directly in the Constitutional Court by one of the authorized parties. On the other hand, the possibility of member prosecutors to complain directly to the Supreme Court has been given taking into account the unification with the regular disciplinary system for prosecutors, according to the Law on Disciplinary Liability of Judges and Prosecutors.

Comments submitted by the Ombudsperson on 29 July 2022

115. On 29 July 2022, after the Court approved the request of the Ombudsperson for an extension of the deadline for comments, the latter on the same date submitted to the Court his comments to the Applicants' allegations.

116. Regarding the changes in the composition of the KPC resulting from the contested Law, the Ombudsperson, among other things, emphasizes that it is important for the Court to assess whether the latter are in accordance with the constitutional provisions and whether: *"... the independence of the Ombudsperson is violated according to Article 132 of the Constitution, as well as if the separation of powers is violated*," as well as the independent functioning of the KPC, as guaranteed by Article 110 of the Constitution. According to the Ombudsperson, the possibility that the Ombudsperson appoint one (1) member of the KPC: "*...eventually it could be seen as a violation of the independence of the Ombudsperson, but also of the KPC*". According to the Ombudsperson, this new competence, which is provided by the contested Law, does not originate from either the Constitution or the Law on Ombudsperson, and based on this, the Ombudsperson: "*...considers it very important that the Constitutional Court assesses the constitutionality of determining the competence of the Ombudsperson in the appointment of a member of the KPC, in terms of the violation of his independence*".

117. Further, regarding the competence of the Assembly to select non-prosecutor members of the KPC, the Ombudsperson states, among other things, that: *"...does not enter the assessment whether the selection of non-prosecutor members by the Assembly can be an interference or violation of the independence of the KPC*", because according to the Ombudsperson, this competence of the Assembly existed in the past as well. However, the Ombudsperson asks the Court to assess whether the reduction of prosecutorial members of the KPC may reflect a violation of the principle of separation of powers. In

this context, the Ombudsperson also refers to Court case KO219/19, submitted by *the Ombudsperson*, Judgment of 30 June 2020, paragraph 325.

118. Regarding the "*qualified majority*", the Ombudsperson considers that there is a risk of procedural blockages in the event that: *"...the quorum of the qualified majority" is not met*. According to him, *"taking into account the content of the norm, it is noted that the legislator has not left another alternative if the quorum of the qualified majority is not met, and not leaving another alternative if the* qualified *majority vote fails leads to the blocking of the functioning of the KPC*".

119. Finally, the Ombudsperson asks the Court to assess whether: (i) the competence of the Ombudsperson to appoint one (1) non-prosecutor member of the KPC contradicts the provisions that guarantee the independence of the Ombudsman and the provisions that guarantee the independent functioning of the KPC, as an independent institution; (ii) the proposed structure of the KPC is in accordance with the separation of powers defined by the constitutional principles; (iii) qualified majority voting on issues expressly determined by the contested Law, violates the independent functioning of the KPC, in the spirit of Article 110 of the Constitution.

Comments submitted by the Chamber of Advocates on 9 August 2022

120. After the approval by the Court of the request of the Chamber of Advocates, to be an interested party in the present case, on 9 August 2022, the Chamber of Advocates submitted its comments, where, among other things, emphasized: "*...will be limited only to giving comments in relation to the two requests mentioned above, but not in relation to the comments of other involved parties*".

121. In this regard, the Chamber of Advocates initially emphasized that it supports the referral of the Applicants and the imposition of an interim measure. Moreover, the Chamber of Advocates emphasized that the contested Law violates its legal interest, specifying the following reasons,(i) "*...the role of the institution of the KCA and its representation in the Kosovo Prosecutorial Council also presents widely recognized international practices is a segment that, among other things, deserves special attention in the circumstances of the present case since the contested law proposes a different solution not only of the number of members of the KPC, but above all, a change of the representative institutions in this body is envisaged, excluding the possibility of representing the KCA in the KPC"; (ii) "... the exclusion of the KCA, in representing its interest in the KPC, apart from being completely unfounded and unreasonable, simultaneously represents an arbitrary approach and deprivation of the KCA to exercise its representative function in the institutions of justice, a function which is necessary above all because of the role of the lawyer and the role of the prosecutor in a judicial process";* and (iii) *"such an approach represents nothing more than prejudice of the representative capacity of the KCA*".

122. Moreover, according to the Chamber of Advocates, (i) the reduction of the number of members of the KPC, through the contested Law, violates the two main segments of the organization, independence and decision-making of this institution, namely the KPC; (ii) the issue of determining the quorum at five (5) members out of the existing seven (7), "*represents a direct blow to the constitutional guarantees embodied in the constitutional principles of the Council such as independence and impartiality"* because in this way every decision of the KPC becomes impossible; (iii) the criterion that important decisions of the KPC can only be taken with the support of two (2) non-prosecutor members of the KPC, makes their vote "*many times more powerful"* and *"therefore, not equal to it*", and in this way, the constitutional guarantees embodied in Article 110 of the Constitution are directly violated; and (iv) the termination of the

mandate of the current members of the KPC, in an "*arbitrary and premature manner is ungrounded, due to the fact that the applicable legal criteria from Article 13 of the law in force are exceeded"*, which also foresees the reasons when a mandate ends. According to them, the termination of the mandate has the consequence of the violation of the right to elect and to be elected, as well as it is contrary to the ECHR and the decisions of the ECtHR as well as Article 25 of the International Covenant on Civil and Political Rights.

123. In support of its allegations, the Chamber of Advocates also refers to the case of the Court, KO203/19, the applicant the Ombudsperson, Judgment of 30 June 2020, emphasizing that: *"*The *Constitution of Kosovo was intended to provide the prosecutorial system (KPC and the State Prosecutor) with the same independence to exercise its functions as the judicial system."* According to the Chamber of Advocates, the above-mentioned Judgment of the Court clearly argues the fact that the Constitution has guaranteed the same independence to the judicial and prosecutorial system.

The Ombudsperson's response of 29 August 2022 to the comments of the KPC, the Ministry of Justice and the Chamber of Advocates

124. On 29 August 2022, the Ombudsperson submitted a response to the comments submitted to the Court by the KPC, the Ministry of Justice and the Chamber of Advocates, regarding the constitutional review of the contested Law. In his response, the Ombudsperson states that the KPC in the comments submitted to the Court, among other things, raised the issue of the conflict of interest of the Ombudsperson, based on the competence of the latter according to the Law on Disciplinary Liability of Judges and Prosecutors, as the initiator of disciplinary cases against judges and prosecutors. Therefore, the Ombudsperson considers it necessary for the Constitutional Court to assess whether: (i) the competence of the Ombudsperson to appoint a non-prosecutor member in the KPC contradicts the provisions that guarantee the independent functioning of the KPC as an independent institution: and (ii) the proposed structure of the KPC is in accordance with the separation of powers defined by the constitutional principles.

125. In this context, also referring to his analysis regarding Law on the Disciplinary Liability of Judges and Prosecutors, he emphasizes that *"the competence, which is not foreseen by the Constitution of the Republic of Kosovo, cannot be given by law"*.

The response of the Ministry of Justice of 29 August 2022 to the comments of the KPC, the Ombudsperson and the Chamber of Advocates

126. On 29 August 2022, the Ministry of Justice submitted a response to the comments submitted by the KPC, the Ombudsperson and the Chamber of Advocates. In the following, the Court will summarize the responses/comments of the Ministry of Justice, regarding the comments submitted by: (i) the KPC; (ii) the Ombudsperson; and (iii) the Chamber of Advocates.

(i) Regarding the comments submitted by the KPC

127. Regarding the comments submitted by the KPC to the Court, the Ministry of Justice, among other things, states that: (i) they are: "*...prejudicial, unsubstantiated and that the cases referred to by the KPC are outside the context of the treatment by the Constitutional Court*"; (ii) that the KPC mentions only the first Opinion of the Venice Commission; and (iii) that the latter allege that the change of the contested Law has been initiated unilaterally, without mentioning the fact that changes have also been initiated to the Law on the State Prosecutor and the Law on Special Prosecution, which are expected to be approved soon by the Government.

128. In addition, as regards the allegations of the KPC, that the new composition of the KPC violates the guarantees established in Article 4 of the Constitution, the Ministry of Justice, among other things, emphasizes that the contested Law does not violate the principle of unification and independence of the judicial power, adding that the judicial power is different from the prosecutorial power and this is mentioned in the Judgment of the Constitutional Court in the case KO29/12 and KO48/12. Furthermore, the Ministry of Justice emphasizes that: (i) there is an essential difference in the extent of the constitutional regulation of courts and prosecutions by the Constitution and that in the case of the prosecutorial system, according to the Constitution, the legislative body can decide this manner within the limits of legal discretion; (ii) the prosecution is not a court and their work, namely the prosecution, is essentially different from the courts, but the independence of both, the court and the prosecution, is indisputable, which is guaranteed by the Constitution and which is not infringed by the contested Law; and (iii) the fact that the prosecutorial system is regulated in Chapter VII (Justice System) of the Constitution and that the prosecutorial system is included in the judicial power, is unsustainable, because Chapter VII of the Constitution also includes the Advocacy, which is a completely different nature of work from courts and prosecution, but still independent. According to the Ministry of Justice, there are three systems, namely different professions, one of which has been specifically regulated by the Constitution, while the other two, namely the prosecution and the advocacy, are regulated by specific laws.

129. Furthermore, regarding the comments of the KPC regarding the new composition determined by the contested Law and the fact that the KPC challenges its new composition, the Ministry of Justice emphasizes that, "*as confirmed by the Venice Commission, the international standards allow that prosecutors do not necessarily have to be the majority in the prosecutorial council, but only to have substantial representation, and what is key is the pluralism of the Prosecutorial Council, to ensure that prosecutors cannot govern alone, and, on the other hand, that the non-prosecutor members who are elected by the parliamentary majority cannot outvote them*." The Ministry of Justice emphasizes that the KPC, composed of ten (10) prosecutor members and only one (1) non-prosecutor member, is not pluralistic, that is, it is inconsistent with the standards of the Venice Commission, and creates a risk of "*corporatization*". Therefore, according to the Ministry of Justice, the new composition of the KPC determined according to the contested Law does not violate Article 110 of the Constitution.

130. Further, according to the Ministry of Justice: (i) the KPC's allegation of violation of Article 3 of the Constitution because the contested Law does not ensure gender and ethnic equality, is ungrounded because Article 6 of the Law on KPC, which amends paragraph 4 of Article 9 of the Basic Law, expressly stated that "*when electing the members of the Council, the Council and the Assembly ensure the gender and multi-ethnic representation of the Council*" and based on this provision, two institutions elect more than one member in the composition of the KPC and have the possibility, from the announcement of the vacancy for these positions, to announce them specifically for the underrepresented gender and for the non-majority community in Kosovo; (ii) the KPC's allegation of violation of Article 4 of the Constitution because the contested Law does not ensure the equality of the election of the members of the KPC, because the appointment of a member by the Ombudsperson conflicts with the equality of the election of other members of the KPC, is ungrounded because the appointment of a member by the Ombudsperson in the composition of KPC does not contradict the Constitution; and (iii) the KPC's allegation that the voting of non-prosecutor members by the Assembly with a majority of the votes of the deputies present and voting does not ensure independence and inclusiveness for an independent constitutional institution,

is also ungrounded because according to Article 80 of the Constitution, this is the only way to vote. The Ministry of Justice recalls that the proposed composition of the KPC, according to the contested Law, has been assessed by the Venice Commission as not being in violation of international standards.

131. Furthermore, regarding the KPC's allegation that the appointment of the KPC member by the Ombudsperson constitutes a conflict of interest, due to the role that the Ombudsperson has according to the Law on Disciplinary Liability of Judges and Prosecutors, the Ministry of Justice clarifies that: (i) the member appointed by the Ombudsperson does not serve as a representative of the interests of the Ombudsperson; (ii) the contested Law has established the Ombudsperson as the authority to appoint a member of the KPC, due to its institutional independence guaranteed by the Constitution and the Law, in order to ensure the pluralism of the KPC by avoiding the determination of other members directly represented by the Government or elected by the Assembly, which would create a possible risk of political influence; (iii) such a solution was even expressly recommended by the Venice Commission and was assessed by them as something that reduces the risk of politicization of KPC-even if it is not contrary to international standards; and (iv) according to the Law on the Prevention of Conflict of Interest, in the exercise of the public function, the conflict of interest is defined as follows: "*A conflict of interest may result from circumstances in which an official has a private interests, which influences, might influence or seems to influence the impartial and objective performance of official duties*."

132. Whereas, regarding the allegations that the decision-making method of the KPC, specifically defined in the contested Law, is contrary to the Constitution, the Ministry of Justice emphasizes that: (i) the KPC is "*prejudicial*" when it speaks about the voting method assigned to the KPC because "*it mentions political, personal interests or other reasons that will make the non-prosecutor members not to participate in the vote, which then leads to illegal compromises. It seems that the KPC in its comments is based on the practice of the operation of this institution and the experience of certain of its members, with making unlawful decisions as explained in the introduction to this answer [...]*"; (ii) KPC also emphasizes that the method of qualified majority vote can cause problems and delays in the completion of processes, while this is not right because qualified majority voting and then alternative voting with two-thirds (2/3) of all members in case that the proposal does not pass with a qualified majority, can be done within one meeting and within the same day; and (iii) the KPC also creates confusion with the mention of the Magna Carta of Judges because this document sets standards for the composition of judicial and non-prosecutorial councils, and the Venice Commission in its Opinion has been very clear that the same standards do not apply to the two councils.

133. Finally, the Ministry of Justice also responds to the claims of the KPC regarding: (i) termination of mandates; (ii) promotion of prosecutors; and (iii) judicial protection of rights. Regarding the first one, the Ministry of Justice emphasizes that it has clarified this issue in the previously submitted comments and remains close to the position that this termination is justified by "*evident progress of the system*", as mentioned by the Venice Commission, for the elimination of the risk of the "*corporatization and depoliticization*" of the Council. Regarding the second, the Ministry of Justice recalls that Article 6 of the contested Law amends Article 9 of the Basic Law, adding paragraph 5/a, where it is expressly emphasized that until two (2) years after the end of the mandate, the members of the Council shall not benefit from the opportunities of promotion in the prosecutorial system, which have been created as a result of the decisions in which they have participated as members of the Council and that this provision is emphasized to be in full compliance with what the Venice Commission has recommended in his Opinions. Whereas, in relation to the third issue, namely the KPC's

allegation that the possibility given by Article 23/A of the contested Law, for prosecutors to appeal to the Supreme Court against the KPC decisions regarding dismissal, performance evaluation and disciplinary decisions, is contrary to the Judgment of the Constitutional Court, because the evaluation of the performance of prosecutors is the mandate of the KPC and not of the Supreme Court. The Ministry of Justice assesses that this provision does not reduce the competence of the KPC for performance evaluation, nor any other competence, because the Supreme Court will only carry out the judicial control of these decisions in case of appeal by the party and that this article even enables the effective implementation of Article 32 of the Constitution, "*... which, surprisingly, according to the Council, in this case is not important, while in the previous case of casting lots it was important*".

(ii) regarding the comments of the Ombudsperson

134. The Ministry of Justice emphasizes that the compatibility of the contested Law with Article 132 of the Constitution is outside the scope of Referrals KO100/22 and KO101/22, however the latter mentions the fact that during the drafting of the draft law and discussions with the Venice Commission, it analyzed carefully the role of the Ombudsperson and his involvement in this law, recalling that the Venice Commission itself in its Opinion has suggested that the members of the KPC can also be elected by the Ombudsman. According to the assessment of the Ministry of Justice, the member appointed by the Ombudsperson based on the contested Law does not act in the KPC as a representative of the interests nor the powers exercised by the Ombudsperson, but as a full-time non-prosecutor member who will ensure the pluralism of the KPC. Moreover, according to the comments, the conclusion of the Ombudsperson is ungrounded, that the competence of the Ombudsperson to appoint a member of the KPC is not provided for either by the Constitution or by the Law on the Ombudsperson, because the Law on Ombudsperson itself in paragraph 13 of its article 16, expressly states that the Ombudsperson also performs other duties defined by the legislation in force.

135. The Ministry of Justice further emphasizes that the case of the contested Law is not an isolated case in the legal framework of Kosovo, where the members of an institution are appointed by other institutions, referring to examples such as: (i) Law on the Academy of Justice, according to which in the Council of the Academy, seven (7) of the members are appointed in certain numbers by KJC, KPC and the Ministry of Justice, despite the fact that the Academy of Justice is defined as an independent institution that reports to the Assembly; and (ii) the Kosovo Agency for Comparison and Verification of Property, where in the Supervisory Board of the Agency, a number of members are appointed directly by the Special Representative of the European Union and that this specific role of the Special Representative of the European Union, according to the Ministry, is not regulated either by the Constitution nor the laws of Kosovo.

136. In conclusion, the Ministry of Justice assesses that the contested Law and the relevant opportunity for the Ombudsperson to appoint one (1) of the non-prosecutor members directly to the KPC, does not violate Article 135 of the Constitution. According to the Ministry, on the contrary, this enables pluralism and the implementation of the competences of the KPC.

(iii) regarding the comments of the Chamber of Advocates

137. Regarding the allegation of the Chamber of Advocates that broad international practices recognize the representation of the Chamber of Advocates in the Prosecutorial Council, the Ministry of Justice states that the Chamber of Advocates: "*...does not offer a single example of any state in this direction*". In this regard, the Ministry of Justice

emphasizes that according to its comparative analysis with the countries of the region: "*… in none of the countries of the region the representative of the* Chamber *of Advocates is part of the Prosecutorial Councils"*. The Ministry of Justice further emphasizes that,: *"there is a possibility that the Chamber of Advocates will determine the nomination or direct appointment of a member in the KPC, but this is not an obligation, but one of the possible options for the elected non-prosecutor members"*. Moreover, the Ministry emphasizes that considering the purpose of the law*"… that all* members *of the KPC serve full-time, it has been assessed that the members of the Kosovo Chamber of Advocates may be less motivated to be members of the Council, since they would have to suspend for 5 years of their work as a lawyer and especially taken into account the fact that the Kosovo Chamber of Advocates, although it had the opportunity according to the law of 2019 to appoint a member to the KPC, it has never done so, leaving the KPC to function almost exclusively with prosecutor members"*. Therefore, the Ministry of Justice maintains that the fact that one of the members will not be nominated by the Chamber of Advocates: *"…as regulated by the Law of 2019, does not violate the Constitution of Kosovo"*.

Relevant Constitutional and Legal Provisions

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.
[…]

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.

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 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.
[...]

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 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.
2. The vote is personal, equal, free and secret.
3. State institutions support the possibility of every person to participate in public activities and everyone's right to democratically influence decisions of public bodies.

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.

Article 65
[Competences of the Assembly]

The Assembly of the Republic of Kosovo:
[...]

(10) elects members of the Kosovo Judicial Council and the Kosovo Prosecutorial Council in accordance with this Constitution;
[...]

Article 108
[Kosovo Judicial Council]

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. The Kosovo Judicial Council shall ensure that the Kosovo courts

are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.
[…]
6. The Kosovo Judicial Council shall be composed of thirteen (13) members, all of whom shall possess relevant professional qualifications and expertise. Members shall be elected for a term of five (5) years and shall be chosen in the following manner:
(1) five (5) members shall be judges elected by the members of the judiciary;
(2) four (4) members shall be elected by deputies of the Assembly holding seats attributed during the general distribution of seats; at least two (2) of the four (4) must be judges and one (1) must be a member of the Kosovo Chamber of Advocates;
(3) two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community and at least one of the two must be a judge;
(4) two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for other Communities and at least one of the two must be a judge.
(5) Incompatibilities with membership on the Kosovo Judicial Council shall be regulated by law.
[…]

Amendment of the Constitution of the Republic of Kosovo no. 25

Article 108, paragraph 6, sub-paragraph 1 and 2 of the Constitution of the Republic of Kosovo shall be amended as follows:

(1) Seven (7) members shall be judges elected by the members of the judiciary.
(2) Two (2) members shall be elected by the deputies of the Assembly, holding seats attributed during the general distribution of seats and at least one of these two must be a judge.

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 110
[Kosovo Prosecutorial Council]

1. The Kosovo Prosecutorial Council is a fully independent institution in the performance of its functions in accordance with law. The Kosovo Prosecutorial Council shall ensure that all persons have equal access to justice. The Kosovo Prosecutorial Council shall ensure that the State Prosecutor is independent, professional and impartial and reflects the multiethnic nature of Kosovo and the principles of gender equality.
2. The Kosovo Prosecutorial Council shall recruit, propose, promote, transfer, reappoint and discipline prosecutors in a manner provided by law. The Council shall give preference for appointment as prosecutors to members of underrepresented Communities as provided by law. All candidates shall fulfill the selection criteria as provided by law.
3. Proposals for appointments of prosecutors must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the relevant territorial jurisdiction.
4. The composition of Kosovo Prosecutorial Council, as well as provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be determined by law.

Article 132
[Role and Competencies of the Ombudsperson]

1. The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities.
2. 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.
3. Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law.

Article 133
[Office of Ombudsperson]

1. The Office of the Ombudsperson shall be an independent office and shall propose and administer its budget in a manner provided by law.
2. The Ombudsperson has one (1) or more deputies. Their number, method of selection and mandate are determined by the Law on Ombudsperson. At least one (1) Deputy Ombudsperson shall be a member of a Community not in the majority in Kosovo.

Law no. 06/L-156 on Kosovo Prosecutorial Council (Basic Law)

Article 9

Composition of Council members

1. The Council shall consist of thirteen (13) members in the following composition:
1.1. ten (10) members from among the prosecutors as follows:
1.1.1. Chief State Prosecutor;
1.1.2. seven (7) members, prosecutors from basic prosecution offices, represented by one (1) member each, elected by prosecutors of that prosecution office;
1.1.3. one (1) member, prosecutor of the Appellate Prosecution, elected by prosecutors of that prosecution office;
1.1.4. one (1) member, a prosecutor from the Special Prosecution Office, selected by the prosecutors of that prosecution office.
1.2. one (1) member, lawyer from the Kosovo Bar Association;
1.3. one (1) member, university professor of law;
1.4. one (1) member representative of civil society.
2. Members of the Council from paragraph 1.1 of this Article, except the Chief State Prosecutor, cannot simultaneously exercise the duty of the chief prosecutor of any prosecution office.
3.Three (3) non-prosecutor Council members, elected by the Assembly, pursuant to Article 65 (10) of the Constitution, shall be elected by secret voting, by a majority votes of the members of the Assembly who are present and vote, based on a list of two (2) candidates for each position proposed by the relevant bodies, which shall include:
3.1. one (1) member from the Kosovo Bar Association;
3.2. one (1) professor from the law faculties of the Republic of Kosovo;
3.3 one (1) representative from civil society. The civil society representative is selected through a public vacancy announcement by the Assembly, who must have a high professional background, evidenced knowledge in the area of law, knowledge in the field of human rights, work experience in legal issues of five (5) years and the support of at least five (5) civil society organizations in the field of justice.
4. Members of the Council reflect the multi-ethnic nature and principles of gender equality in the Republic of Kosovo.
5. During the exercise of the function of a member of the Council, the same cannot be promoted to the prosecutorial system.
6. Full-time Council members cannot exercise the duty of a prosecutor in any of the prosecution offices
7. The Council shall adopt a special regulation for the implementation of this Article.

Article 15
Quorum and decision-making

1. The quorum of the Council shall be composed of nine (9) members.
2. The decisions of the Council shall be taken by a simple majority vote of the members present, unless otherwise provided by law.
3. The Chair, or Vice Chair, when chairing the Council meeting, shall be the last to vote.

Article 19
Disciplinary procedures for Council members

1. The Council shall determine and publish the rules and disciplinary procedures applicable to its members, including the procedures governing the investigation, suspension or recommendation for dismissal of any Council member.

2. A committee established by the Council composed of three (3) members, one of whom shall be a prosecutor member of the Council, and two other prosecutors, shall decide on disciplinary measures and sanctions, including suspension and dismissal of any member of the Council.
3. On the recommendation of the Committee, a member of the Council may be dismissed by two-thirds (2/3) of the votes of the members of the Council.
4. One (1) member of the Council who has been dismissed has the right to appeal against the Council's decision directly to the Supreme Court within fifteen (15) days from the decision to dismissal.

Article 23
Appointment and re-appointment of prosecutors

1. The President appoints and reappoints prosecutors based on the Council's proposals.
2. Within 60 days after the receipt of the proposal, the President shall issue a decree on the appointment as prosecutor of the candidate proposed by the Council. If within this deadline the President does not appoint the prosecutor, the Council may re-submit the proposed candidate together with the supplementary reasoning in writing. Thereafter the President appoints the prosecutor upon the proposal of the Council.

CHAPTER VI
TRANSITIONAL AND FINAL PROVISIONS

Article 36
Continuance of duty

1. Elected Council members who, at the time of entry into force of this Law, are exercising their function, may remain in office until the end of their current mandate. 2. The mandate of the Chair and the Vice-Chair of the Council, set forth in paragraph 1 of Article 11 of this Law, shall also apply to the Chair and the Vice-Chair who are currently exercising such functions.
3. Council members shall continue to perform their duties in accordance with the provisions set out in this Law.
4. Elected Council shall have the right to resign within thirty (30) days and must continue the elected position until the election of new members in accordance with the provisions set forth in this Law.

Law No. 06/L-057 on Disciplinary Liability of Judges and Prosecutors

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.
2. The complaint against the decision of the Council shall have a suspension effect and shall prohibit the implementation of such decision, until the complaint is reviewed.
[…]

5. The Supreme Court, within a trial panel composed of three (3) members elected by the President of the Supreme Court shall, within thirty (30) days, review and decide on the complaint. If the President of the Supreme Court is the subject of the Council's decision, then the oldest judge of the Supreme Court will elect the member.
[…]

Law No. 08/L-136 on amending and supplementing Law No. 06/L-156 on Kosovo Prosecutorial Council

Article 6

1. Article 9 of the Basic Law, paragraph 1 shall be amended as follows:
1. The Council shall consist of seven (7) members as follows:
1.1. The Chief State Prosecutor ex officio;
1.2. Three (3) prosecutor members, elected by the prosecutorial system, as follows:
1.2.1. One (1) prosecutor elected by the Appellate Prosecution Office or Special Prosecution Office;
1.2.2. Two (2) prosecutors elected from among basic prosecution offices, and
1.3. Three (3) lay members, as follows:
1.3.1. Two (2) elected by the Assembly and
1.3.2. One (1) appointed by the Ombudsperson.
2. Paragraph 3 of Article 9, of the Basic Law shall be deleted.
3. Paragraph 4 of Article 9 in the Basic Law shall be amended as follows:
4. When electing members of the Council, the Council and the Assembly shall ensure the multiethnic and gender representation of the Council.
4. The following new paragraph 5/a shall be added after paragraph 5 of Article 9 of the Basic Law:
5/a. Up to two (2) years following completion of the mandate, the Council member cannot take advantage of promotion opportunities in the prosecutorial system, which were created because of decisions in which they took part as members of the Council.
5. In Article 9 of the Basic Law, paragraph 6, words "full time", shall be deleted.

Article 7

Article 10 of the Basic Law shall be amended as follows.

Article 10
Procedure for election of members by the Assembly

[…]
12. The Assembly elects the Council member through a secret voting, with a majority of votes of deputies present and voting.
[…]

Article 8

After Article 10 of the Basic Law, the following Articles 10/A, 10/B and 10/C shall be added:

Article 10/A
Lay member appointed by the Ombudsperson

1. The Ombudsperson appoints one member to the Council, who fulfils the conditions from Article 5 paragraph 2 of this Law.

2. The Ombudsperson holds a substantive consultation meeting with civil society organizations which are active in the field of prosecutorial system in Kosovo, prior to appointing the Council member.

3. When the mandate of the member from paragraph 1 of this Article ends prematurely as defined by this law, the Ombudsperson appoints the new member, with the regular mandate, within thirty (30) days from the day the position remained vacant.

Article 13

1. Article 15 of the Basic Law, paragraph 1 is amended as follows:

1. The quorum for the Council is five (5) members, unless otherwise established by this Law. The quorum is five (5) members also for disciplinary cases.

2. Article 15 of basic law, after paragraph 2, a new paragraph is added:
2/a. Notwithstanding paragraph 2 of this Article, voting for the positions of Chief State Prosecutor and Chief Prosecutors as well as for disciplinary matters for prosecutors, is done by qualified majority, which requires not less than five (5) votes from the overall composition of the Council, two (2) from non-prosecutor members. The exception provided for in this provision is valid also for adoption of sub-legal acts which regulate the appointment of Chief Prosecutors and appointment, transfer, discipline and promotion of prosecutors. In case of insufficient votes, a second vote is held at the next meeting, in which case the proposals from this paragraph are approved with the votes of two thirds (2/3) of all members of the Council.

Article 16

1. **Article 19** of the Basic Law shall be amended as follows:

Article 19
Disciplinary procedures for Council members

1. The Council shall determine and publish the rules and disciplinary procedures applicable to its members, including procedures determining investigation, suspension or dismissal of prosecutor member, namely recommendation for dismissal of a lay member of the Council.
2. A Commission composed of three (3) prosecutor members, who are not Council members, selected by lot by the Council, shall carry out the disciplinary procedure within thirty (30) days and decide about disciplinary measures and sanctions, including temporary suspension and recommendation for dismissal of a Council member.
3. With the proposal of the Commission under paragraph 2 of this article, the Council may dismiss the prosecutor member of the Council with two-thirds (2/3) of the votes of Council members.
4. The Council shall recommend to the Assembly, respectively to the Ombudsperson, to dismiss a lay member, based on the proposal of the Commission under paragraph 2 of this article. The dismissal of the lay members elected by the Assembly shall be done by majority of votes from the Assembly. The dismissal of the lay member appointed by the Ombudsperson shall be done by his decision.

5. The member of the Council shall have the right to appeal the decision of the Council for dismissal, respectively the recommendation of the Council for dismissal, directly to the Supreme Court, within fifteen (15) days from the decision on dismissal.
6. The Supreme Court shall decide about appeals under paragraph 5 of this article within thirty (30) days from receipt of the appeal.

Article 18

*After **Article 23** of the Basic Law, **Article 23A shall be added**, as follows:*

Article 23A
Judicial Protection

1. The prosecutor has the right to submit an appeal directly to the Supreme Court of Kosovo, against the decisions of the Council for dismissal, decisions related to the evaluation of the performance of prosecutors, as well as disciplinary decisions, which as a consequence have the demotion in duties of prosecutors.
2. The Supreme Court, within ninety (90) days from the time of receipt of the appeal, must decide on the merits, unless otherwise provided by law.

Article 20

***Article 36** of the Basic Law, shall be amended as follows:*

Article 36

1. No later than fifteen (15) days from entry into force of this law, the Assembly of the Republic of Kosovo, shall make a public announcement for application of candidates for two (2) positions of lay members of the Council that are elected by the Assembly in accordance with the provisions of this Law, and completes the procedure of their election within three (3) months from entry into force of this Law.
2. No later than thirty (30) days after entry into force of this law, the Ombudsperson appoints the Council member based on the provisions of this Law.
3. No later than seven (7) days from the election of all lay members, the President of the Supreme Court of Kosovo, together with the Chairperson of the Kosovo Judicial Council and the Ombudsperson, have the obligation to organize and carry out drawing of the lot, in order to appoint members of the Council, who continue to remain members from among prosecutor members of the Council.
4. The draw shall be arranged in two parts, first part is arranged for the prosecutor member who will continue to remain on the Council from amongst the prosecutors of Appellate Prosecution Office and Special Prosecution Office and the second part is arranged for the two (2) prosecutor members who will continue to remain on the Council from amongst the prosecutors of Basic Prosecution Offices. The President of the Supreme Court of Kosovo shall convene and chair the meeting and at the end of the process shall sign the result of drawing lots.
5. The procedure of drawing lots under paragraph 4 of this article shall be public.
6. Members appointed by lot from among prosecutors shall exercise their duty until the end of the term for which they were initially selected.
7. After the appointment of members by lot, who continue to remain members of the Council from among prosecutor members, the mandate of other Council members from among prosecutors shall end.

8. With the election of all lay members of the Council according to the provisions of this Law, the mandate of the lay member elected before the entry into force of this Law, shall end.
9. After the completion of the lot as foreseen by this Article, the Council shall begin its work with the new composition in accordance with this Law.
10. Notwithstanding the paragraph 3 of this Article, in case the Assembly or the Ombudsperson does not elect, respectively appoint, the members of the Council according to the deadlines defined in this Article, the lottery process and the end of the mandates shall apply in accordance with paragraphs 3 to 7 of this Article, and the Council shall begin its work with this composition.

Admissibility of the Referrals

138. The Court first examines whether the Referrals submitted to the Court have fulfilled the admissibility requirements established in the Constitution and as further specified in the Law and Rules of Procedure.

139. In this respect, the Court refers to paragraphs 1 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establishes that: *"The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties".*

140. The Court notes that the Applicants filed their referrals based on paragraph 5 of Article 113 of the Constitution, which defines:

> *"5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed."*

141. Therefore, based on the above, a referral submitted to the Court according to paragraph 5 of Article 113 of the Constitution, must: (i) be submitted by at least ten (10) deputies of the Assembly; (ii) challenging the constitutionality of a law or decision approved by the Assembly, as regards its content and/or for the procedure followed; and (iii) it must be submitted within a period of eight (8) days from the day of adoption of the contested act.

142. The Court, in assessing the fulfillment of the first criterion, namely the necessary number of deputies of the Assembly to submit the relevant referrals, notes that the referrals were submitted by eleven (11) members each, namely twenty-two (22) members of the Assembly, this number which fulfills the criteria defined through the first sentence of paragraph 5 of Article 113 of the Constitution to set the Court in motion.

143. The Court, also in assessing the fulfillment of the second criterion, notes that the Applicants contest Law No. 08/L-136 on Amending and Supplementing Law no. 06/L-056 on Kosovo Prosecutorial Council, approved by the Assembly. As for the third criterion, namely the time limit within which the relevant referral must be submitted to the Court, the Court notes that both referrals were submitted to the Court on 1 July 2022, while the contested Law was approved by the Assembly on 23 June 2022, which means that the referrals were submitted to the Court within the deadline stipulated by paragraph 5 of Article 113 of the Constitution.

144. Therefore, the Court notes that the Applicants are legitimized as an authorized party within the meaning of paragraph 5 of Article 113 of the Constitution to challenge the constitutionality of the contested act before the Court, both in terms of content and the

procedure followed, since in the present case, the Applicants, who are all deputies of the VIII legislature of the Assembly, are therefore considered an authorized party and, therefore, have the right to challenge the constitutionality of the contested Law approved by the Assembly.

145. In addition to the aforementioned constitutional criteria, the Court also takes into account Article 42 (Accuracy of the Referral) of the Law, which specifies the submission of the referral based on paragraph 5 of Article 113 of the Constitution, which stipulates as follows:

Article 42
(Accuracy of the Referral)

"1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:
1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;
1.2. provisions of the Constitution or other act or legislation relevant to this referral; and
1.3. presentation of evidence that supports the contest."

146. The Court also refers to Rule 74 [Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law] of the Rules of Procedure, which:

Rule 74
[Referral pursuant to Article 113.5 of the Constitution and Articles 42 and 43 of the Law]

"[...]

(1) A referral filed under this Rule must fulfill the criteria established under Article 113.5 of the Constitution and Articles 42 and 43 of the Law:

(a) names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;
(b) provisions of the Constitution or other act or legislation relevant to this referral; and
(c) evidence that supports the contest.

(2) The applicants shall attach to the referral a copy of the contested law or decision adopted by the Assembly, the register and personal signatures of the Deputies submitting the referral and the authorization of the person representing them before the Court."

147. In the context of the two aforementioned provisions, the Court notes that the Applicants: (i) have noted their names and signatures in their respective referrals; (ii) have specified the contested Law of the Assembly of 23 June 2022; (iii) have referred to specific articles of the Constitution, which they claim that the provisions of the contested Law are incompatible with; and (iv) submitted arguments in support of their allegations.

148. Therefore, taking into account the fulfillment of the constitutional and legal criteria regarding the admissibility of the respective referrals, the Court declares the Applicants' referrals admissible and will further examine their merits.

Merits of the Referral

I. Introduction

149. The Court first recalls that the Applicants, namely twenty-two (22) deputies of the Assembly of the Republic of Kosovo, based on paragraph 5 of Article 113 of the Constitution, request the constitutional review of the contested Law, which they claim is not compatible with articles 4, 16, 24, 32, 45, 54, 109 and 110 of the Constitution. These allegations, in essence and according to the clarifications given in the part related to the allegations and responses of the interested parties before the Court, are also supported by the KPC, the Chamber of Advocates and the Ombudsperson with respect to his competences, while they are opposed by the Ministry of Justice.

150. The Court emphasizes that the essence of the applicants' allegations, supported by the Prosecutorial Council, the Bar Association and, in essence, also by the Ombudsperson in relation to issues pertaining to its competences, and opposed by the Ministry of Justice, pertains to the alleged infringement of the constitutional independence of the Prosecutorial Council, and the separation and balance of powers, in violation of the guarantees contained in articles 4 and 110 of the Constitution, respectively, because according to the applicants, the Contested Law, among others: (i) changes the composition of the Prosecutorial Council, reducing the proportion between prosecutorial and lay members, with the latter being elected by a simple majority vote of the deputies present and voting in the Assembly, thereby subjecting the election of the members of a constitutionally independent institution only to the will of the ruling majority represented in the Assembly; (ii) stipulates the competence of the Ombudsperson to elect one (1) of the lay members of the Prosecutorial Council, contrary to the Constitution and the constitutional functions of the Ombudsperson; (iii) by stipulating the decision-making majority of the Prosecutorial Council to a qualified majority and conditioning the same on the vote of its lay members elected by a simple majority in the Assembly, subjects the decision-making of a constitutionally independent institution to the political will of the ruling majority represented in the Assembly; (iv) does not treat prosecutorial and lay members equally in the context of the legal remedies available in case of their dismissal, making it possible only for the prosecutorial members of the Council to appeal directly to the Supreme Court; and (v) arbitrarily terminates the mandates of the members of the Prosecutorial Council, in violation of the constitutional guarantees, the case-law of the Court and the ECtHR.

151. The Court recalls that the Applicants in case KO100/22 challenge the constitutionality of Articles 13, 16, 18 and 20 of the Contested Law, while the Applicants in case KO101/22 challenge the Contested Law in its entirety, yet presenting concrete arguments with respect to Articles 6, 13 and 20 of the Contested Law. Having said that, (i) taking into account the Applicants' allegations and the respective arguments as well as the responses of the interested parties; and (ii) the connection of the respective articles with each other, the Court, in the circumstances of the present case, will assess the articles of the contested Law as follows: (i) Article 6 [untitled] by which article 9 (Composition of Council members) of the Basic Law is amended and supplemented; (ii) Article 7 [untitled] by which Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is amended and supplemented; (iii) Article 8 [untitled] by which Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is amended, respectively supplemented, that is the new Article 10/A is added (Lay member appointed by the

Ombudsperson); (iv) Article 13 [untitled] by which Article 15 (Quorum and decision-making) of the Basic Law is amended and supplemented; (v) Article 16 [untitled] by which Article 19 (Disciplinary procedure for Council members) of the Basic Law is amended and supplemented and Article 18 [untitled] by which Article 23 (Appointment and re-appointment of prosecutors) of the Basic Law is amended, namely supplemented, that is new Article 23/A (The right to appeal) is added; and (vi) Article 20 [untitled] amending and supplementing Article 36 (Continuance of duty) of the Basic Law in conjunction with paragraph 3 of Article 11 [untitled] of the contested Law amending and supplementing Article 13 (Termination of the term) of the Basic Law.

152. The Court further emphasizes that in order to assess the constitutionality of the aforementioned provisions of the contested Law, it will initially summarize: (i) the fundamental constitutional principles regarding the justice system, as specified by the Constitution and further clarified through its case law; (ii) the brief history of the KPC, through the respective laws, since its establishment, as far as it is relevant to the circumstances of the present case; and (iii) Opinions of the Consultative Council of European Prosecutors and the relevant opinions of the Venice Commission, including those on Kosovo and related to the analysis of the contested Law.

II. General Principles

1. Prosecutorial System in the Legal Order of the Republic of Kosovo

153. The Court initially emphasizes 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. Any ambiguity of the norms must be interpreted in the spirit of the Constitution and its values (see the Court case KO72/20, Applicant: *Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo*, Constitutional review of the Decree of the President of the Republic of Kosovo, No. 24/2020, of 30 April 2020, Judgment of the Court of 28 Mary 2020, paragraph 549).

154. In the aforementioned context and in the following, the Court emphasizes that based on the first article of the Constitution of the Republic of Kosovo, namely Article 1 [Definition of State], the Republic of Kosovo is "*an independent, sovereign, democratic, unique and indivisible state*". The "*democratic*" definition of the state of the Republic of Kosovo, among other things and as far as it is relevant to the circumstances of the present case, is complemented by four (4) essential constitutional provisions, namely Article 3 [Equality Before the Law], Article 4 [Form of Government and Separation of Power], Article 7 [Values] and Article 16 [Supremacy of the Constitution] of the Constitution of the Republic of Kosovo.

155. First, Article 3 of the Constitution, among other things, specifies that (i) the Republic of Kosovo is governed democratically, with full respect for the rule of law, through its legislative, executive and judicial institutions; and (ii) 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. Second, Article 4 of the Constitution, which determines the form of government and separation of power, among others, specifies that 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, principles according to which, (i) the Assembly exercises legislative power; (ii) the President 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 and representing the unity of the people according to the latter; (iii) The Government is responsible for implementation of laws and state policies and is subject to parliamentarian control; (iv) the judicial power is unique, independent and is exercised by courts; and (v) the Constitutional Court is an independent organ for the protection of constitutionality and makes the final interpretation of the Constitution. Third, Article 7 of the Constitution, specifies that the constitutional order of the Republic of Kosovo, among other things and as far as it is relevant in the circumstances of the present case, is based on the principles of democracy, respect for human rights and freedoms, the rule of law, non-discrimination, pluralism and separation of state power and gender equality. This article is also supported through article 21 [General Principles] of the Constitution, based on which, among other things, basic human rights and freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. Finally, and importantly, Article 16 of the Constitution specifies that: (i) the Constitution is the highest legal act of the Republic of Kosovo and that laws and other legal acts must be in accordance with this Constitution; (ii) the Republic of Kosovo respects international law; and (iii) each person and body in the Republic of Kosovo is subject to the provisions of the Constitution.

156. Beyond these basic provisions and which specify the principles of independence, separation and balancing of powers, the Constitution, has further elaborated these principles in separate chapters, namely in: (i) Chapter II, Fundamental Rights and Freedoms; (ii) Chapter III, Rights of Communities and their Members; (iii) Chapter IV, the Assembly of the Republic of Kosovo; (iv) Chapter V, President of the Republic of Kosovo; (v) Chapter VI, Government of the Republic of Kosovo; (vi) Chapter VII, the Justice System; (vii) Chapter VIII, the Constitutional Court of the Republic of Kosovo; and (viii) in Chapter XII, Independent Institutions.

157. The Court has elaborated in its judgments the basic principles of the separation and balancing of powers and the guarantees for independent constitutional institutions, since its establishment, based, among other things, on good international practices, the relevant Opinions of the Venice Commission as well as the case-law of the ECtHR and the Court of Justice of the European Union (hereinafter: CJEU), as far as it was necessary and applicable. More specifically, the Court has elaborated the principles regarding the separation and balancing of powers and the independence of constitutionally independent institutions, by Judgments including but not limited to: (i) Court Judgment in case KO73/16, with the Ombudsperson as Applicant, in which the Court assessed the constitutionality of Administrative Circular no. 01/2016, issued by the Ministry of Public Administration of the Republic of Kosovo (hereinafter: Court Judgment in case KO73/16); (ii) The Court's judgment in case KO171/18, with the Ombudsperson as Applicant, in which the Court assessed the constitutionality of Law no. 06/L-048 for the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: Judgment in case KO171/18); (iii) The Court's judgment in case KO203/19, with the Ombudsperson as Applicant, in which the Court assessed the constitutionality of Law no. 06/L-114 for Public Officials (hereinafter: Judgment in case KO203/19); (iv) Judgment in case KO219/19, with the Ombudsperson as Applicant, in which the Court assessed the constitutionality of Law no. 06/L-111 on Salaries in the Public Sector (hereinafter: Judgment in case KO219/19); and (v) Judgment in case KO127/21, with the applicant *Abelard Tahiri and 10 other deputies of the Assembly of*

the Republic of Kosovo, concerning the constitutional review of Decision no. 08-V-29 of the Assembly of the Republic of Kosovo of 30 June 2021, on the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: Judgment in case KO127/21).

158. Through the aforementioned Judgments, the Court has emphasized, among other things, that (i) among the basic values embodied in the Constitution, on which the constitutional order of the Republic of Kosovo is based, are also "*separation of powers*" and "*rule of law*"; (ii) the functioning of the democratic state of the Republic of Kosovo is based on the constitutional principle of the separation of powers and checks and balances among them; (iii) the three independent powers defined by the Constitution constitute the classic triangle of separation of powers and that the relationship between them is based on the principle of separation of powers and control checks and balances among them; (iv) each of the powers, including the independent institutions, are regulated in separate constitutional chapters and each of these chapters establishes the general principles as well as the duties and responsibilities of each power, including the check and balance mechanisms between them, which constitute the essence of how these powers should check and balance each other, without creating any unconstitutional "*interference*", "*dependence*" or "*subordination"* between them, which could potentially affect the independence of one or the other power; (v) in addition to the three classical powers, the Constitutional Court has a special place in the system of separation of powers, as an institution responsible for the final guarantee of constitutionality at the country level, the President, as a representative of the unity of the people and guarantor of the democratic functioning of the institutions of the Republic of Kosovo, as well as the independent institutions referred to in Chapter XII of the Constitution; and finally, (vi) the separation of powers as a fundamental principle of the highest constitutional level, is embodied in the spirit of the country's Constitution and, as such, is non-negotiable.

159. Regarding the independence of the judicial power in particular and its interaction with other powers in the Republic of Kosovo, the Court first emphasizes that the justice system is specified through Chapter VII of the Constitution. The latter establishes: (i) the general principles of the judicial system; (ii) organization and jurisdiction of the courts; (iii) appointment and removal of judges; (iv) their mandates and reappointment; (v) function incompatibility; (vi) immunity; (vii) KJC; (viii) State Prosecutor; (ix) KPC; and (x) the Advocacy.

160. Based on these provisions and as far as it is relevant in the circumstances of the present case, the Constitution defines two (2) constitutionally independent institutions, namely the KJC and the KPC, which mandates them with the task of ensuring the independence and impartiality of the judicial and prosecutorial system, respectively. More precisely and for this purpose, the KJC and the KPC are the only constitutional institutions which, together with the Constitutional Court, as regulated under a special constitutional chapter, namely chapter VIII, are defined as "*fully independent*" in the Constitution of the Republic of Kosovo.

161. In this context, the Court recalls that Articles 108 and 110 of the chapter on "*Justice System*" specify that: (i) the KJC is a "*fully independent*" institution in the exercise of its functions; and the (ii) KPC is a "*fully independent*" institution in the performance of its functions, in accordance with the law. Despite the differences in the powers and functions of these three institutions, the use of the same terminology in terms of their independence, describing them as "*fully independent*", reflects the intention of the Constitution-maker to accord the highest level of constitutional independence to these institutions.

162. Having said this and as far as it is relevant to the circumstances of the independent case, the Court notes that: (i) the Constitution has treated each of these institutions separately; (ii) for each of them has determined the balancing and interaction mechanisms with other powers; and (iii) based on the relevant constitutional provisions, it has also defined the differences between them.

163. More specifically and in relation to the KJC, Article 108 of the Constitution specifies, among other things, that the KJC (i) ensures the independence and impartiality of the judicial system; (ii) is a fully independent institution in the performance of its functions; (iii) ensures that the courts in Kosovo are independent, professional and impartial and fully reflect the multi-ethnic nature of the Republic of Kosovo and follow the principles of gender equality; (iv) is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office, based on the principles defined by the Constitution; and (v) is responsible for conducting judicial inspection, judicial administration, drafting rules for courts in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts.

164. The Constitution also, in the same article, defines the composition of the KJC and the way of determining this composition, specifying, among other things, that the KJC consists of thirteen (13) members, (i) five (5) of whom are judges elected by the members of the judiciary; and (ii) eight (8) of whom are elected by the Assembly, in the manner established in the Constitution, namely four (4) by the deputies holding the seats attributed during the general distribution of seats on condition that at least two (2) of them are judges and one represents the Chamber of the Advocates and by two (2) by the deputies holding seats guaranteed for representatives of the Serb community and seats guaranteed for representatives of other communities, respectively, also determining that at least one of the two (2) is a judge. This structure of the KJC was changed through constitutional amendments of 24 February 2016, namely through Amendment no. 25 to the Constitution, according to which, the number of members elected by the judiciary itself has increased from five (5) to seven (7), while the number of members of the KJC elected by the Assembly, namely by the deputies holding the seats won during of the general distribution of seats, has been reduced from four (4) to two (2), on the condition that one of them is a judge. The manner of electing the members of the KJC by the deputies holding guaranteed seats for the representatives of the Serbian community and other communities has remained the same. Based on the constitutional structure defined for the KJC, in fact, it consists of at least ten (10) judges, seven (7) of whom are elected by the KJC and three (3) elected by the Assembly, while the election of the other three (3) other members, is at the discretion of the Assembly, which is yet not limited to elect also additional judges.

165. On the other hand, Articles 109 and 110 of the Constitution, respectively, specify the basic principles regarding (i) the State Prosecutor; and (ii) the KPC. The former, namely Article 109, determines, as far as it is relevant to the circumstances of the present case, that (i) the State Prosecutor is an independent institution with authority and responsibility for the criminal prosecution of persons charged with committing criminal acts and other acts specified by law; (ii) The State Prosecutor is an impartial institution, and acts in accordance with the Constitution and the law; (iii) the organization, competencies and duties of the State Prosecutor shall be defined by law; and (iv) the State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality. Moreover, the same article also defines two basic constitutional principles: (i) the mandate of prosecutors, after reappointment, is permanent until retirement age, unless removed in accordance with the law; and (ii) prosecutors may be removed from office upon conviction of a serious criminal offense

or for serious neglect of duties. Importantly, according to Article 109 of the Constitution, the Chief State Prosecutor is appointed and dismissed by the President of the Republic, upon the proposal of the KPC.

166. The latter, namely Article 110 of the Constitution establishes the basic principles regarding the KPC. This article specifies the basic functions of the KPC, namely and among others, (i) ensuring that the State Prosecutor is independent, professional, impartial and reflects the multi-ethnic nature of Kosovo and the principles of gender equality; (ii) the power to recruit, propose, promote, transfer and discipline prosecutors in the manner provided by law; (iii) the power to propose to the President of the Republic prosecutors for appointment, based on the principles and criteria defined in the Constitution and applicable laws; and (iv) the power to propose to the President the appointment of the Chief State Prosecutor with seven (7) year mandates, according to the constitutional provisions. This constitutional provision also assigns to the KPC the duties of (i) ensuring equal access to justice for all persons in Kosovo; and (ii) that in the proposal for appointments for prosecutors, to give priority to the appointment as prosecutors of members of underrepresented communities, in the manner defined by law; and (iii) that the respective proposals reflect the principle of gender equality and the ethnic composition of the relevant territorial jurisdiction.

167. The Court notes that beyond the differences in composition and functions, the two Councils determined through the constitutional Chapter of the Justice System are the fundamental guarantors of the independence of the justice system, the judicial and prosecutorial system, the independence which is, among others, embodied in Articles 3, 4 and 7 of the Constitution of the Republic, that determine the separation and balancing of powers and the values of a Republic defined as democratic in the first article of its Constitution. Moreover, the latter, as stated above, are qualified as "*fully independent*" and in the exercise of this independence and among others, carry the obligation of (i) the proposal of the President of the Supreme Court and the Chief State Prosecutor; (ii) the proposal for appointments of all judges and prosecutors of the Republic of Kosovo; and (iii) in determining these proposals, ensuring that they are made based on the principles of merit defined by the Constitution and relevant laws, always maintaining the values of the protection of fundamental rights and freedoms, gender equality and the representation of non-majority communities in the Republic of Kosovo.

168. However, the Court further notes that as established in the basic constitutional provisions, namely Articles 1, 3, 4 and 7 of the Constitution, elaborated above, the independence of powers and independent constitutional institutions is conditional on the balance and interdependence between them. More precisely and based on the Constitution and as far as it is relevant for the circumstances of the present case, the interaction between the KJC and the KPC is defined in relation to the Assembly, the President and the Government of the Republic of Kosovo.

169. The first, namely the Assembly, is assigned by Constitution the competence to: (i) adopt laws based on paragraph 1 of Article 65 [Competencies of the Assembly] of the Constitution and to which the Constitution also refers in terms of the justice system, including the functions and competences of the KJC and the KPC, respectively; and (ii) to elect the members of the KJC and the KPC in accordance with the Constitution, based on paragraph 10 of Article 65 of the Constitution. The second, namely the President of the Republic is assigned by the Constitution the competence for (i) initially, guaranteeing the constitutional functioning of the institutions defined by the Constitution based on paragraph 2 of Article 84 [Competencies of the President] of the Constitution; and (ii) the appointment and dismissal of the President of the Supreme Court, judges, the Chief State Prosecutor and prosecutors of the Republic of Kosovo,

upon the proposals of the KJC and the KPC, respectively, as stipulated in paragraphs 15, 16, 17 and 18 of Article 84 of the Constitution. The third, namely the Government, the Constitution limits its competencies only to the proposal of draft laws and other acts of the Assembly, including in the field of the justice system, based on paragraph 3 of Article 93 [Competencies of the Government] of the Constitution.

170. Having said that, the Court also notes that beyond the differences in the relevant functions within the justice system and as defined in the respective articles of the Constitution, the Constitution has also determined differences in terms of the KJC and the KPC and which are further clarified through the case law of the Court, with emphasis on two of its Judgments, namely (i) Judgment of the Court KO29/12 and KO48/12, in which the Court reviewed the constitutionality of the proposed constitutional amendments submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 5 May 2012 (hereinafter: Judgment of the Court in cases KO29/12 and KO48/12); and (ii) Judgment of the Court in the case KO219/19.

171. In this abovementioned context, the Court first emphasizes articles 108 and 110 of the Constitution, based on which, the KJC and the KPC, respectively, are defined as "*fully independent*" in the exercise of their functions. However, first of all, in contrast to Article 108, which specifies the "*fully independent*" functioning of the KJC, in the case of the KPC, namely in Article 110 of the Constitution, its "*fully independent*" functioning also refers to the law. Having said that, the law, taking into consideration paragraph 1 of Article 110 of the Constitution, is in function of guaranteeing this independence. Whereas, secondly, unlike paragraph 6 of article 108 of the Constitution, which specifies the composition of the KJC at the constitutional level, in the case of the KPC, paragraph 4 of Article 110 of the Constitution determines that (i) the composition of the KPC; as well as (ii) provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be regulated by law.

172. As noted above, these differences in functions, but also in regulation at the constitutional level, have been addressed by the Court, among others, in the two aforementioned judgments. Through the first, that is the Court Judgment in cases KO29/12 and KO48/12, among others, the Court had reviewed the constitutionality of the proposed amendments in relation to Articles 104 and 109 of the Constitution, regarding the appointment, reappointment and removal of judges and appointment and removal of the Chief Prosecutor following the proposal of the respective Councils. More precisely, the Assembly had proposed that with respect to appointment, reappointment and removal of judges and the Chief State Prosecutor, as per proposals of the KJC and KPC, respectively, the President of the State, who, based on the same constitutional amendments, would be elected directly by the people in contrast to the current system, would be given such constitutional competencies to have the possibility to return the proposed candidates for reconsideration to the KJC and/or KPC only once, leaving the possibility for both to propose again the same candidates for appointment, but this time with the proposal of two thirds (2/3) of the members of the respective Council.

173. By the abovementioned Judgment, the Court emphasized: (i) the full independence of the Councils in exercising their respective functions, but, (ii) distinguishing between judges and the Chief Prosecutor, emphasized that if the proposed constitutional amendment was adopted, in case of the proposed competence to the President for the right to one-time return for reconsideration to the KJC of the proposed candidate for judge, the fundamental rights and freedoms defined in Chapter II of the Constitution would be reduced, as long as this would not be the case with the State Chief Prosecutor's Office. This according to this Court Judgment, because in the case of judges, among other things, such a constitutional competence of the President would result in "*the risk that the safe and continuous administration of justice, guaranteed by the Constitution,*

will be hindered if a sufficient number of judges are not appointed in a timely manner" and as a result, the constitutional guarantees regarding the right to legal remedies and judicial protection of rights, as established in Article 32 [Right Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution, while and by contrast, the position of the Chief Prosecutor would also be able to be exercised by the "*deputies until the appointment of the new State Chief Prosecutor"*, if such a competence proposed through constitutional amendments would be adopted in the Assembly, thus not resulting in diminishing the fundamental rights and freedoms established in Chapter II of the Constitution (see Court's Judgment in case KO29/12 and 48/12, paragraphs 205, 212).

174. Furthermore, by the Court's Judgment in case KO219/19, the Court also highlighted the constitutional differences and similarities and those arising from international principles, summarized mainly by the relevant Opinions of the Venice Commission, in terms of the judicial and prosecutorial systems. The Court, through the aforementioned Judgment, among other things, specified that: (i) 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, since specifically, the Constitution has foreseen that the judicial power is exercised by the courts; but (ii) however, the Constitution has included the prosecutorial system in Chapter VII related to the Justice System together with the judicial system, where it is specifically defined that the State Prosecutor's Office is an independent institution, with authority and responsibility for criminal prosecution, while the KPC is mandated to ensure, among other things, the independence of the State Prosecutor, similarly as the KJC is mandated to ensure the independence of the courts; and as a result, (iii) despite the fact that based on the relevant Opinions of the Venice Commission, as long as there is a consolidated and uniform standard regarding the full independence of the judicial powers and that this is not necessarily the case with prosecutorial systems, the Constitution intended to ensure to the prosecutorial system the same independence to exercise its functions as the judicial system (see, Court case KO219/19, Applicant *the Ombudsperson*, Judgment, paragraphs 209 and 210).

175. In this context and taking into account first, the differences in the functions of the judiciary and the prosecution within the justice system, as defined in Chapter VII of the Constitution and secondly, the differences between paragraph 6 of article 108 and paragraph 4 of article 110 of the Constitution, regarding the composition of the KJC, as regulated at the constitutional level and the KPC, as referred to at the law level, the Court, however, emphasizes that such a difference does not diminish the "*full independence*" of the KPC. This is because paragraph 4 of Article 110 of the Constitution must be read in accordance with paragraph 1 of Article 110 of the Constitution, namely the reference to a law, means that the same should serves and be compatible with the constitutional provision and which determines to the KPC "*full independence*" in exercising relevant functions, just as it does to the KJC.

2. KPC according to the laws of the Republic of Kosovo

(i) KJC and KPC according to UNMIK Regulations

176. In the following, and as far as it is relevant in the circumstances of the present case, the Court will briefly outline the history and context of the establishment of the KJC and the KPC, through various stages of their institutional development. In this context, it should be noted first that during the UNMIK administration, the Special Representative of the Secretary General (hereinafter: SRSG) had issued three (3) emergency decrees, regarding which the Joint Consultative Council on Temporary Judicial Appointments was established, among others. In consultation with this body, the SRSG appointed the

first judges and prosecutors to serve on a temporary basis in the established emergency judicial system. In September 1999, by UNMIK Regulation no. 1999/7 on the Appointment and Removal from Office of Judges and Prosecutors, the Judicial Advisory Committee was established replacing the Joint Consultative Council on Temporary Judicial Appointments. The Judicial Advisory Committee had the power to advise the SRSG in issues related to the appointment of judges and prosecutors, complaints against them, as well as in other issues related to the judicial system.

177. In April 2001, the SRSG issued UNMIK Regulation no. 2001/8 on the Establishment of the Judicial and Prosecutorial Council of Kosovo (hereinafter: KJPC), which replaced the Judicial Advisory Committee. The KJPC was an independent body, consisting of nine (9) members, with the competence to advise the SRSG regarding the appointment of judges, prosecutors and lay judges, to hear complaints against any judge, prosecutor or lay judge, if there were such. The KJPC also had the power to decide on disciplinary sanctions and to recommend to the SRSG the imposition of disciplinary measures, including the dismissal of judges, prosecutors or lay judges. At the request of the SRSG, the KJPC also offered advice on other issues related to the judicial and prosecutorial system. Further, UNMIK Regulation no. 2001/9 on the Constitutional Framework for Provisional Self-Government in Kosovo of 15 May 2001, determined the competence of the KJPC to propose to the SRSG the list of candidates for judges and prosecutors, after the latter had been approved by the Assembly, as well as to recommend to the SRSG the promotion, transfer and also removal of judges and prosecutors.

178. With the issuance of UNMIK Regulation no. 2005/52 on the Establishment of the Kosovo Judicial Council in December 2005, the KJPC was replaced by the Kosovo Judicial Council. The KJC had the primary role of determining administrative policies and conducting administrative supervision of the judiciary and courts, while the SRSG continued to exercise final power regarding the appointment and dismissal of judges. According to paragraph 1.6 of Article 1 (Kosovo Judicial Council) of this Regulation, it was determined that the provisions regarding the cases that apply to judges, will also apply to prosecutors, until the SRSG announced the regulation that would establish the entity responsible for advising SRSG related to the issues of appointment, sanctioning and dismissal of prosecutors. Article 2 (Composition) of UNMIK Regulation no. 2005/52, determined that the KJC consisted of eleven (11) members, of which seven (7) were judges and four (4) non-judges, whereas, according to paragraph 2.3 of Article 2 (Composition) of this Regulation, until the announcement of the relevant regulation for prosecutors, two (2) out of seven (7) positions of judges would belong to prosecutors.

(ii) KPC according to the laws of the Republic of Kosovo

179. Finally, the Constitution, through its articles 108 and 110, respectively, laid the foundations for two separate and different bodies with independent competencies related to the administration of the judicial system, namely the prosecutorial system. However, although temporarily, paragraph 1 of Article 151 [Temporary Composition of Kosovo Judicial Council] of the Constitution, later repealed through Amendment 12 to the Constitution regarding the Ending of the International Supervision of the Independence of Kosovo, determined that the KJC it consisted jointly of judges and prosecutors. Pursuant to this constitutional provision, the Assembly approved Law no. 03/L-123 for the Temporary Composition of the Kosovo Judicial Council. This law was repealed by Law no. 03/L-223 on the Judicial Council of Kosovo, and which continued to include also prosecutor members in its composition, until establishment of the Prosecutorial Council. However, Article 53 (Transition to the Prosecutorial Council) of this Law determined that until the establishment of the KPC according to Article 110 of the Constitution, the KJC would no longer exercise the relevant duties and functions related to the public prosecution; and (ii) the prosecutors who are members of the KJC

at the time the Prosecutorial Council is established, shall be transferred to the Prosecutorial Council and remain there until natural expiration of their terms.

180. With the adoption of Law no. 03/L-224 on the Kosovo Prosecution Council (hereinafter: the 2010 Law on KPC), which entered into force on 1 January 2011, through paragraph 1 of Article 43 (Transfer of Competencies), it was specified that upon the establishment of the KPC, the duties and competencies then being exercised by the KJC, were to be transferred to the newly formed KPC. With the establishment of the KPC, in accordance with paragraph 2 of Article 43 of this law, the prosecutor members of the KJC were transferred as members of the KPC, to continue their mandates until natural expiration of their terms.

181. The 2010 Law on KPC was amended and supplemented in 2012, by Law no. 04/L-115 in connection with the end of the international supervision of the independence of Kosovo. The latter was then amended and supplemented once again in 2015 by Law no. 05/L-035 on Amending and Supplementing Law no. 03/L-224 on the Kosovo Prosecutorial Council (hereinafter: 2015 Law on KPC). Finally, in 2019, the Assembly approved the new law for the KPC, namely Law no. 06/L-056 for the Kosovo Prosecutorial Council (hereinafter: 2019 Law on KPC). It is the latter, which has been amended and supplemented by the contested Law under the circumstances of the present case. However, initially and before the Court elaborates on the amendments and supplementations to the contested Law, below I will summarize a chronology of the amendments and supplementations to the laws regarding the KPC, as far as it is relevant to the circumstances of the present case, with an emphasis on (i) the composition of the KPC; (ii) quorum and decision-making; and (iii) the mandates of KPC members and their termination.

182. Initially and regarding the composition of the KPC, the Court emphasizes that based on Article 5 (Composition and Selection of Members of the Council) of the Law of 2010, the KPC is composed of nine (9) members, five (5) of which prosecutors and four (4) non-prosecutors. The category of prosecutors represented in the KPC, according to this article, included (i) the Chief State Prosecutor; (ii) one (1) prosecutor from the Special Prosecutor's Office; (iii) one (1) prosecutor from the Appellate Prosecutor's Office; (iv) two (2) prosecutors from the Basic Prosecutor's Office, who are selected by the prosecutors serving in that office. Whereas, the category of non-prosecutors, with the exception of the Minister of Justice, who, based on the 2010 Law, was an *ex-officio* member of the KPC, was appointed by the KPC itself, based on a list of at least five (5) candidates for each position, sent by the relevant bodies, namely: (i) one (1) member from the Chamber of Advocates; (ii) one (1) professor from the law faculties of the Republic of Kosovo; and (iii) one (1) representative from civil society, according to the specifications defined in this law.

183. Upon adoption of the 2015 Law, the Assembly changed the structure of the KPC, increasing the number of its members from nine (9) to thirteen (13) now. More precisely, Article 3 [untitled] of the 2015 Law added five (5) additional prosecutor members to the then composition of the KPC and eliminated the *ex-officio* participation of the Minister of Justice in the KPC, specifying that this institution will consists of thirteen (13) members, of which ten (10) are prosecutors, including (i) the Chief State Prosecutor; (ii) seven (7) prosecutor members from the basic prosecutor's offices, represented by one (1) member each; (iii) one (1) prosecutor member from the Appellate Prosecutor's Office; and (iv) one (1) prosecutor member from the Special Prosecutor's Office, elected by the prosecutors of the respective prosecutor's offices. The number of non-prosecutor members was kept the same, namely three (3) members who, same as in the previous law, would represent the proposals of the Chamber of Advocates, one would be a university professor of law and third, a representative of civil society. Having said that, unlike the previous Law, according to the 2015 Law, the three (3) non-

prosecutor members would be elected by the Assembly of the Republic of Kosovo, according to the manner defined in that law. This structure remained unchanged through the amendment and supplementation of the Law in 2019, namely its Article 9 (Composition of Council members), with the exception of the change in the mechanism of administering the competition for the selection of civil society members. More precisely, unlike the 2015 Law, according to the 2019 Law, the vacancy for this member would be administered through the Assembly in a manner and according to criteria specified in this law.

184. The issues related to the quorum and decision-making have also changed over the years through the above-mentioned amendments and supplements to the relevant law, depending on the changes in the composition of the KPC. More specifically and firstly, Article 12 (Residency of the Council, Quorum, and Public Nature of Meetings) of the 2010 Law, in a structure of the Council consisting of five (5) prosecutor members and four (4) non-prosecutor members, determined (i) the quorum of six (6) members; while (ii) decision-making, by a simple majority of the members present, unless the law had stipulated otherwise. With the amendment and supplementations by the Law of 2015, namely Article 8 [untitled] thereof, in a structure of the Council consisting of ten (10) prosecutor members and three (3) non-prosecutor members, (i) the quorum was set in nine (9) members, while (ii) decision-making by a simple majority of the members present, unless the law stipulated otherwise. In the end, by the Law of 2019, namely by its Article 15 (Quorum and decision-making), in a structure of the Council that consisted of ten (10) prosecutor members and three (3) non-prosecutor members, (i) the quorum remained again assigned to nine (9) members, while (ii) decision-making by a simple majority of the members present, unless the law stipulated otherwise. In all three cases, the exception to the rule of simple majority decision-making, by Article 11 (Disciplinary Procedures for Council Members), Article 8 (Termination and dismissal from the function of a Council member) and Article 19 (Disciplinary procedures for Council members) of the laws of 2010, 2015 and 2019, respectively, related to decision-making regarding the dismissal of Council members, in which case a two-thirds (2/3) majority of Council members was required, in line with the specifics of the applicable laws.

185. Regarding the mandates of KPC members, the three aforementioned laws specify (i) the duration of the mandate; (ii) the manner of termination of the mandate; and (iii) transitional provisions related to the impact of these mandates as a result of legal changes. Regarding the first, namely the duration of the mandate, articles 7 (Terms of the Council Members), 3 [untitled] and 12 (Mandate of the members of the Council) of the laws of 2010, 2015 and 2019, respectively, had determined the mandate of Council members at five (5) years, with the difference that (i) the 2010 Law enabled the re-election for a second mandate, but not consecutively, (ii) the 2015 Law did not specify this possibility; while (iii) the 2019 Law prevented the right to re-election, limiting the exercise of this function to only one mandate.

186. Regarding the manner of ending the mandate and the relevant bases, the three laws, namely the 2010, 2015 and 2019 laws, through Articles 8 (Termination of the Term), 8 (Termination and dismissal from the function of a Council member) and 13 (Termination of the term), respectively, determined that the mandate of the member of the Council, ends (i) with death; (ii) with the loss of capacity to act for more than three (3) months due to certified medical reasons; (iii) repeated failure to attend the activities of the Council for more than three (3) months; (iv) upon the termination of the status on which the appointment is based, if the appointment is based on a certain status; and (v) by resignation, informing the Council with thirty (30) days prior notice. While unlike the common grounds for termination of the mandate outlined above, (i) the 2010 Law, as a basis for termination of the mandate, also defined the punishment for a criminal offense, with the exception of minor offence as defined by law, while despite the fact

that in its article 11 it provided for the possibility of dismissal of the member of the Council, it had not expressly defined it as one of the grounds for termination of the mandate, enumerated in its article 8; (ii) The 2015 law added the expiration of the mandate as a basis for termination of the mandate, while it specified dismissal as a basis for termination of the mandate in three circumstances, namely when a member of the Council does not perform the relevant function in accordance with the Constitution and the law, exercises the function contrary to his duties and responsibilities and when convicted of a criminal offense; while (iii) the Law of 2019 added as a basis for the termination of the mandate also the reaching of the retirement age and the punishment for a criminal offense, with the exception of criminal offenses committed by negligence, while it had limited the possibility of the termination of the mandate as a result of dismissal in only two circumstances, namely when a member of the Council does not perform the relevant function in accordance with the Constitution and the law and when exercising the function contrary to his duties and responsibilities.

187. While, in the end and in relation to the transitional provisions related to the impact of these mandates as a result of legal changes over the years, the Court notes that with regard to the Law of 2010, namely the first law regarding the KPC, pursuant to Article 110 of the Constitution, after the declaration of independence of the Republic of Kosovo, Transitional Provisions, namely Articles 41 (Validity of Prior Actions of the Council established under UNMIK Administrative Regulation 2005/52 and the Law on the Temporary Composition of the Kosovo Judicial Council), 42 (Initial Composition of the Council) and 43 (Transfer of Competences), respectively, determined the transfer of competences from the composition of the Kosovo Judicial Council to the newly established Prosecutorial Council, specifying that the prosecutors who at the time of the establishment of this Council were members of the KJC- are transferred to the KPC and remain there until the natural expiration of their mandate. Similarly, the 2015 Law, which, among other things, determined several differences in the composition of the KPC, as detailed above, namely (i) it added five (5) prosecutor members to the composition of the KPC; (ii) it eliminated the ex-officio representation of the Minister of Justice to the Council; and (iii) it changed the manner of electing three (3) non-prosecutor members, specifying election of the non-prosecutor members by the Assembly, in the manner specified by this law, but in its Article 6 [untitled], it specified the continuation of the existing mandates, determining that the positions in the KPC that are vacated before the expiration of the mandate of a member, are filled in the same way as for the member whose mandate has expired and that the latter, except for the Chief State Prosecutor, are appointed or elected with a full mandate of five (5) years. In the end, and regarding the 2019 Law, which did not change the structure of the KPC, but only the way of administering the competition for electing the member of the civil society, in Article 36 (Continuance of duty), it was determined, among other things, that the elected members of the KPC, who exercise this function at the time this law enters into force, can remain in office until the end of their current mandates.

3. Principles deriving from the Reports and Opinions of the Venice Commission and the Council of Europe

188. The Court below will present detached parts, relevant to the circumstances of the present case, from the thematic documents of the Venice Commission and the Council of Europe, which specifically deal with issues related to the prosecutorial system. The Court will present the following documents: (i) Report on European Standards as regards the Independence of the Judicial System: Part II – "The Prosecution Service", adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010; (ii) "The Role of the Public Prosecution in the Criminal Justice System", Recommendation Rec (2000) 19, approved by the Committee of Ministers of the Council of Europe on 6 October 2000 and the Explanatory Memorandum; (iii) Opinions

no. 9 (2014) and no. 13 (2018) of the Consultative Council of European Prosecutors; and (iv) Compilation of Opinions and Reports of the Venice Commission on Prosecutors CDL-PI(2022)23, published on 26 April 2022, which also contains some references to the two Opinions of the Venice Commission regarding the contested Law.

(i) Report on European Standards as regards the Independence of the Judicial System: Part II – "*The Prosecution Service*", adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010

189. The Report on European Standards as regards the Independence of the Judicial System: Part II – "The Prosecution Service", adopted by the Venice Commission at its 85th plenary session on 17-18 December 2010 (hereinafter: the Report on Prosecution Office or the Report) firstly points out that criminal justice systems vary across Europe and the world. In this respect, the Report also states that "*the variety in prosecution systems may appear arbitrary and shapeless but in reality it is shaped by and reflects the variety in criminal justice systems themselves. It is possible to identify features and values which are common to virtually all modern criminal justice systems*" (paragraph 10). In this aspect and as far as it is important for the circumstances of the case in question, in chapter VII, the Report addresses "*Main models of the organization of the prosecution service*". Regarding the latter, the Report, among other things, clarifies (i) the variety of models in terms of the prosecution service; (ii) trends towards their independence; and (iii) the relevant differences to the judicial system.

190. Regarding the first, the Report, among other things, asserts that "*the major reference texts allow for 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*" (paragraph 23). However, also in paragraph 24 of the Report it is emphasized that "*for years, the scope or degree of independence which the prosecution office should enjoy has evoked discussion. That stems to a large extent from the fact that European standards allow for two different ways of resolving the position of the prosecution vis-à-vis other state organs*:

"*Legal Europe is divided on this key issue between the systems under which the public prosecutor's office enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. As a prevailing concept, it can be seen, that in the current situation the very notion of European harmonisation round a single concept of a prosecutor's office seemed premature.*"

191. Having said this and in the context of the second, namely the trend towards more independent prosecution systems, the Report on the Prosecution Service, among other things, notes that (i) "*Nonetheless, 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 […]" (paragraph 26); and (ii) "tendency described above is visible not only among the civil law member states of the Council of Europe but also in the common law world*" (paragraph 27).

192. As for the third, namely the difference with the judicial system, the Report on the Prosecution Service, among other things, notes that "*Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it*

is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. [...] However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general" (paragraph 28).

193. In parts VIII and IX, the Report on the Prosecution Service addresses the "Prosecutor General" and "Other Prosecutors", respectively. In both categories, the Report addresses (i) appointment and dismissal; (ii) public accountability; (iii) discipline; (iv) guarantees of non-interference into the work of other prosecutors; and (v) immunity, restraint and security (see paragraphs 23-33 and 47-63).

194. Finally, the Report on Prosecution Systems also addresses the Prosecutorial Councils, which is the most significant aspect of the circumstances of the present case, so the Court will present below paragraphs 64 to 68 of the Report in their entirety:

> *"64. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils6 but there is no standard to do so.*
>
> *65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they [*Prosecutorial Councils*] often also play a role in discipline including the removal of prosecutors.*
>
> *66. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot outvote the other group in each others' appointment and disciplinary proceedings because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the Conseil supérieur de la magistrature sits in two chambers, which are competent for judges and prosecutors respectively.*
>
> *67. The effects of the decisions of prosecutorial councils can vary. Their decisions could have a direct effect on the prosecutors or could be only of advisory nature, thus requiring their implementation by the Ministry of Justice. The former is to be preferred because it takes away discretion from the Ministry and leaves less opportunity for political interference in the prosecutors' careers.*
>
> *68. It would be difficult to impose a single model of such a council in all the states of the Council of Europe. Moreover, the existence of such a Council cannot be regarded as a uniform standard binding on all European states."*

(ii) "*The Role of Public Prosecution in the Criminal Justice System*", Recommendation Rec (2000) 19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum

195. "*The Role of Public Prosecution in the Criminal* Justice *System*", Recommendation Rec (2000) 19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum (hereinafter: Recommendation Rec (2000)19 or the Recommendation) addresses (i) functions of the public prosecutor; (ii) safeguards provided to public prosecutors for carrying out their functions; (iii) relationship between public prosecutors and the executive and legislative powers; (iv) relationship between public prosecutors and court judges; (v) relationship between public prosecutors and the police; (vi) duties of the public prosecutor towards individuals; and (vii) international cooperation. In point 14 of the relevant Recommendation and addressing those systems in which the public prosecution system is independent from the executive power, the Recommendation states: "*In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law*". In relation to this issue, the Explanatory Memorandum further explains that "*Where the public prosecutor is independent of the executive authority, the nature and extent of that independence must be fixed by law so as to rule out (a) informal practices that could undermine that principle and (b) any risk of drift towards self-interest by public prosecutors themselves*".

(iii) Opinion no. 9 (2014) of the Consultative Council of European Prosecutors for the Committee of Ministers of the Council of Europe on European norms and principles regarding prosecutors (Charter of Rome) and Opinion no. 13 (2018) of the Consultative Council of European Prosecutors on the independence, accountability and ethics of prosecutors

196. The Charter of Rome, among other things, assesses that (i) "*the independence and autonomy of the prosecution services constitutes a necessary connection with the independence of the judiciary, therefore, the general tendency to increase the effective independence and autonomy of the prosecution services should be encouraged"* (point IV); (ii) *"The ECtHR considered it necessary to emphasize that "in a democratic society, both courts and investigative authorities must be free from political pressure". From this it follows that prosecutors must be autonomous in decision-making and, cooperating with other institutions, must perform their respective duties without pressure or external interference from the executive power or parliament, bearing in mind the principles of separation of powers and accountability. The ECtHR also referred to the issue of independence of prosecutors in the context of "general guarantees such as guarantees that ensure the functional independence of prosecutors from their hierarchy and judicial control of the acts of the prosecution service" (paragraph 34);* and (iii) *"the method of appointing and dismissing the General Prosecutor plays an important role in the system that guarantees the fair functioning of the prosecution*" (paragraph 55).

197. Opinion no. 13, among other things, assesses that (i) "*given that many international instruments have already been devoted to the independence of prosecutors, the CCPE relies especially on its Opinion no. 4 (2009) entitled "Judges and prosecutors in a democratic society" (Bordeaux Declaration), adopted together with the Consultative Council of European Judges (CCJE), and recalls that the independence of the public prosecution is a necessary corollary to the independence of the judiciary. CCPE also refers to its Opinion No. 9 (2014) entitled "European norms and principles regarding prosecutors" Charter of Rome), where it is stated that the general tendency to increase the independence and effective autonomy of prosecution services should be*

encouraged, prosecutors should be autonomous in their decision-making and perform their duties without external pressure or interference" (paragraph 3); (ii) *"in recent years, the ECtHR has developed important judicial practice in support of the independence of prosecutors, regardless of whether they are considered judicial authorities or not. The prosecutor who directs and controls the first stage of the criminal procedure should be considered an "advanced defender of human rights" and this essential role should be played throughout the process" (paragraph 7);* (iii) *"taking into account the closeness and complementary nature of the missions of judges and prosecutors, as well as the requirements regarding their status and conditions of service, prosecutors should have guarantees similar to those for judges" (paragraph 14);* (iv) *"prosecutors must be independent in their status and behaviour, they must enjoy external independence, namely in the face of unfair or illegal interference by other public or non-public authorities, e.g. political parties and they must enjoy internal independence and must be able to freely perform their functions and decide, even if the modalities of action differ from one legal system to another, according to relations with the hierarchy" (paragraph 31);* and (v) *"relevant provisions should be adopted in the member states, in parallel with the independence of judges, to strengthen the independence, accountability and ethics of prosecutors, either in the field of criminal law or in relation to other areas of their competence. Political influence should not be acceptable"* (recommendations, point i).

(iv) *Compilation of Venice Commission Opinions and Reports concerning Prosecutors CDL-PI(2022)23, published on 26 April 2022*

198. Compilation of Venice Commission Opinions and Reports concerning Prosecutors CDL-PI(2022)23, published on 26 April 2022 (hereinafter: Compilation of the Venice Commission on Prosecutors) contains excerpts of opinions, reports and researches adopted over the years by the Venice Commission concerning prosecutors, including certain parts of the First Opinion and the Second Opinion of the Venice Commission on the contested Law. This document addresses the key principles established through the Venice Commission Opinions and Reports, in areas which include but are not limited to (i) independence vs autonomy of the prosecution service; (ii) level of regulation: Constitution, Legislation, Decrees and Self-Regulation; (iii) functions and powers of the prosecution service; (iv) status of the prosecutors; (v) conflict of interest and incompatibilities; and (vi) prosecutorial council.

199. The Court will in what follows summarize the main principles as outlined in the Compilation, only to the extent that they are relevant to circumstances of the present case, presented according to the structure and thematic grouping of this Compilation, namely (i) independence and autonomy; (ii) the Prosecutorial Councils, including the balance between the prosecutorial and lay members; and (iii) tenure, namely the term of office of the Prosecutorial Council members and the early termination of the respective mandate.

200. In referring to the key principles pertaining to *the* areas as outlined above, the Court will refer to the Venice Commission Opinions and Reports, including but not limited to (i) First Opinion on the contested Law; (ii) Second Opinion on the contested Law; (iii) Opinion on the Regulatory concept of the Constitution of the Hungarian Republic; (iv) Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia; (v) Opinion on the Judicial System Act of Bulgaria; (vi) Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts of Georgia; (vii) Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office

of Georgia; (viii) Opinion on the Act on the Public Prosecutor's office of Poland; (ix) Opinion on the draft law on the Public Prosecutors' service of Moldova; and ix) Opinion on the Draft Law amending the Law of Ukraine on the Office of the Public Prosecutor.

a) As it pertains to independence and autonomy

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia

> *16. Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. […] The Venice Commission further notes that in many countries "subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases". That being said, a general tendency of giving more independence to the prosecution service has not yet transformed itself into a binding rule that is uniformly applied across Europe.*

CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic

> *The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society.(chapter 11, p. 6)*

b) As it pertains to the Prosecutorial Councils

CDL-AD(2019)034, Republic of Moldova - *Amicus Curiae* Brief for the Constitutional Court of the Republic of Moldova on the amendments to the Law on the Prosecutor's Office

> *40. If a legislative amendment was adopted in order to prevent the SCP from nominating a particular candidate, or in order to ensure that certain specific persons may or may not participate in the new competition, or for any improper reasons, this could impinge on the constitutional "division of labor" between the legislator (whose main task is to adopt rules of general application) and the SCP (whose main task, in this context, is to elect appropriate candidates for the prosecutorial positions). This would come close to ad hominem ad hominem legislation (directed at a specific person) previously criticized by the Venice Commission.*
>
> *41. The Venice Commission acknowledges, at the same time, that a legislator may have good reasons to intervene in a pending recruitment procedure which is grossly unfair, inefficient, discriminatory etc. By redefining eligibility criteria and redesigning procedural rules the new legislation may exclude certain candidates from the competition or open the way to new ones who otherwise were not eligible or*

raise/reduce their chances of success. So, the question whether such legislative intervention into a pending procedure is constitutionally permissible does not have a simple and categorical answer. Most likely, to answer this question the Constitutional Court of the Republic of Moldova will have to decide whether the legislative intervention was justified by weighty considerations of public interest or pursued ulterior reasons.

c) Pertaining to the balance of prosecutorial and lay members in the Prosecutorial Councils

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo

25. […]. In the newly composed KPC, prosecutors "elected by their peers" will be in a slight minority (three out of seven members). Four members are elected by the Assembly. One of them should be a prosecutor, but since he or she owes the mandate to the Assembly, in the opinion of the Venice Commission this member should rather be counted as a "lay member" (contrary to the "prosecutorial" members elected by their peers).

26. […]. In this respect there is an important difference between standards regarding judicial and prosecutorial councils. While prosecutors should be protected from political interference, and while a prosecutorial council may offer such protection, there is no requirement that such council should necessarily be dominated by the prosecutors.. The Venice Commission has consistently advocated for prosecutorial councils where prosecutors selected by their peers represent a ""substantive part", yet not necessarily a majority of members.

55. […] As soon as new lay members are elected by the Assembly, the mandate of the current members will be terminated. […]

56. These transitional provisions raise two major concerns. First of all, the "reduced KPC" will be composed exclusively of lay members, elected by a simple majority in the Assembly. First, […] Most importantly, it may decide on the election of the new PG, which is to take place in the beginning of 2022. Furthermore, the "reduced KPC" may replace the head of the Secretariat of the KPC and thus ensure full control of the EC, which oversees the process of election of the prosecutorial members.

58. In the opinion of the Venice Commission, the proposed amendments run counter international and European standards: they effectively remove prosecutors from the governance of the system at the most critical moment when both the PG and the prosecutorial members are to be elected.

CDL-AD(2022)006, Kosovo - Opinion on the revised Draft Amendments to the Law on the Prosecutorial Council

11. The revised draft proposes the following composition of the KPC: out of its 7 members three will be prosecutors selected by their peers (two from the lower prosecution offices and one from the Appellate and the Special Prosecution Offices), three will be lay members (one appointed by the Ombudsman and two elected by Assembly by a simple majority of votes), and the PG will be a member ex officio. Thus, in the future KPC composition, prosecutors will regain a (slight) majority, together with the Chief Prosecutor, which is not against standards.

12. […] The revised draft returns to a model where the KPC is dominated by the prosecutors. In addition, the revised draft provides that one of the lay members is to be appointed directly by the Ombudsman. The Venice Commission assumes that the institution of the Ombudsman can be seen as an independent body in the Kosovo legal order. […] Otherwise, in this set-up, the fact that the remaining two lay members are elected by a simple majority in the Assembly reduces the risk of politicisation of the KPC.

15. Article 12 of the revised draft (amending Article 15 2a of the existing law and establishing a "special majority" requirement) calls for another important remark. While it does not allow the prosecutorial members to govern alone (which is positive), at the same time, the mechanism of a "special majority" contains an inherent risk of blockages, if the Assembly-appointed members vote together and block certain decisions, including the decision to select a new Prosecutor General. Thus, it would be advisable to provide for an anti-deadlock mechanism for such cases, which would permit the KPC to take such decisions if the prosecutorial and lay members cannot find a compromise. The specific parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders.

CDL-AD(2021)030, Montenegro - urgent opinion on the revised draft amendments to the law on the state prosecution service

13. The second main recommendation was about the envisaged new composition of the PC (Prosecutorial Council), with the lay members elected by parliament by simple majority outnumbering the prosecutors selected by their peers (5 to 4). The majority of lay members over prosecutors was not as such contrary to the European standards and could be justified in order to avoid corporatism. However, since all lay members would be elected by parliament by a simple majority at the same time, hence by the same political majority, the serious risk existed that the PC would be politicised even further. To avoid such risk, the Venice Commission proposed several alternatives:

- *election of the lay members by parliament by a qualified majority (with an effective anti- deadlock mechanism);*
- *election of the lay members by parliament on the basis of a proportional system (so that lay members represent different political forces);*
- *nomination or even direct appointment by external non-governmental actors (such as universities, the Bar, the judiciary, etc.).*

65. […] [I]t is necessary to ensure that the Prosecutorial Council should not be politicized. The Commission does not consider that election by parliament by simple majority is conducive to political neutrality or at least pluralism. When qualified majority or proportional voting systems do not appear as an acceptable solution, as a transitional solution simple majority may be accepted only if it is coupled with additional solid guarantees and safeguards.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organized crime and corruption

36. What is important is that the Prosecutorial Council escapes two dangers: corporatism and politicization. Now the lay members are in a minority, which may lead to the dominance of the prosecutors and thus to the corporatist governance. This danger is stronger in the prosecutorial councils than in the judicial councils due to the hierarchical organization of the prosecutorial systems and the culture of subordination which results in prosecutorial members of such councils voting as a

block together with the PG. On the other hand, the increase in the quota of lay members may lead to the politicization and lack of independence, given that all of the lay members are elected at the same time (therefore by the same Parliament), and by a simple majority.

37. There are several possible ways to avert or at least reduce the risk of politicization. […] In theory, the qualified majority requirement should help to elect a candidate who enjoys the trust of different political forces and is therefore politically neutral. However, the qualified majority solution may present disadvantages. First of all, it may lead to political quid pro quo, when the votes given by the opposition in support of a majority candidate can be exchanged against some other concessions. If this is so, the qualified majority requirement will not necessarily reach its objective to ensure the election of a politically neutral figure. In addition, as the experience of Montenegro shows, it may be practically difficult to reach a political agreement. Thus, a qualified majority requirement should be associated with an effective anti-deadlock mechanism.

40. Another possible solution is to provide for the nomination of candidates to those positions by the civil society and/or the legal community, the Supreme Court, or the Judicial Council. If Parliament has to choose amongst candidates who have the support of some non-governmental or independent institutions, that may somewhat reduce the risk of politicization (albeit not remove it completely, since there is always a risk of manipulation of the nomination process, and there is a risk that NGOs participating in this process are not entirely politically neutral or not sufficiently representative of the civil society as a whole and thus not legitimate to play this role).

41. External bodies may not only be given the power to nominate candidate for the positions of lay member for their future election by Parliament, but even the power to appoint a certain number of lay members directly, in order to make the composition of the Prosecutorial Council more pluralistic.

42. As previously stressed by the Venice Commission, in respect of the anti-deadlock mechanisms, "each state has to devise its own formula" which should lead to the creation of a pluralistic Prosecutorial Council were politically affiliated members have no clear majority.

43. The Constitution of Montenegro does not define the composition of the Prosecutorial Council and the method of election of its members but leaves these questions to an ordinary law. The Venice Commission has previously recommended that the composition and core competences of the Prosecutorial Council be entrenched in the Constitution. Unfortunately, this recommendation has not been followed in Montenegro. In the 2015 Opinion the Venice Commission also suggested that the requirement to have a qualified majority for the election of lay members may be introduced in the law, and this recommendation remains valid. The Montenegrin legislator should consider introducing one of the alternative ways of ensuring depoliticization, such as those mentioned above. However, any legal mechanism will only function if it is coupled with political will. A future Parliament, dominated by a different majority, may be tempted to try to gain control over the lay members, and, through them, over the Prosecutorial Council. Consequently, it is highly recommendable to find a more sustainable solution and describe the composition of the Prosecutorial Council and the method of election of its members in the Constitution itself – as it is done in respect of the Judicial Council.

59. The envisaged new composition of the Prosecutorial Council (which would have a slight majority of lay members) is not as such directly contrary to the European

standards and could be explained by the need to avoid corporatism. However, in the current setting – where all lay members are elected at the same time by a simple majority of votes in Parliament – this reform may lead to the increased politicization of the Prosecutorial Council. To avoid it, the authorities have a choice of options. For example, lay members may be elected by a qualified majority. But in this case an effective anti-deadlock mechanism should be in place. Another option would be to elect the lay members on the basis of a proportional system (so that they represent different political forces) or to provide for their nomination or even direct appointment by external non- governmental actors (such as universities, the Bar, the Judiciary etc.). Ideally, the composition and the method of election of lay members should be entrenched in the Constitution.

CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro

38. [...] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him or herself be a member but it is reasonable that an official of that Ministry should participate. One may wonder however whether ten members, in addition to the president, are not too many, since there are reportedly only 140 state prosecutors in Montenegro.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia

33. [...] [I]t is very important that the Prosecutorial Council is conceived as a pluralistic body, which includes MPs, prosecutors, members of civil society and a Government official. [...]

35. If the Chief Prosecutor is elected and removed by a simple majority of votes in Parliament (see Article 91 par 4 and Article 92 par 12), it becomes all the more important for the Prosecutorial Council to have a sufficient non-political component, to prevent the parliamentary majority from imposing its will upon this body.

38. It is welcome that a significant number of members of the Council are prosecutors selected by their peers (four out of nine), and it is noted that in certain systems, prosecutors may even be in the majority in such bodies. [...]

CDL-AD(2018)029, Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts

33. [...] The Prosecutorial Council is composed of a majority of prosecutors elected by their peers. This achieves professional representation and expertise, but does not sufficiently enhance public credibility of independence. Such a composition was appropriate before the Council received the new constitutional role given to it by Article 65 (3) of the new Constitution. The vertical nature of authority within the Prosecutor's Office and the professional subordination, as recognized by Article 5 (d), undermines the independence of the prosecution service. This gap is not sufficiently filled by the other components of the Council's membership, each of which may be

valuable, but the overall design is not sufficient to achieve independence. The Georgian authorities should consider an enhanced representation from civil society.

d) Pertaining to ex officio members or members of the independent institutions

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo

32. […] A certain number of seats in a prosecutorial council could be reserved to representatives of external independent institutions (such as the Bar, the conference of the law faculties, the Ombudsperson, etc.) or to civil society. In this model it is necessary to ensure that the institution delegating lay members is genuinely neutral (which may be difficult to achieve in a small and very politically polarized society), and/or that the members delegated by the NGOs are truly representatives of the civil society.

37. […] In a hierarchically organized prosecution service it is understandable that the PG should participate in decisions about the appointments, career, and discipline of the prosecutors, to influence budgetary and organizational policies, and to take part in the development of professional standards and procedures.

38. Admittedly, the PG should not be able to take decisions alone – this is why the prosecutorial councils are created. However, completely excluding the PG from the KPC is objectionable, if the proposed balance between prosecutorial and lay members is to be maintained.

[…]

In general, participation of the Prosecutor General in a Prosecutorial Council should be evaluated not in abstracto, but in the light of several factors specific to each particular country, in particular:

- *the composition of the council (whether the council is dominated by the prosecutorial or lay members);*
- *the organisation of the prosecutorial system (whether it is a hierarchical system with the Prosecutor General at the top, or a decentralised system where prosecutors are attached to the courts and not subordinated to the Prosecutor General from the procedural and administrative perspective);*
- *the competencies of the council (whether it decides on issues related to the discipline, career of prosecutor; budgetary and organisational matters, etc. or those powers belong to other bodies);*
- *the powers of the Prosecutor General in the decision-making within the council (participation with the right to vote or in an advisory capacity only), and whether there are sufficient safeguards in the way the council operates in order to counterbalance any excessive influence of the prosecutor general within the hierarchy, etc.*

Turning to the situation in Kosovo, participation of the Prosecutor General in the KPC is not objectionable if the Prosecutor General has no voting rights or if the prosecutorial members in the reformed KPC remain in the minority, even together with the PG. If the PG remains in the composition of the KPC as an ex officio member with voting rights, that may require a revision of the composition of the KPC in order to preserve the balance between different groups of members. In a nutshell, it is important is to avoid a situation where the Prosecutor General, using his or her position vis-à-vis prosecutorial members (and even some lay members) may dictate his/her will to the KPC. Similarly, the executive or the President should not be in a

position to dominate the KPC – it should remain a self-governing body not subordinated to any branches of the government. Thus, if the PG participates in the KPC without voting rights, the Minister of Justice may also participate there without the right to vote, in order to balance the influence of the executive and the influence of the prosecutorial community within this body.

CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia

45. […] [U]nder the Draft Law the politicization of the Council is somehow reduced by the fact that two out of the four members elected by the Parliament come from civil society and not from the ranks of MPs. However, these candidates still have to obtain the approval of the governing majority (see Article 81 par 2 (d)) which may predetermine their position for the entire period of their service. In order to make those persons less dependent on the will of the ruling majority, it is necessary to put in place additional guarantees, applied both at the stages of nomination and of election of candidates.

46. First of all, the nomination of members of civil society and academia (Article 81 par 2 (d)) should be done in a transparent manner, with the selection process following clear rules and criteria, which should be set out in the Draft Law. A range of options could be considered here. One possibility (the simplest option) is for certain office holders to gain membership of the Council automatically, e.g. the head of a law faculty, or the President of the Bar Association may become ex officio members of the Prosecutorial Council without being elected by Parliament.

47. Additionally, a possible option would be to appoint one or more members of the judiciary to the Prosecutorial Council. Judges could bring their own practical expertise in the criminal justice system to the work of the Council, and would also help enhance the independence of this body, and thereby the public's trust in the Council's work. A range of possible judges could be considered for this position, including chairpersons of certain courts (e.g. the Supreme Court, the Tbilisi city court and/or regional courts).

48. An alternative solution, which is closer to the scheme proposed by the Draft Law, would be to give the nominating power to one or several independent bodies outside of the Ministry of Justice or the Prosecutorial Council, such as the High Council of Justice, the Bar Association, or a body representing law universities and academic institutions. In this process, consideration should be given to the need to achieve proper gender balance amongst the candidates. The nominating power may also be given to certain well-established NGOs, which will increase transparency of the Prosecutorial Council and public trust in its autonomy. In cases where the power to nominate candidate would belong to external actors, the Parliament should still retain the power to approve or not approve them.

50. At the stage of elections by the Parliament it is important to ensure that the resulting composition of the four Council members elected by the Parliament is not politically monolithic. To achieve this, two alternative solutions may be considered: election by a qualified majority or the introduction of quotas for the opposition.

51. The most radical solution would be to require that at least two out of the four members elected by Parliament are elected by qualified majority (one member representing the Parliament, and one member representing civil society). This would

ensure that at least two members of the Council are elected as the result of a compromise, which would somehow counterbalance those two members whose election depends more on the support of the ruling majority, and the fact that the Minister of Justice sits on the Council ex officio.

52. Since such a qualified majority may be hard to achieve in the current political context in Georgia, an alternative solution is also possible: the Draft Law might introduce quotas for members appointed by opposition parties. This means that opposition parties should have the right to appoint at least one member of the Council, regardless of their number of seats in Parliament. Given the current relative strength of the opposition in the Georgian Parliament, the opposition might even be given two seats out of four: one for an MP and one for a representative of civil society whom the opposition wishes to nominate. Whichever solution is chosen, the parliamentary majority would still control more seats in the Prosecutorial Council, due to the participation of the Minister of Justice, but its decisive influence within the Council would be reduced and the Council would become more politically balanced; in order to pass important decisions or to block them, candidates chosen by the parliamentary majority would need to obtain support of those elected by qualified majority or appointed by the opposition, or those members which are selected by the Conference of Prosecutors.

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service

46. As regards the Ombudsperson, it is quite unusual for a defender of rights to participate in the governance of the prosecution system. It is questionable whether the functions of a member of the SCP [the Superior Council of Prosecutors] are compatible with the Ombudsperson's mandate. Reportedly, in the Moldovan context, the Ombudsperson himself refused to participate in the work of the SCP. That being said, the Ombudsperson, as a politically neutral figure, may serve as an arbiter between the prosecutorial members and lay members affiliated with the Government, so his or her participation in a prosecutorial council may help avoiding deadlocks.

e) Term of office of the members of the Prosecutorial Council and their early removal

CDL-AD(2021)051, Kosovo - Opinion on the draft amendments to the Law on the Prosecutorial Council of Kosovo

54. The Venice Commission reiterates that the early termination of the mandate of a member of a council (where it is not due to the voluntary resignation, abolition of the whole institution, or to other similar reasons) should always be related to an identifiable wrongdoing or the failure to perform his or her duty. Members of the KPC should not be "impeached" simply because the parliamentary majority or their colleagues disapprove of the decisions they take.

59. The second objection relates to the early termination of the mandates of the currently sitting members of the KPC. The Constitution does not fix the term of office of the members of the KPC but authorizes it to be determined by law. However, it does not mean that the legislature may reduce the duration of a mandate or interrupt it at will. The security of tenure should be respected. In an opinion on Montenegro the Venice Commission formulated a general rule that even when the prosecutorial council is reformed, its current members should normally be allowed to terminate their mandate. It would be incorrect to allow for a complete renewal of the composition of a prosecutorial council following each parliamentary election, when the ruling majority changes.

60. That being said, the principle of security of tenure is not absolute; early termination of mandates may sometimes be justified. Thus, in the same opinion on Montenegro the Venice Commission admitted that the renewal of the composition of a prosecutorial council may be necessary when the manner of the appointment of lay members changed from simple to qualified majority, as this would lessen the risk of politicization of the council. Similarly, the introduction of some new ineligibility criteria which would strengthen the independence and political detachment of members may arguably justify replacement of those members who do not correspond to those criteria. In simple words, the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system.

61. The Ministry of Justice, in their comments, argued that the main goal of the proposed reform is to combat corporatism within the KPC, by increasing representation of lay members therein. In theory, this goal may be achieved by adding to the current composition of the KPC a certain number of additional lay members. That would allow the current prosecutorial members to remain in the KPC until the expiry of their mandates. However, in this case the KPC would become too big (with more than 20 members), considering the relatively small number of prosecutors in Kosovo.36 And this solution would be certainly very expensive, given that the amendments also provide for the full-time employment of all members of the KPC.

62. The Commission considered whether, instead of the simultaneous termination of mandates of all prosecutorial members, some alternative models of the renewal of the composition of the KPC might be explored. For example, three of the prosecutorial members, selected by lot, might remain on the KPC. This would at least respect their security of tenure and, at the same time, permit the KPC to start functioning with the new composition immediately.

63. Such revision of the composition of the KPC could also be supported by the fact that the future system would eliminate a certain disparity of representation of the lower prosecution offices in the KPC, which is a feature of the current system. Currently, every lower office delegates one candidate to the KPC, which means that smaller offices are over-represented, while larger offices are under-represented in the KPC. The revised system would restore the balance, by providing that each prosecutor has one vote.

64. In conclusion, […], currently sitting prosecutorial members should be allowed to finish their mandates. They can be removed prematurely only if the Governments demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system.

CDL-AD(2022)006, Kosovo - Opinion on the revised Draft Amendments to the Law on the Prosecutorial Council

30. In the revised draft the idea of the automatic termination of mandates of all members of the current KPC is abandoned. The revised draft proposes to retain three currently sitting prosecutorial members by selecting them by lot, which follows the suggestion made in the December opinion. The revised draft also abandons the idea of a "reduced KPC" operating only or essentially with the newly elected lay members. Article 18 of the revised draft – amending Article 36 of the Law – provides for the following procedure of the renewal of the Council: first the new lay members are to be elected by the Assembly/appointed by the Ombudsman; next, a drawing by lot is organized, which would define three members who would remain until the end of their

mandates, and, finally, once they are selected, "the Council shall begin its work with the new composition in accordance with this Law" (see Article 36(8)).

31. Even though, as a rule, the Venice Commission is not in favor of an automatic early termination of mandates of members of a prosecutorial council due to an institutional reform, the new transitional provisions are more respectful of the security of tenure of the members of the existing KPC than the previous model.

CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organized crime and corruption

29. In certain exceptional situations, a law may have a direct effect on the mandate of an officeholder. For example, it is conceivable that if the whole institution is terminated, the security of tenure of its head cannot be guaranteed. However, minor changes to an institution do not justify the replacement of its head. In addition, institutional reforms should not be launched with the sole purpose of replacing individuals in key positions.

30. It is legitimate to replace ministers or other holders of political offices following elections. But if in the domestic system an institution enjoys some sort of autonomy or, a fortiori, is defined as "independent", replacing key office holders in such an institution on account of the change in the political majority and under the pretext of a legislative reform appears to run counter to the Constitution and the Rule of Law. If every new parliamentary majority in Parliament were entitled to do this, that would be contrary to the very idea of the "tenure" and to the stability of mandate of the officeholders, and the "independent" – i.e. apolitical – nature of those bodies. It would also frustrate provisions on the disciplinary liability. Disciplinary liability is imposed for specific misbehavior by a disciplinary body, which, in the case of judicial and prosecutorial councils, enjoys independence or at least a high degree of autonomy. Since the parliamentary majority does not have control of those procedures, it may be tempted to use legislative amendment in order to circumvent the disciplinary liability provisions.

31. If the ruling coalition, as transpires from the meetings with the rapporteurs, is disappointed by the allegedly unprofessional or politically biased actions of the SSP, then he must be checked for disciplinary liability for specific misbehavior, and not removed under the pretext of the change of his title, and/or of the name of the institution he runs. […]

45. The draft amendments to the Law on the SPS provide that, after their adoption, the members of the Prosecutorial Council will have to be re-elected, according to the new rules.

46. The above analysis on the replacement of the SSP is also applicable to the replacement of the members of the Prosecutorial Council. The Prosecutorial Council continues to exist, and the slight alteration in its composition neither extinguishes the organ nor modifies drastically its competences, nature, or functions. Furthermore, the mandate of the current members of the Prosecutorial Council expires within less than a year. The Venice Commission does not see the need for replacing the existing members of the Prosecutorial Council, not least for the sake of respecting their security of tenure.

47. The Venice Commission refers to a previous opinion concerning the renewal of the composition of a Judicial Council following a legislative reform. The functions of the

Judicial Council and of the Prosecutorial Council in the system of checks and balances are very similar, so the Commission's findings are applicable to the case at hand as well:

"The Venice Commission is of the opinion that when using its legislative power to design the future organization and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardize the continuity in membership of the High Judicial Council.

Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council. In many circumstances such a change, especially on short notice, would raise a suspicion that the intention behind it was to influence cases pending before the Council. […]"

48. One may argue that the political goal of the reform – to change the balance between lay members and prosecutorial members in the future Council – would not be achieved if the current members are allowed to serve until the end of their original mandate. This goal, however, may be achieved without the immediate re-election of all lay members. To achieve this new balance it would be sufficient to elect one additional lay member, and remove one prosecutorial member (for example, by drawing lots, or by removing a member representing the [Special Prosecutor's Office]), or to add two lay members and not remove prosecutorial members at all, as a transitional solution. If, for whatever reason, it is difficult to designate one prosecutorial member to be removed, it should be possible re-elect all of them, eventually, under the new rules. In this scenario the prosecutorial and lay members would end their mandate at different times. The majority of the lay members, elected by the previous Parliament and until the end of their mandate, would not be perceived as political appointees of the current majority, and the risk of total politicization of the Council (due to the arrival of the new members appointed by the current majority) would be at least temporarily diminished. In any event, the Venice Commission does not recommend the immediate removal of the lay and prosecutorial members and considers that they should be allowed to finish their mandate.

CDL-AD(2021)030 Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service

46. The revised draft maintains the provision for the immediate replacement of all currently sitting members of the PC [Prosecutorial Council] upon the entry into force of the law, that is before the end of their mandate (which expires on 22 January 2022). In the March opinion, the Venice Commission expressed the view that the members of the current PC should be allowed to terminate their mandate. The Commission has previously stated in respect of judicial councils that as one of their important functions is to shield judges from political influence, "it would be inconsistent to allow for a complete renewal of the composition of a judicial council following parliamentary elections."[…] While using its legislative power to design the future organization and functioning of the judiciary, Parliament should refrain from adopting measures which would jeopardize the continuity in membership of the High Judicial Council [and the independence of the Judiciary (judges and prosecutors)]. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council, which amounts to an infringement of its independence. The Venice Commission found on the other hand that the renewal of the members could be

justified on condition that the manner of appointment changed from simple to qualified majority as this it would lessen the risk of politicization of the Council.

CDL-AD(2021)030, Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service

48. […] [The] Commission does not consider that the termination of mandate of all the current members of the Prosecutorial Council would be justified.

49. However, the Commission considers that the ineligibility criteria introduced by the draft are an adequate means to create the conditions to strengthen independence in an environment which presents risks of improper political influence. The relevant general interest in setting such standards can be considered as proportionate and justify their immediate application on a case-by-case basis, to the current members of the PC, without affecting the principle of trust in the integrity of the mandates. A procedure could therefore be devised for assessing the possible ineligibility of the current members of the PC in the light of these criteria. Should this exercise lead to loss of mandates, the balance of lay members and prosecutor members may be reassessed to see if adjustments are necessary prior to the regular expiry of the mandate on 22 January 2022. In general, in the Commission's view, as long as the election is carried out by simple majority it would be preferable if lay members were elected at different moments (possibly by different parliaments).

CDL-AD(2021)047, Republic of Moldova - Opinion on the amendments of 24 August 2021 to the law on the prosecution service

55. […] As such, providing for a retirement age for a public official is not contrary to any international standard or principle. As noted by the CCRM [the Constitutional Court of the Republic of Moldova] […] the idea of an age limit is not incompatible with the constitutional right to work. Such matters can be regulated by the legislature to ensure that certain office holders have the mental and physical capacity to perform their duties.

56. That being said, an age limit should not be introduced with the effect to terminate mandates of specific individuals, elected under the previously existing rules. The Venice Commission criticized such measures in an opinion on Poland, and repeats this in the context of the Republic of Moldova. […]

60. The Venice Commission is ready to accept this argument. What is problematic, however, is that the lay members appointed under the old rules (which did not provide for any age-limit) were removed (or would be removed) prematurely, due to the application of the new rule. It is true that the security of tenure of members of the SCP is not guaranteed by the Constitution (which is silent on the duration of their mandate, age-limit, etc.). However, the appointment as a member of a constitutional body – which, according to the Constitution, is the main guarantor of the independence of the prosecutorial system, creates at least some legitimate expectation that the mandate will not be interrupted mid-term without a very good reason. The question is whether the declared goal of this amendment – putting all members of the Council on an equal footing as regards their retirement age – hampers the independence of this body and is a sufficiently strong reason for a premature termination of the mandate of some of its members. This is another argument in favor of entrenching the basic requirements to the members of the SCP and the conditions of early termination of the mandate in the Constitution.

CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia

52. A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC [State Prosecutorial Council], whose members are elected for a fixed term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.

53. A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties 'in compliance with the constitution and law'. This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.

56. [...] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced.

III. Constitutional review of the contested Law

201. The Court emphasizes that the Applicants in Case KO100/22 challenge the constitutionality of Articles 13, 16, 18 and 20 of the Contested Law, whereas the Applicants in Case KO101/22 challenge the Contested Law, in its entirety, presenting yet concrete arguments pertaining to the constitutionality of Articles 6, 13 and 20 of the Contested Law. Having said that, (i) taking into account the Applicants' allegations and arguments presented to the Court by the Applicants and the responses of the interested parties; and (ii) the connection of the respective articles with each other, the Court, in the circumstances of the present case, will assess the articles of the contested Law as follows: (i) Article 6 [untitled] by which Article 9 (Composition of Council members) of the Basic Law is amended and supplemented; (ii) Article 7 [untitled] by which Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is amended and supplemented; (iii) Article 8 [untitled] by which Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is amended, namely supplemented, that is new article 10/A is added (Lay member appointed by the Ombudsperson) of the contested Law; (iv) Article 13 [untitled] of the contested Law by which Article 15 (Quorum and decision-making) of the Basic Law is amended and supplemented; (v) Article 16 [untitled] by which Article 19 (Disciplinary procedure for Council members) of the Basic Law is amended and supplemented; (vi) Article 18 [untitled] by which Article 23 (Appointment and re-appointment of prosecutors) of the Basic Law is amended, namely supplemented, that is new Article 23/A (The right to appeal) of the basic law is added; and (vii) Article 20 [untitled] amending and supplementing Article 36 (Continuance of duty) of the Basic Law in conjunction with paragraph 3 of Article 11 [untitled] of the contested Law amending and supplementing Article 13 (Termination of the term) of the Basic Law.

202. Whereas, the aforementioned articles of the contested Law, the Court will assess each one separately, by (i) first summarizing the essential allegations of the Applicants and the arguments and counter-arguments of the interested parties before the Court; and (ii) applying the general principles elaborated above, namely the case law of the Court and ECtHR and CJEU, and the relevant principles deriving from the relevant Reports and Opinions of the Venice Commission, with an emphasis on the two Opinions on Kosovo with respect to the Contested Law.

1. Constitutional review of Article 6 [untitled] of the contested Law by which Article 9 (Composition of Council members) of the Basic Law is amended and supplemented

203. Initially and for the purpose of the constitutional review of Article 6 of the contested Law, the Court will present: (i) the essence of the allegations of the Applicants and supporting comments submitted by interested parties as well as the substance of arguments of the opposing party (see paragraphs 74-137 of this Judgment for a detailed description of the relevant arguments and counter-arguments); and (iii) the Court's assessment regarding these allegations regarding the unconstitutionality of the relevant article.

(i) The substance of the allegations/arguments and counter-arguments of the Applicants and interested parties

204. The Applicants allege that Article 6 of the contested Law is in contradiction with Articles 4 and 110 of the Constitution, basically, because (i) it reduces the ratio, namely the proportion between prosecutor and non-prosecutor members in the KPC, infringing upon the independence of an independent constitutional institution; (ii) the new composition of the KPC, with this new proportion between prosecutor and non-prosecutor members, enables the parliamentary majority to interfere with the independent exercise of the function of the prosecutorial system; (iii) The Ombudsperson is not authorized, namely does not have the constitutional and legal competence to appoint a member of the KPC; (iv) such an increased competence of the Ombudsperson constitutes a conflict of interest in relation to his constitutional obligation to protect fundamental freedoms and rights; (v) the election of two (2) non-prosecutor members by the Assembly with a simple majority of votes, violates the independence and integrity of the KPC as an independent constitutional body, thus giving each parliamentary majority great opportunity for influence and political control on non-prosecutor members in the KPC.

205. In support of the allegations of the applicants, the KPC, the Ombudsperson and the Chamber of Advocates have also submitted comments to the Court. According to the KPC, basically, (i) the current structure of the KPC is similar to that of the KJC, which in its composition has ten (10) judges and where only three (3) of the members are non-judges and that this difference in the treatment of the KPC and the KJC is contrary to the Constitution and the case law of the Constitutional Court; (ii) the proposed composition of the KPC, in fact, determines equal representation of prosecutors and non-prosecutors in the Council, because the participation of the Chief State Prosecutor, *ex-officio* in the KPC, is not considered a majority of prosecutor members, because the latter is not selected by colleagues directly, but is represented in the KPC *ex-officio*; (iii) the appointment of a member by the Ombudsperson to the KPC is contrary to his authorizations to supervise and protect the rights and freedoms of individuals from illegal and irregular actions or inactions of public authorities, including the KPC itself; (iv) this increased competence of the Ombudsperson represents a conflict of interest, based on the competence of the Ombudsperson according to the Law on Disciplinary Liability of Judges and Prosecutors to initiate disciplinary cases against judges and

prosecutors; and (v) The contested law, as far as the Ombudsperson is concerned, only defines his obligation to consult with civil society and does not specify any other criteria regarding the appointment of the relevant member in the KPC.

206. According to the Ombudsperson, (i) the possibility for the Ombudsperson to appoint one (1) member of the KPC "*could possibly be seen as an infringement of the independence of the Ombudsperson, but also that of the KPC*"; and (ii) this new competence, which is provided by the contested Law, does not originate from either the Constitution or the Law on the Ombudsperson. Finally, the Chamber of Advocates also challenges the proposed structure of the KPC and the inclusion of the Ombudsperson through the competence to appoint one of the seven (7) members of the KPC, also challenging the exclusion of the representation of the Chamber of Advocates in the KPC, unlike the Basic Law.

207. The Ministry of Justice, on the other hand, disputes/opposes the allegations of the Applicant deputies of the Assembly and the arguments of other parties, namely the KPC, the Ombudsperson and the Chamber of Advocates, respectively, emphasizing that (i) there is an essential difference in the extent of the constitutional regulation of the courts and prosecutor's offices by the Constitution and that in the case of the prosecutorial system, according to the Constitution, the legislative body can decide the method of election of the members of the KPC within the discretionary legal restrictions; (ii) the prosecution is not a court and the work of the prosecution differs essentially from the work of the court, but the independence of both, the court and the prosecution, is indisputable, which is guaranteed by the Constitution and which is not infringed by the contested Law; (iii) the composition of thirty (13) members and not balanced between prosecutor and non-prosecutor members, creates a risk of corporatism within the KPC; (iv) by amending and supplementing the Basic Law, a balanced representation is achieved in order to ensure the efficiency of the KPC in the exercise of its competencies and that such an approach is in accordance with the Opinion of the Venice Commission, according to which "*prosecutors represent a substantive part, yet not necessarily a majority*"; (v) The Ombudsperson is an independent constitutional institution and, as a result, can appoint one (1) of the three (3) non-prosecutor members in order to achieve "*pluralism*" of the members of the KPC, moreover such a recommendation also originates from the Opinions of the Venice Commission; (vi) the non- prosecutor member appointed by the Ombudsperson does not act in the KPC as a representative of the interests nor the competencies exercised by the Ombudsperson, but as a full-time non- prosecutor member, which will ensure the pluralism of the KPC; and (vii) The Law on the Ombudsperson expressly states that the Ombudsperson also performs other duties defined by the legislation in force.

(ii) Assessment of the Court

208. Based on the Applicants' allegations and the respective responses and objections, the Court considers that in relation to Article 6 of the contested Law, in essence, it is important to assess whether the changed composition of the KPC, including the method of electing members, is in accordance with the Constitution. In this regard, the Court will first address whether (i) the reduction of the number of members of the KPC, including the change in the ratio between prosecutor and non-prosecutor members, and whether the proposed structure is in accordance with the constitutional independence of the KPC, as established in Article 110 of the Constitution; and (ii) the competence of the Ombudsperson to "*appoint*" a member of the KPC based on the provisions of the Constitution, namely its Articles 110 and 65.

209. In this context, the Court first recalls the current composition of the KPC, defined by the Basic Law, according to Article 9 of which, the KPC consists of thirteen (13)

members as follows: (i) ten (10) members from among prosecutors, including the Chief State Prosecutor, seven (7) prosecutor members from the basic prosecutor's offices represented by one (1) member each; one (1) prosecutor member from the Appellate Prosecutor's Office and one (1) prosecutor member from the Special Prosecutor's Office, selected by the prosecutors of those prosecutor's offices; and (ii) three (3) non-prosecutor members, namely one (1) member from the Chamber of Advocates, one (1) member university professor of law and one (1) representative member from civil society. Regarding the three (3) non-prosecutor members of the KPC, the Basic Law specifies that they are elected by the Assembly, according to paragraph 10 of Article 65 of the Constitution, by secret ballot with the majority of votes of all deputies present and that vote, based on a list of two (2) candidates, for each position proposed by the relevant bodies, namely the Chamber of Advocates and law faculties and specify that the representative of civil society is elected through a public competition and elected by the Assembly, according to the criteria determined by this law.

210. More precisely and in relation to the method of election of non-prosecutor members by the Assembly, Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law, among other things, specifies that (i) the list for the session of the Assembly consists of two (2) candidates for one (1) position, after the assessment of the relevant commission as defined in this law; and (ii) the election by the Assembly is based on two (2) rounds of voting, respectively, if in the first round, the candidates proposed by the relevant committee of the Assembly do not receive the majority of votes of all deputies present and voting, then in the second round the candidate with the highest number of votes is considered elected.

211. By Article 4 of the first draft proposed by the Government to supplement and amend the Basic Law and which was subject to the first analysis of the Venice Commission, as a result of which the Venice Commission drafted the first Opinion, supplementing/amending Article 9 of the Basic Law, determined that the KPC should consist of seven (7) members, (i) four (4) prosecutors, excluding the Chief Prosecutor and specifying that one of the prosecutors be elected by the Assembly; and (ii) three (3) non-prosecutors elected by the Assembly. According to this amendment/supplementation, four (4) out of seven (7) members of the KPC would be elected by the Assembly with a simple majority, namely majority of the deputies present and voting.

212. The first opinion of the Venice Commission dealt with the proposed new composition of the KPC, including the procedure for the election of the respective non-prosecutor members, in sub-title A of section IV of the relevant Opinion. In the context of the latter, the Court notes that the object of the relevant analysis was a previous draft of the contested Law, namely the Government's draft law, which was submitted to the Venice Commission through the letter of 26 October 2021, as stated in paragraph 30 of this Judgment. Therefore, the Court will refer to the first Opinion only to the extent that this Opinion has addressed the principles related to the draft approved in the Assembly, i.e. the contested Law, clarifying that the latter has been subjected to (i) further analysis by the Venice Commission, which resulted in the second Opinion, approved at the 130th plenary session of the Venice Commission, held on 18-19 March 2022; and (ii) subsequent amendment in the Assembly, as elaborated in this Judgment in the section of the Proceedings before the Court.

213. Regarding the new composition of the KPC and the way of choosing the relevant members, the first Opinion of the Venice Commission initially notes that the central element of the reform, namely the new balance between prosecutors and non-prosecutors within the KPC is not contrary to European standards (see, the first Opinion of the Venice Commission, paragraph 70). However, the Venice Commission also

emphasizes that "*the reform should not lead to the subordination of the KPC to the governing majority"* (see, the first Opinion of the Venice Commission, paragraph 28). Having said this and in relation to the revised structure of the KPC, as a result of the decrease in the presence of prosecutor members and, consequently, the increased proportion of non-prosecutor members, the Venice Commission, among other things, has emphasized that: (i) always has acknowledged that in some democratic legal orders, there are no prosecutorial councils and that where they exist, there are a number of acceptable models regarding the composition of these councils and that in this sense, there is an important difference between the standards that apply to judicial and prosecutorial councils (see, First Opinion of the Venice Commission, paragraph 26); and (ii) while prosecutors must be protected from political interference and while prosecutorial councils can provide this protection, there is no requirement that these councils be necessarily *"dominated"* by prosecutors and that the Venice Commission has consistently advocated for prosecutorial councils in which prosecutors selected by their peers represent a "*substantial part",* but not necessarily the majority of members (see, the first opinion of the Venice Commission, paragraph 26).

214. Further and more specifically, the first Opinion of the Venice Commission observed that (i) currently the KPC consists almost entirely of prosecutors and as such, has a predisposition to be endangered by "*corporatism";* (ii) most of the prosecutor members of the KPC come from lower prosecutors and therefore, it is natural that they can be perceived to vote together with their colleagues of higher levels, and especially with the Chief State Prosecutor himself; and as a result, (iii) reducing the proportion of prosecutor members, can help fight the "*corporatist tendency"* of this body or *the "perception of such a tendency*", also emphasizing that the reform of the KPC should not lead to its submission to the ruling majority in the Assembly (see, First Opinion of the Venice Commission, paragraphs 27 and 28).

215. According to the first Opinion of the Venice Commission, "*none of these models is without flaws*", however, (i) "*any pluralistic model is better than a model where prosecutorial councils are dominated by a monolithic group of prosecutor members, subordinate to the Chief State Prosecutor, or a monolithic group of political appointees loyal to the ruling majority*"; and (ii) it is important that the composition of the KPC be sufficiently "*pluralistic*" to ensure that the prosecutors cannot govern alone and at the same time that the non-prosecutor members, whose election was made by the votes of the majority representing the governing majority, "*cannot easily outvote them*" (see, First Opinion of the Venice Commission, paragraphs 28 and 33). As for the non-prosecutor members of the KPC, the first Opinion of the Venice Commission notes that a certain number of seats in a Prosecutorial Council can *be "reserved for representatives of independent external institutions (such as the Chamber of Advocates, the conference of law faculties, the Ombudsperson, etc.) or for civil society*" and that "*in this model it is important to ensure that the institution that delegates the non-prosecutor member is really neutral (which can be difficult to achieve in a small and highly politicized society) and/or that the members delegated by NGOs are truly representatives of civil society*" (see, First Opinion of the Venice Commission, paragraph 32).

216. As for the election of non-prosecutor members of the KPC, the first Opinion of the Venice Commission raises the concern that the election of non-prosecutor members by the Assembly through simple majority voting increases the risk of their politicization and that in this sense, three conditions are important, that is, that the body that makes the election, in this case the Assembly: (i) be "*truly pluralistic*", i.e. "*not be dominated by the ruling majority or members close to it*"; (ii) the decision-making process within this body, i.e. the Assembly, must ensure that the candidates nominated to be elected by the Assembly have support across the entire political spectrum; and (iii) the majority

in the Assembly is not able to avoid or sabotage the election procedure (see, First Opinion of the Venice Commission, paragraph 42).

217. Regarding the presence of the Chief State Prosecutor in the composition of the KPC, which in essence, the Venice Commission recommended in the first Opinion, the Commission emphasized that (i) the Chief State Prosecutor "should not be able to make *decisions alone - and this is the reason why prosecutorial councils were created";* and (ii) if the Chief State Prosecutor remains in the composition of the KPC as an ex-officio member with the right to vote, this may necessitate a revision of the composition of the KPC in order to "maintain the balance between the groups of *different members*", since it is important *to "avoid the situation when the Chief State Prosecutor, using his position in front of the prosecutor members (and even some non-prosecutor members), dictates his will to the KPC*" (see, First Opinion of the Venice Commission, paragraph 38).

218. Finally, and as far as it is relevant to the circumstances of the present case, the first Opinion of the Commission emphasized that (i) *"the central element of the reform - namely the new balance between prosecutor and non-prosecutor members in the KPC - is not contrary to European standards. Prosecutors elected by their peers still represent an essential part of this body (three members out of seven)"* (paragraph 70); however, (ii) *"the reform should not result in the subjugation of the KPC" to the governing majority. The draft amendments propose that all non-prosecutor members be elected by a simple majority in the Assembly. This proposal increases the risk of political influence on the KPC and should be revised: the simple majority election should be replaced by a proportional system of election, or the appointment of some non-prosecutor members from independent external institutions or civil society"* (paragraph 71); (iii) *"in summary, the procedure for electing non-prosecutor members proposed in the draft amendments is, at the same time, too complex and too vague, and therefore does not provide sufficient guarantees against manipulation or the perception of manipulation. Therefore, this proposal must be substantially reworked. The Venice Commission reverts to its previous recommendation to elect non-prosecutor members on the basis of the proportional system, or to provide for the appointment of a certain number of non-prosecutor members from independent bodies, in order to achieve a pluralistic composition of KPC. Each of these solutions is simpler and, at the same time, reduces the risk of excessive political influence on the KPC"* (paragraph 49); and (iv) *"therefore, the first recommendation of the Venice Commission would be to ensure that the non-prosecutor members in the future composition of the KPC are elected in a way that ensures sufficient pluralism in the composition of the KPC and "counter-balances" the members appointed by the votes of the ruling majority"* (paragraph 35).

219. After the first Opinion of the Venice Commission, through Article 5 of the second draft proposed by the Government to supplement and amend the Basic Law and which was subjected to the second analysis of the Venice Commission, as a result of which the second Opinion resulted with the Venice Commission, supplementing/amending Article 9 of the Basic Law, determining that the KPC should consist of seven (7) members, (i) four (4) prosecutors, including the Chief Prosecutor and specifying that one of the prosecutors be chosen by the Appellate Prosecutor's Office or the Special Prosecutor's Office, while two (2) others from the basic prosecutor's offices; and (ii) three (3) non-prosecutor members, two (2) of whom are elected by the Assembly with a simple majority and one (1) member is "*appointed"* by the Ombudsperson.

220. In the context of the proposed new composition of the KPC, the Venice Commission, through the second Opinion, emphasized again that (i) it is not contrary to European standards to have a majority of non-prosecutor members in a Prosecutorial Council;

however, it was emphasized that (ii) it is important that the increased presence of non-prosecutor members does not result in the politicization of the KPC; and that (iii) the prosecutors, elected by their peers, represent a significant part of the membership (see, Second Opinion of the Venice Commission, paragraph 10). In this sense and analyzing whether the amendments in the draft law as a result of the first Opinion are in accordance with the findings of the Venice Commission, the Commission emphasized that "*in the future KPC, the prosecutors will regain a (slight) majority together with the Chief State Prosecutor, what is not contrary to the standards"* (see, Second Opinion of the Venice Commission, paragraph 11).

221. As for the proposal of the draft law to add the competence of the Ombudsperson to "*appoint"* one (1) non-prosecutor member in the future KPC, the Venice Commission has emphasized that (i) it assumes that the Ombudsperson institution can be seen as an independent body in the legal system of Kosovo; (ii) it is important that the involvement of the Ombudsperson does not limit his or her ability to make independent assessments regarding matters involving the KPC; and (iii) the new composition of the KPC (where prosecutors selected by their peers represent three (3) of the seven (7) members, with two (2) non-prosecutor members elected by the Assembly, one (1) non-prosecutor member appointed by the Ombudsperson and the Chief State Prosecutor as an ex officio member, does not violate international standards (see, Second Opinion of the Venice Commission, paragraphs 12 and 33).

222. The Court recalls that in addition to the two Opinions regarding the contested Law, over the years the Venice Commission has dealt with similar issues related to the composition of prosecutorial councils and the balance between prosecutor and non-prosecutor members in the context of different countries and which, as far as relevant to the circumstances of the concrete case, have been summarized also in this Judgment through two main reports, namely (i) the Report on Prosecution Service; and (ii) Compilation of Opinions and Reports of the Venice Commission concerning Prosecutors, which includes certain parts of the two Opinions on Kosovo.

223. The abovementioned, among other things and in principle, emphasize that unlike the common denominator, namely the consolidated standard that exists regarding the independence of judicial systems, including judicial councils, such standard does not exist as regards prosecutorial systems/services and which, depending on the Constitutions and/or applicable laws, may be subject to various measures, supervision by the executive and/or legislative powers, always containing the necessary guarantees for the independence and autonomy of the exercise of the function of the prosecution and the necessary mechanisms to prevent any kind of influence of other powers in individual cases of criminal prosecution. The same Reports and Opinions, including also the Opinions of the Consultative Council for the European Prosecutors, emphasize, however, that the current trends go towards a greater independence of prosecutorial systems as well. In cases of full independence of prosecutorial systems, in principle, these systems are managed by an independent institution, such as prosecutorial councils, this solution is also adopted by the Constitution of Kosovo.

224. Having said that according to the relevant Reports and Opinions of the Venice Commission, while a number of states have established prosecutorial councils, there is no uniform standard regarding their respective composition, structure and/or functions. However, a common characteristic of these councils is that they have diversity or pluralism in their composition, namely a proper balance between prosecutor members elected by the prosecutorial system itself and non-prosecutor members, with the latter being, in principle, necessary for the democratic legitimacy of the respective councils, always with the necessary guarantees to avoid their politicization. Depending on the relevant constitutional and/or legal systems and

regulations, non-prosecutor members may also be delegated or nominated by other institutions or elected by the Assembly, and in that case, it is preferable to be elected by a qualified majority, in order to avoid the possibility of politicization and political interference.

225. It is important to note that based on the relevant Reports and Opinions of the Venice Commission, among the most delicate issues in terms of determining the composition of prosecutorial councils, is the balance between prosecutor and non-prosecutor members. This matter, in addition to the first and second Opinions regarding the contested Law, the Venice Commission has also recently addressed the Opinions on Montenegro, Georgia, Moldova and Serbia, and which, as far as they are relevant to the circumstances of the present case, are explained in paragraphs 188-200 of this Judgment.

226. From a joint reading of all these reports and opinions, including the contexts in which they are drawn, the proper balance between prosecutorial and non-prosecutor members is necessary (i) to avoid the risk of corporatism, taking into account the hierarchical nature of prosecutorial systems and potentially, the organizational culture subordinating to the Chief Prosecutor and consequently, balancing the composition of the councils with non-prosecutor members; and (ii) to avoid the risk of politicization in the event of the election of non-prosecutor members by the Assembly, balancing the composition of the councils with prosecutor members selected by the prosecutorial system itself. This balance should result in a pluralistic composition of the relevant councils, in which prosecutor and non-prosecutor members will not be able to easily dominate each other.

227. Further and based on the relevant Reports and Opinions of the Venice Commission, including the two Opinions on Kosovo, regarding the contested Law, in the composition of prosecutorial councils, depending on the respective constitutional systems and not determining whether the majority of members should be prosecutors or not, in principle (i) a number of prosecutors are elected by the prosecutorial system itself; (ii) a number of members may be elected by the Assembly, where election by qualified majority or a proportional system is preferred, always accompanied by an efficient unblocking mechanism; and (iii) non-prosecutor members who may come from the judiciary, independent institutions, civil society and who are delegated *ex-officio* in the composition of prosecutorial councils and/or are nominated and elected through the systems defined in the Constitution and/or relevant laws by the legislative power.

228. In the context of the clarifications above, but with emphasis on Article 16 of the Constitution, based on which the Constitution is the highest legal act in the Republic of Kosovo and according to which laws and other legal acts must be in accordance with the Constitution, the Court, as explained above, in the context of Article 6 of the contested Law, must evaluate whether (i) the proposed structure, namely the ratio between the prosecutor and non-prosecutor members, is in accordance with the constitutional independence of the KPC as laid down in Article 110 of the Constitution; and (ii) the competence of the Ombudsman to "*appoint*" one (1) non-prosecutor member of the KPC, is in accordance with Articles 110 and 65 of the Constitution.

a) Regarding the balance between the prosecutor and non-prosecutor members

229. The court first reiterates that based on the constitutional provisions, namely Article 110 of the Constitution, it is not contentious that the KPC has full constitutional independence. This independence determined by the Constitution constitutes the essence of the form of governance and the separation of powers in the Republic of Kosovo and also constitutes its value, as defined in Articles 4 and 7 of the Constitution,

respectively. Such independence of the institutions as stipulated under Chapter VII regarding the Justice System, has already been clarified through a number of Judgments of this Court and which are also clarified, to the extent relevant, in the part on the general principles of this Judgment.

230. The Court also recalls that regarding the composition of the KPC, the Constitution has two (2) defining provisions, its articles 65 and 110, which lay down the interaction between the two institutions, namely the Assembly and the KPC, respectively, in determining the composition of the latter.

231. More precisely, according to paragraph 4 of Article 110 of the Constitution, the composition of the KPC is determined by law, which, according to paragraph 1 of Article 65 of the Constitution, is adopted by the Assembly. While, according to paragraph 10 of Article 65 of the Constitution, the Assembly is the institution that elects the members of the KPC in accordance with the Constitution. The exercise of the respective functions of both the KPC and the Assembly in this context is subject to the constitutional principles and obligations for the balancing and separation of powers. The Court emphasizes that despite the fact that the Constitution, through paragraph 4 of its Article 110, has determined that the composition of the KPC shall be determined by law, leaving the competence to the Assembly to adopt this law and to elect the members of the KPC in the manner determined by the Constitution and the law, this competence of the Assembly must always be exercised in accordance with paragraph 1 of Article 110 of the Constitution and which guarantees full independence to the KPC in the exercise of its constitutional function. Consequently and as already explained, while the Constitution also refers to the law in the context of, among other things, the composition of the KPC, the guarantee of the full independence of the KPC, accorded by the Constitution, certainly cannot be reduced through law provisions.

232. In this context and as clarified in paragraphs 179-187 of this Judgment, the Court recalls that after the declaration of independence, the Assembly, through the laws of 2010, 2015 and 2019, respectively, changed the composition of the KPC three (3) times. Throughout these three laws, the KPC has had different compositions. Initially, through the 2010 Law, the composition of the KPC was determined to be nine (9) members, five (5) of which were prosecutors and four (4) non-prosecutors, while later, through the 2015 and 2019 Laws, the number of KPC members increased to thirteen (13), of which ten (10) were prosecutors and three (3) non-prosecutors. In addition to the amendments/supplements in terms of the composition and ratio between prosecutor and non-prosecutor members, the manner of electing non-prosecutor members was subject to changes. More precisely, (i) through the 2010 Law, the administration of the selection of non-prosecutor members was done by the KPC; (ii) through the 2015 Law, the administration of the process of electing non-prosecutor members, with the exception of the administration of the competition for the civil society member, was done by the Assembly; and (iii) through the 2019 Law, the administration of the competition for election of the civil society member, was transferred to the Assembly, always according to the specifics defined by the relevant law on the KPC.

233. The Court also notes that, over the years, the Assembly of the Republic has attempted to find the right ration between the prosecutor and non-prosecutor members in the composition of the KPC. Despite the differences in the number of KPC members and the ratio between the prosecutor and non-prosecutor members, throughout all legal regulations, namely all amendments/supplementations to the Laws on the KPC since the declaration of independence, the competence for appointment/election of the KPC members was shared between the KPC and the Assembly, with the exception of the *ex officio* representation of the Chief Prosecutor and the Minister of Justice, until the amendments and supplements of the 2015 Law regarding the latter. The contested law,

through the amendment to Article 9 of the Basic Law, again supplements/amends this structure, changing the number of the members, including the ratio between non-prosecutor and prosecutor members, but also changing the manner of their election, namely by assigning/delegating to the Ombudsman the competence to "*appoint*", namely elect one (1) non-prosecutor member of the KPC.

234. In the context of the aforementioned clarifications and taking into account (i) paragraph 4 of Article 110 of the Constitution in conjunction with paragraph 1 of Article 65 of the Constitution, namely, the stipulation of the Constitution that the composition of the KPC is determined by a law adopted by the Assembly; and (ii) the standards and principles in the context of the composition of the prosecutorial councils that derive from the relevant Reports and Opinions of the Venice Commission, including the two Opinions on Kosovo regarding the contested Law, the Court first emphasizes that it is not contentious that the Assembly has the constitutional competence to determine the composition of the KPC, always in accordance with paragraph 1 of Article 110 of the Constitution, namely by not infringing the full independence in the exercise of the constitutional function of the KPC and the principles of separation and balance of powers and values of the Republic, as defined in Articles 4 and 7 of the Constitution, respectively.

235. Also, and taking into account (i) the connection of paragraph 4 of Article 110 of the Constitution with paragraph 1 of Article 110 of the Constitution; and (ii) the standards and principles in the context of the composition of prosecutorial councils deriving from the relevant Reports and Opinions of the Venice Commission, including the two Opinions on Kosovo regarding the contested Law, the Court emphasizes that it is not contentious that a part of the KPC members, in a manner specified through the adopted laws of the Assembly, namely its prosecutor members, are selected by the prosecutorial system itself. Such a standard derives from the Constitution and the relevant principles and standards of the Venice Commission, as is the case with (i) the composition of the Judicial Council and which selects a part of the member by the system itself, in the manner stipulated by the Constitution and the applicable law; but also (ii) the KPC laws through the years, respectively, based on which the prosecutor members of the KPC were selected by the prosecutorial system itself, while the non-prosecutor members were elected by the Assembly, in the manner specified in these laws. Moreover, the Court notes that despite the fact that the three institutions are defined as "*fully independent*" by the Constitution, KJC, KPC and the Constitutional Court, respectively and which are subject to the collective nature of decision-making, the Constitution has determined different majorities for election of their members. More precisely, in the case of the KJC and the KPC, it has stipulated a simple majority because it has determined/foreseen that a part of the respective membership/composition of the Councils is to be selected by the judicial and/or prosecutorial system, respectively, whereas when it has determined that all members of a fully independent institution, such as the Constitutional Court, are to be elected by the Assembly, then it has specified the necessary majority for the election of the respective members to be a qualified majority of two thirds (2/3) of the deputies present and voting.

236. Contentious, however in the circumstances of the concrete case, is the reduction of the number of members of the KPC and the reduction of the ratio between prosecutor and non-prosecutor members, namely the balance between the prosecutor and non-prosecutor members and the manner of election of the latter, so that the two factors jeopardizing Prosecutorial Councils, namely the corporatism and politicization, counterbalance each other.

237. However, as explained in the relevant parts of this Judgment, (i) based on paragraph 4 of Article 110 of the Constitution, among other things, the composition of the KPC is

determined by law; (ii) three previous laws have provided for different compositions of the KPC, while in all cases, the composition of the KPC included members selected by the prosecutorial system itself and non-prosecutor members, selected by the KPC and/or elected by the Assembly; (iii) The Assembly, based on the respective laws, has continuously elected non-prosecutor members of the KPC according to paragraph 10 of Article 65 of the Constitution; (iv) as long as there is no predetermined constitutional standard and/or that originates from international practice, including those specified in the Reports and Opinions of the Venice Commission for the proportion between prosecutor and non-prosecutor members in prosecutorial councils, the latter, namely the non-prosecutor members, have an important role in the composition of the relevant councils and play the role of balancing and avoiding possible corporatism in the prosecutorial system, for the benefit of its pluralism and democratic legitimacy, insofar as the way of their election is designed in a manner so as to avoid the possible political influence on the Council, namely the possible interference with the independence of the respective council.

238. Therefore, the Court emphasizes that taking into account paragraph 4 of Article 110 of the Constitution in conjunction with paragraphs 1 and 10 of Article 65 of the Constitution, the composition of (7) members of the KPC, in which four (4) prosecutors and 3 (three) non-prosecutor members, is not contrary to paragraph 1 of Article 110 of the Constitution, nor the principles stemming from the standards established by the Venice Commission, as elaborated in this Judgment.

b) Regarding the competence of the Ombudsperson to "appoint" one KPC member

239. The Court recalls that with respect to the manner of election of non-prosecutor members in the KPC, based on the contested Law, one (1) of the three (3) non-prosecutor members is "*appointed*" by the Ombudsperson. The competence of the Ombudsperson in this context was contested by the Applicants of the Referral and the KPC, but also by the Ombudsperson, himself. In this context and among other things, it was argued that (i) the Ombudsperson does not have this competence defined in the Constitution; and that (ii) taking into account the function of the Ombudsperson defined by the Constitution, namely the competence to supervise and protect the rights and freedoms of individuals from illegal and irregular actions or inactions of public authorities, as defined in Article 132 of the Constitution, including also the competences of the Ombudsperson for disciplinary matters pertaining to prosecutors, determined as per Law on Disciplinary Liability of Judges and Prosecutors, the competence of this institution to "*appoint*" a member of the KPC, conflicts with its constitutional function and, as a result, constitutes a "*conflict of interest*". On the other hand, the Ministry of Justice, in essence, emphasizes that the inclusion of the Ombudsperson in the KPC, namely the determination of the legal competence to "*appoint*" a member in this Council, stems from the recommendations issued by the Opinions of the Venice Commission.

240. The court first recalls that point 1.3.2 of Article 6 of the contested Law, determines that in the KCP, one (1) member is *"appointed"* by the Ombudsperson. Secondly, pursuant to Article 10/A (Non-prosecutor member appointed by the Ombudsperson) of the Contested Law, it is stipulated that (i) the Ombudsperson *"appoints"* a member to the Council who fulfills the conditions from Article 5, paragraph 2 of this the law; (ii) The Ombudsperson holds a substantive consultative meeting with civil society organizations that are active in the field of the prosecutorial system in Kosovo, before the "*appointment*" of the member of the Council; and (iii) when the mandate of the member from paragraph 1 of this article ends prematurely, as defined by this law, the Ombudsperson "*elects*" the member, with a full mandate, from the day the place remains vacant. Thirdly, according to paragraph 4 of Article 16 of the Contested Law,

the dismissal of the member "*elected*" by the Ombudsperson is done by his decision. In the context of the latter, the Court emphasizes that according to the same law, (i) the prosecutor members of the Council are dismissed upon the proposal of two-thirds (2/3) of the members of the Council and the same have the right to appeal to the Supreme Court; (ii) the members elected by the Assembly are proposed for dismissal by a committee consisting of three (3) prosecutor members who are not members of the Council and after the proposal of the Council, not specifying the majority required for this proposal, they are voted in the Assembly with the majority of deputies present and voting, without the possibility of appeal to the Supreme Court, as is the case with the prosecutor members of the Council; while (iii) the member "*elected*" by the Ombudsperson is dismissed only by his/her decision, after the proposal of a committee composed of three (3) prosecutor members who are not members of the Council and after the proposal of the Council, not specifying the majority required for this proposal and without the possibility of appeal to the Supreme Court, as is the case with the prosecutor members of the Council.

241. In the context of the competence of the Ombudsperson to "*appoint/elect*" one (1) non-prosecutor member of the KPC, the Court emphasizes that (i) it is correct that in the first Opinion of the Venice Commission, the latter also took the Ombudsperson as an example of an institution that can be represented in prosecutorial councils (paragraph 32); and (ii) it is also correct that in the second Opinion of the Venice Commission, it was emphasized that the "*appointment*" of one (1) member by the Ombudsperson to the KPC is not necessary contrary to international standards, but also in the same report, the Venice Commission had withdrawn the attention that "it is important that *the Ombudsperson's involvement does not compromise his or her ability to make independent determinations concerning matters involving the KPC"* (paragraph 12).

242. The Court also notes that the possibility of the representation of the Ombudsperson in the KPC was raised at least in two other Opinions of the Venice Commission, namely (i) Opinion CDL-AD(2021)047 for Moldova, related to the amendments of 24 August 2021 to the Law on Prosecutorial Service (paragraph 46) and Opinion CDL-AD(2008)005 for Montenegro, regarding the draft amendments to the Law on the Prosecutor of the State of Montenegro (paragraph 53). In neither case, the Venice Commission explicitly declared its objection regarding the representation of the Ombudsperson in the relevant prosecutorial councils, despite the fact that in the above Opinion for Moldova, among other things, it had emphasized that "*As regards the Ombudsperson, it is quite unusual for a defender of rights to participate in the governance of the prosecution system. It is questionable whether the functions of a member of the SCP are compatible with the Ombudsperson's mandate. Reportedly, in the Moldovan context, the Ombudsperson himself refused to participate in the work of the SCP [the Superior Council of Prosecutors]. That being said, the Ombudsperson, as a politically neutral figure, may serve as an arbiter between the prosecutor members and non-prosecutor members affiliated with the Government, so his or her participation in a prosecutorial council may help avoiding deadlocks*" (see, CDL-AD(2021)047, paragraph 46).

243. The Court, in the context of the aforementioned clarifications and the determination of the Contested Law to assign to the Ombudsperson the competence to "*appoint/elect*" one (1) member of the KPC, initially emphasizes that it is not disputable that (i) in the constitutional order of Kosovo, the Ombudsperson is an independent institution and this has been confirmed by a number of Court Judgments over the years, including but not limited to Judgments of the Court, in cases KO29/12 and KO48/12, KO73/16, KO171/18, KO203/19 and KO219/19; and (ii) the inclusion of the Ombudsperson in prosecutorial councils, is not necessarily contrary to international practices, just as, in terms of prosecutorial systems and in the context of the specific constitutional and legal regulations, there are also practices in which the prosecutorial system is not subject to

the management of councils but also to other constitutional and/or law solutions that can include the role of executive and legislative powers, as elaborated in this Judgment, based on the relevant Reports and Opinions of the Venice Commission. Having said this, the Court emphasizes that the competence of the Ombudsperson to "*appoint/elect*", one (1) member of the KPC, must be assessed in the context of the constitutional regulation of the Republic of Kosovo.

244. In this context, the Court initially reiterates that (i) based on Article 16 of the Constitution, the Constitution is the highest legal act of the Republic of Kosovo, with which laws and other legal acts must be in accordance and from which the power to govern stems; and (ii) the Constitution consists of a unique entirety of constitutional principles and values on the basis of which the Republic of Kosovo is built and should function and that the norms stipulated by the Constitution must be read in correlation to each other and based on the constitutional values of the Republic of Kosovo, including separation and balance of powers.

245. Based on the two aforementioned principles and the circumstances of the concrete case, the Court emphasizes that the constitutionality of the Contested Law in the context of assigning the competence to the Ombudsperson, to "*appoint/elect*" a non-prosecutor member in the KPP, should be reviewed in the context of (i) paragraph 10 of Article 65 of the Constitution, according to which, among other things, the Assembly elects the members of the Prosecutorial Council; (ii) the constitutional powers of the Assembly to elect the holders of the functions of the independent constitutional institutions defined in Chapters VII and XII of the Constitution, respectively; and (iii) Article 132 of the Constitution, according to which, among other things, the Ombudsperson has powers to supervise all public authorities, including the Prosecutorial Council, in the context of unlawful actions and inactions pertaining to fundamental rights and freedoms.

246. Initially and in the context of the powers of the Assembly to elect the holders of the functions of independent constitutional institutions, the Court recalls that (i) based on paragraph 10 of Article 65 of the Constitution, the Assembly elects the members of the Judicial Council and the Prosecutorial Council in accordance with the Constitution; while (ii) based on paragraph 4 of Article 110 of the Constitution, the composition of the Prosecutorial Council as well as the provisions for appointment, removal, mandate, organizational structure and rules of procedure are regulated by law. In the context of the correlation between these two provisions, the Court, according to the clarifications above, reiterates that (i) in the case of the Judicial and Prosecutorial Councils, a part of the membership is selected by the respective systems themselves, namely the judicial and prosecutorial system; while (ii) according to paragraph 10 of Article 65 of the Constitution, the other members are elected by the Assembly, in the case of the KJC according to the constitutional provisions, while in the case of the KPC, according to the provisions of the law adopted by the Assembly.

247. Having said this, and in order to assess whether paragraph 4 of Article 110 of the Constitution may imply that not only the competence to determine the composition, but also the constitutional competence of the Assembly to elect the members of the KPC, can be delegated to another public authority through the law, the Court will now analyze all the provisions of the Constitution, which specify the competence of the Assembly to "*elect*" holders of the functions of independent institutions.

248. In this context, the Court recalls that the competences of the Assembly to elect holders of public functions are defined in (i) Chapter IV of the Constitution regarding the Assembly of the Republic of Kosovo; and (ii) Chapter XII of the Constitution regarding Independent Institutions.

249. In the former, namely in Article 65 of Chapter IV, the latter stipulates that the Assembly (i) elects and dismisses the President and Deputy Presidents of the Assembly; (ii) elects and may dismiss the President of the Republic of Kosovo; (iii) elects the Government and expresses no confidence in it; (iv) elects members of the Judicial Council and the Prosecutorial Council; and (v) proposes the judges of the Constitutional Court.

250. Manner of electing the holders of the aforementioned functions in the case of (i) electing the President and Deputy Presidents of the Assembly; (ii) the President of the Republic of Kosovo; (iii) the Government; and members of the Judicial Council and the judges of the Constitutional Court, is defined in Article 67 [Election of the President and Deputy Presidents], 86 [Election of the President],95 [Election of the Government], 108 [Kosovo Judicial Council] and Article114 [Composition and Mandate of the Constitutional Court] of the Constitution. As explained above, in the case of the Prosecutorial Council, paragraph 10 of article 65 of the Constitution specifies that the Assembly elects members of the Prosecutorial Council, as well as the Judicial one, while paragraph 4 of article 110 of the Constitution determines that the composition of the Kosovo Prosecutorial Council, as well as provisions regarding appointment, removal, term of office, organizational structure and rules of procedure, shall be determined by law.

251. On the other hand, in the latter, namely, Chapter XII of the Constitution, the latter defines the Independent Institutions, such as the Ombudsperson, Auditor-General, Central Election Commission, Central Bank of Kosovo, Independent Media Commission and independent agencies. With the exception of the Central Election Commission, whose composition is determined by the Constitution, as well as that of Independent Agencies, which are institutions established by the Assembly, in compliance with the relevant legislation regulating their establishment, functioning and competences, in the case of the other four (4) independent institutions, the Constitution either determines the competence of the Assembly to elect their holders/heads or delegates this issue to the level of legal regulation.

252. More precisely, and firstly, in the case of the Ombudsperson, (i) Article 134 [Qualification, Election and Dismissal of the Ombudsperson] of the Constitution stipulates that the Ombudsperson is elected by the Assembly of Kosovo by a majority of all its deputies; while (ii) Article 133 [Office of Ombudsperson], determines that the Ombudsperson has one (1) or more deputies and that their number, method of selection and mandate are determined by the Law on Ombudsperson. Secondly, in the case of the Auditor-General, Article 136 [Auditor-General of Kosovo], determines that the same is elected by a majority vote of all the deputies of the Assembly. Thirdly, in the case of the Central Bank, Article 140 [Central Bank of Kosovo] stipulates that the governance of the Central Bank of the Republic of Kosovo and the selection and nomination procedures of the Central Bank Board members shall be regulated by law, which shall ensure its independence and autonomy. And fourthly, Article 141 [Independent Media Commission] stipulates that the members of the Independent Media Commission shall be elected in a transparent process in accordance with the law.

253. As per given explanation, despite the fact that in the case of (i) the deputies of the Ombudsperson; (ii) the Governor of the Central Bank and its Board members; and (iii) members of the Independent Media Commission, the Constitution, in terms of election, selection, appointment, nomination, refers to regulation at the law level, all the holders of the aforementioned public functions of the independent constitutional institutions are in fact elected by the Assembly.

254. More precisely, (i) pursuant to Article 10 (Procedure for election of Deputy Ombudspersons) of the Law No. 05/L-019 on Ombudsperson, the deputy

Ombudspersons are elected by the Assembly of the Republic of Kosovo, with the majority of votes of deputies who are present and vote; (ii) pursuant to Article 38 (Appointment) of the Law No. 03/L-200 on Central Bank of the Republic of Kosovo, the Governor and the members of the Central Bank Board shall be elected by the Assembly and appointed by the President; and (iii) pursuant to Article 11 (Selection of Members of the IMC) of the Law No. 04/L-44 on the Independent Media Commission, members of the IMC shall be appointed/elected by the Assembly.

255. Based on the above clarifications, it follows without exception that in the case of independent constitutional institutions, and regardless of whether the Constitution specifically defines their election by the Assembly or delegates this election/appointment to the level of legal regulation through the Constitution, all relevant laws that regulate independent constitutional institutions, specify the competence of the Assembly to elect the heads/holders of their functions.

256. In the context of the above explanations, the Court emphasizes the fact that in all cases of independent institutions defined by the Constitution, taking into account their independent constitutional status, the competence to elect the heads/holders of the relevant functions is exercised by the Assembly, regardless of whether this competence is specified specifically in the Constitution or is delegated according to the Constitution at the level of legal regulation.

257. In the case of the KPC, this competence of the Assembly is specified at the level of the Constitution, namely in paragraph 10 of its Article 65, and in the assessment whether such competence can be transferred/delegated to other public authorities through the law approved according to paragraph 4 of Article 110 of the Constitution, the Court beyond the now already explained fact that the competence of the Assembly to elect/appoint the heads and/or members of the independent constitutional institutions, and regardless of whether such competence has been specified in the Constitution and/or has been delegated at the level of legal regulation, it has not been transferred/delegated in any case, it also recalls its case law, through which it has held the position that the competences defined by Constitution, cannot be transferred to other public authorities through lower acts, namely laws. This position has been clarified, among others, through Judgment in the case KO43/19, with applicants *Albulena Haxhiu, Driton Selmanaj and thirty (30) other deputies of the Assembly of the Republic of Kosovo*, regarding the constitutional review of Law no. 06/L-145 on the Duties, Responsibilities and Competences of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia (hereinafter: Judgment of the Court in case KO43/19). The Court recalls that through this Judgment, it had reviewed the constitutionality of the aforementioned Law, according to which, among other things, the Assembly had authorized the respective State Delegation to negotiate and reach an agreement with Serbia during the dialogue process. In the assessment of this law, which the Court declared to be contrary to the Constitution, as far as it is relevant to the circumstances of the concrete case, the Court had emphasized that (i) within the framework of the constitutional legal system, all other norms are subject to the supremacy of the constitutional norm; (ii) when a matter is defined by the Constitution, it cannot be changed, undermined or transformed through an act with lower legal force, such as law; and that (iii) the competences expressly defined by the Constitution, in the context of this case regarding foreign policy, could not be transferred to other special institutions or bodies, through lower legal acts (see the Judgment of the Court in case KO43 /19, paragraphs 68 and 88).

258. In fact, and moreover, it is worth noting that despite the fact that Article 133 [Office of Ombudsperson], specifies that the number of deputy Ombudspersons, method of selection and their mandate are determined by Law on Ombudsperson, the latter, based

on Law on Ombudsperson, does not even have the competence to *"appoint/elect"* his own deputies, because based on the aforementioned law, such competence is exercised by the Assembly of the Republic of Kosovo.

259. This is also important in the context of the constitutional competences of the Ombudsperson. More precisely, the Court emphasizes that the role and competences of the Ombudsperson are specified by Article 132 [Role and Competencies of the Ombudsperson] and which specifies that (i) The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities; (ii) 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 (iii) every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law. Beyond that, based on Article 135 [Ombudsperson Reporting] and 113 [Jurisdiction and Authorized Parties] of the Constitution, the Ombudsperson can directly address the Constitutional Court regarding the constitutionality of laws, decrees of the President and Prime Minister and Government regulations.

260. Considering the constitutional functions of the Ombudsperson in the constitutional order of the Republic of Kosovo, with an emphasis on his competence of monitoring and protecting the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities, including the Prosecutorial Council and the right to refer matters directly to the Constitutional Court, the Constitution in its Article 134 [Qualification, Election and Dismissal of the Ombudsperson] has specifically stipulated that the Ombudsperson and Deputy Ombudspersons shall not be members of any political party, exercise any political, state or professional private activity, or participate in the management of civil, economic or trade organizations.

261. Furthermore, given the nature of the constitutional competences of the Ombudsperson, including the monitoring function over public authorities in the context of protecting fundamental rights and freedoms, based on Law on Disciplinary Liability of Judges and Prosecutors, the same has been given extended competences regarding the disciplinary proceedings of judges and prosecutors, competences of the Judicial and Prosecutorial Councils, respectively. More precisely, based on Articles 9 (Complaints against judges and prosecutors for disciplinary offenses), 11 (Criminal offence), 12 (Investigation procedure), 14 (Disciplinary proceedings) and 15 (Complaints against disciplinary decisions) of the aforementioned Law, the Ombudsperson has (i) the competence to accept complaints from natural and legal persons against judges and prosecutors; (ii) in cases where the alleged violation contains elements of a criminal offense, the case is referred to the State Prosecutor and the Ombudsperson is notified; (iii) the competence to ask the relevant Council to initiate investigations against judges and prosecutors, including court presidents, chief prosecutors and the Chief State Prosecutor, regarding their actions as competent authorities in disciplinary proceedings; and (iv) the right to file an appeal with the Supreme Court in case the respective Councils fail to take actions, in their capacity as competent authorities.

262. In the context of the above, the Court recalls that (i) the Venice Commission itself had drawn attention to the fact that it is important that the Ombudsperson's involvement does not limit his or her ability to make independent assessments related to matters involving the KPC; and (ii) the Ombudsperson himself raised dilemmas before the Court regarding the constitutionality of the competence determined by the Contested Law to "*appoint/elect*" one (1) non-prosecutor member of the KPC.

263. Moreover, and as far as it is relevant in the circumstances of the concrete case, in terms of the composition of the KJC and the KPC, the applicable laws have also distinguished between "*election*", "nomination/proposal" or "ex officio representation" in an independent constitutional institution. This is also the case with the KPC according to the laws of 2010, 2015 and 2019, respectively, which defined (i) the right to nominations/proposals of independent institutions, including the Chamber of Advocates and law faculties and the competence of the Assembly to elect, in the manner specified in the applicable laws, from the relevant nominations/proposals; and (ii) ex officio representation, as was the case with the representation of the Minister of Justice in the Council, until amending/supplementing of the law in 2015 and with the Chief State Prosecutor. Such a combination of alternatives and mechanisms, in fact, is recommended by the Venice Commission in two Opinions on Kosovo, as explained in the general principles part of the present Judgment. It is precisely such a system, which, beyond the prosecutor members selected by the system itself and the non-prosecutor members elected by the Assembly and who, depending on the stipulated method of voting, can also increase the risk of politicization of the Council, enables pluralism of a Council, through balancing the influence of prosecutors, but also the influence of non-prosecutor members elected by the Assembly in the decision-making of the Council.

264. Having said that, the Ombudsperson, based on the contested Law, (i) does not nominate nor (i) is represented *ex officio* in the KPC, but he (iii) "*appoints*", namely, "*elects*" one (1) non-prosecutor member to the KPC, a competence which, pursuant to paragraph 10 of Article 65 of the Constitution, has been assigned to the Assembly of the Republic. Furthermore and, as explained above, beyond the competence to "*appoint/*elect" that member, the Ombudsperson, according to the Contested Law, has also the competence to dismiss him/her by his own decision, only following proposal of the Council, without specifying the necessary majority for such proposal and without the right to appeal before the Supreme Court, unlike his/her (i) prosecutor colleagues, for whose dismissal a two-third (2/3) majority of the Council members is required and who can challenge such decision directly before the Supreme Court; and (ii) other non-prosecutor colleagues who can be dismissed only after the majority vote of the deputies, present and voting in the Assembly.

265. Therefore, and taking into account (i) Article 16 of the Constitution, based on which the Constitution is the highest legal act in the Republic of Kosovo and according to which laws and other legal acts must be in accordance with the Constitution; (ii) paragraph 1 of Article 110 of the Constitution, by which the KPC is accorded full constitutional independence; (iii) paragraph 10 of Article 65 of the Constitution, based on which the members of the KPC are elected by the Assembly in the manner defined by the Constitution;, and (iv) the fact that with respect to the constitutionally independent institutions of Chapters VII and XII, the competence of the Assembly to elect the holders of their public functions has not been delegated to the public authorities, even when the Constitution does not specifically stipulate the competence of the Assembly to "*elect*" rather delegating the same at the law level; (v) the case law of the Court, based on which the competencies defined by the Constitution for relevant institutions cannot be transferred to other institutions through lower legal acts, including laws; and (vi) considering the constitutional competences of the Ombudsperson, including his monitoring function over the public authorities, including the Prosecutorial Council, itself, the Court finds that the provision of the Contested Law, by which the Assembly transfers its competence to elect one (1) non-prosecutor member of the KPC, to the Ombudsperson, is in violation with the Constitution.

266. The Court notes that the goals of the legislator may have been related to the increase of pluralism in the KPC and that such a solution, according to the Venice Commission, is not contrary to international standards. Having said this, the Court also emphasizes

that whatever solution is foreseen in the laws approved by the Assembly of the Republic of Kosovo, it must first and foremost, be in compliance with the provisions of the Constitution of the Republic.

267. As a consequence and finally, the Court finds that point 1.3.2 of paragraph 1 of Article 6 [untitled] of the Contested Law, by which Article 9 (Composition of Council members) of the Basic Law is amended and supplemented, is not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 10 of Article 65 of the Constitution and Article 132 [Role and Competencies of the Ombudsperson] of the Constitution.

2. Constitutional review of Article 7 [untitled] of the contested Law by which Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is amended and supplemented

268. Initially and for the purpose of the constitutional review of Article 7 of the contested Law, the Court will present: (i) the essence of the Applicants' allegations and the supporting comments submitted by the interested parties, as well as the essence of the opposing party's arguments (see paragraphs 46-137 of this Judgment for a detailed description of the relevant arguments and counterarguments); and (iii) the Court's response regarding these allegations of the unconstitutionality of the relevant article.

(i) The substance of the allegations/arguments and counter-arguments of the applicants and interested parties

269. The Applicants allege that (i) the provisions of the contested Law, which determine the election of two (2) non-prosecutor members with a simple majority of votes in the Assembly, increase the risk that the members of the KPC appointed by the Assembly will be persons who potentially represent the policies of the majority of the Assembly and not persons with authority and integrity who receive the comprehensive trust of the people's representatives; (ii) in the way the election of two (2) non-prosecutor members by the Assembly is determined, these members can easily be appointed with only thirty-one (31) votes of deputies, which as a representation is the minimum for appointment in an important constitutional institution such as is the KPC; and (iii) assess that the election of these members of the KPC must be done by law and with the votes of at least sixty-one (61) deputies or two-thirds (2/3) of the deputies who vote in the procedure of their election by the Assembly. The comments of the Applicants, regarding the majority required to elect non-prosecutor members from the Assembly, are also supported by the KPC. On the other hand, the Ministry of Justice, emphasizes that Article 80 of the Constitution, expressly determines that laws, decisions and other acts are approved by the Assembly with the majority of votes of the deputies present and voting, except in cases where it is otherwise determined by this Constitution, therefore, according to them, any other way of voting would be against the Constitution.

(ii) Assessment of the Court

270. The Court first recalls that Article 10 (Procedure for the proposal, election and dismissal of members elected by the Assembly) of the Basic Law defines the procedure for the election of members of the KPC by the Assembly, determining, among other things, (i) the deadlines of the relevant procedures; (ii) the way of administration of vacancies; (iii) the relevant committees of the Assembly and the procedures for the election of non-prosecutor members of the KPC. Regarding the manner of electing non-prosecutor members, paragraphs 7, 9 and 10 of the same article, provide that (i) The Assembly elects the Council members through a secret voting; (ii) If in the first round the

candidates proposed by the respective Committee of the Assembly do not receive the majority of votes of all members of the Assembly that are present and voting, then in the second round the candidate with the highest number of votes shall be considered as elected; and (iii) Dismissal of non-prosecutor members of the Council shall be done by the Assembly with the majority of votes of all members of the Assembly, upon the proposal of the respective committee or Council, namely with at least sixty-one (61) votes of the Assembly.

271. Article 7 of the contested Law amending and supplementing Article 10 of the Basic Law, in its paragraph 12, stipulates that the Assembly elects the non-prosecutor members of the KPC with the majority of votes of the deputies present and voting. While, paragraph 4 of Article 19 of the contested Law determines the dismissal of the non-prosecutor member of the Council, to the majority vote of the deputies present and voting, unlike the Basic Law, which in this context requires the majority vote of all deputies of the Assembly.

272. The Court notes that based on the relevant Reports and Opinions of the Venice Commission, including the Opinions on Kosovo regarding the contested Law, it is emphasized that it is preferable that the election of members of the KPC be done by qualified majority and not by simple majority. The Venice Commission has consistently recommended that the council members (i) be elected by the Assembly through a qualified majority, accompanied by an effective anti-deadlock mechanism; (ii) through a proportional system by which it would be ensured that the parliamentary majority does not have the opportunity to elect all the non-prosecutor members of the Council; or (iii) through direct nominations or appointments by non-governmental actors, including the judiciary, the bar and universities, to name a few. Even in the Opinions on Kosovo, the Venice Commission has emphasized that some or all non-prosecutor members are recommended to be elected through a qualified majority, with the assumption that the parliamentary majority does not have a qualified majority in the Assembly, emphasizing the importance and an effective anti-deadlock mechanism, so that the relevant members can be elected even if the necessary majority could not be achieved in the Assembly (see, First Opinion of the Venice Commission, paragraph 29; and Interim Opinion on the Draft Law on the State Prosecutor's Office of Montenegro CDL-AD(2014)042, paragraph 49). Such a recommendation, that the non-prosecutor members of the relevant Prosecutorial Council should be elected by a qualified majority or through a proportional system in order to ensure that the respective members of the Council are not elected only by the ruling majority represented in the Assembly, was specified also in the Opinions of Venice Commission, as explained in the part on the general principles of this Judgment (see, among others, also the Report on Prosecution Service, paragraph 66).

273. In addition, these issues have been specifically treated in the Compilation of Reports and Opinions of the Venice Commission relating to qualified majorities and anti-deadlock mechanisms in relation to the Election by the Parliament of Constitutional Court Judges, Prosecutors General, members of the Supreme Judicial and Prosecutorial Councils and the Ombudsman, namely Compilation CDL-PI(2018)003rev of 27 June 2018 (hereinafter: Compilation regarding qualified majorities and the relevant anti-deadlock mechanisms) regarding the election by the Assemblies of the judges of the Constitutional Court, the Prosecutor General, the members of the judicial and prosecutorial councils and the Ombudsperson.

274. In fact, through this compilation, the Venice Commission recommends that the election of the members of all the aforementioned institutions be done by a qualified majority, taking into account the importance of these institutions in any constitutional system and the possibility that the members of the justice institutions and independent ones,

to be elected through a simple parliamentary majority and consequently, to be subject to potentially politicized elections. Having said that, the same Compilation emphasizes the need to design effective anti-deadlock mechanisms. In the context of the latter, among other things, it it is emphasized that the Commission "*is of the view that difficulty of reaching a qualified majority and the ensuing risk of paralysis of dysfunction of an institution – in particular "safeguard institutions" - should not lead to abandon the requirement of a qualified majority but rather to devise tailor-made, effective deadlock-breaking mechanisms. A balance needs to be found between the superior state interest of the preservation of the functioning of the institutions and the democratic exigency that these institutions should be balanced and should not be merely dominated by the ruling majority. In other words, the supreme state interest lies in the preservation of the institutions of the democratic state"* and (ii) *"qualified majorities aim to ensure that a broader agreement is reached in the Assembly, as they require the majority to find a compromise with the minority. For this reason, qualified majorities are usually required in more sensitive areas, especially regarding the election of officials in state institutions. However, there is a risk that the requirement to achieve a qualified majority leads to stalemate, which if not addressed in time, can lead to the paralysis of a relevant institution. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one which is unattractive both to the majority and the minority* (see Compilation of Venice Commission relating to qualified majorities and anti-deadlock mechanisms, page 4, 13).

275. Having said this, the Court notes that the Constitution in Article 69 [Schedule of Sessions and Quorum], initially defines that the Assembly has a quorum when more than half of all the deputies of the Assembly are present. Further, Article 80 [Adoption of Laws], stipulates that laws, decisions and other acts adopted by the Assembly by a majority vote of the deputies present and voting, except when otherwise provided by the Constitution. The Constitution defines these exceptions specifically, dividing them into two (2) categories: (i) cases where a majority that differs from a simple one is required; and (ii) cases where decision-making is also conditional on a certain majority of non-majority communities represented in the Assembly of the Republic of Kosovo.

276. The first category recognizes (i) the majority of all deputies of the Assembly; and (ii) the qualified majority, namely that of two-thirds (2/3), however, distinguishing cases when the qualified majority of all deputies of the Assembly or the qualified majority of deputies present and voting is required. The first case includes the circumstances defined by Article 86 [Election of the President], namely the third vote for the election of the President, after the first two votes have failed. Whereas, in the second case, and in which two-thirds (2/3) of all deputies of the Assembly are required, the circumstances defined by (i) Article 18 [Ratification of International Agreements], regarding the ratification of international agreements, are included for the issues specified in paragraph 1 of this article; (ii) Article 20 [Delegation of Sovereignty]; (iii) Article 65 [Competencies of the Assembly] based on Decree no. 23 of the Constitution in relation to the granting of amnesty (iv) Article 67 [Election of the President and – Deputy Presidents], in relation to the dismissal of the President and deputy presidents of the Assembly; (v) Article 76 [Rules of Procedure], regarding the adoption of the Rules of Procedure of the Assembly; (vi) Article 82 [Dissolution of the Assembly], regarding the dissolution of the Assembly in the manner defined by the Constitution; (vii) Article

86 [Election of the President], in the case of the first two votes for the election of the President; (viii) Article 90 [Temporary Absence of the President], regarding the decision-making if the President is temporarily unable to exercise his responsibilities in the manner defined by the Constitution; (ix) Article 91 [Dismissal of the President], regarding the dismissal of the President due to the circumstances defined in paragraph 3 of this article; (x) Article 131 [State of Emergency], regarding the extension of the period of state of emergency, determined by paragraph 6 of this article; (xi) Article 134 [Qualification, Election and Dismissal of the Ombudsperson], regarding the dismissal of the Ombudsperson; and (xii) Article 136 [Auditor-General of Kosovo] regarding the dismissal of the Auditor General. Whereas, the cases in which the majority of two-thirds (2/3) of the deputies present and voting is required, include the circumstances defined by (i) Article 68 [Sessions], regarding the cases when, exceptionally, the meetings of Assemblies must be closed; (ii) Article 131 [State of Emergency**]**, regarding the granting of consent by the Assembly regarding the President's decree declaring a state of emergency, as defined in paragraph 3 of this article; and (iii) Article 114 [Composition and Mandate of the Constitutional Court], regarding the election of seven (7) judges of the Constitutional Court.

277. On the other hand, the second category includes cases where decision-making is conditional on a certain majority of non-majority communities represented in the Assembly of the Republic of Kosovo, namely, (i) Article 81 [Legislation of Vital Interest], (amended through Amendment no. 2 of the Constitution) regarding the adoption, amendment or repeal of the category of the laws specified by the Constitution, cases requiring the vote of the majority of the deputies of the Assembly and of the majority of the deputies of the Assembly holding seats guaranteed for representatives of communities that are not the majority: (ii) Article 96 [Ministries and Representation of Communities] with respect to the manner of election of ministers and deputy ministers from the Serb community and other non-majority communities; (iii) Article 114 [Composition and Mandate of the Constitutional Court], regarding the election of two (2) judges of the Constitutional Court, in this case the decision is taken by the majority to the votes of the members of the Assembly, who are present and voting, but which can only be done after the consent of the majority of the members of the Assembly, who hold their seats that are guaranteed for representatives of communities that are not the majority in Kosovo; and (iv) articles 65 [Competencies of the Assembly] and 144 [Amendments], regarding the amendment of the Constitution, which requires two-thirds (2/3) of the votes of all its deputies, including two-thirds (2/3) of all deputies holding guaranteed seats for representatives of communities that are not the majority in Kosovo.

278. Based on the clarification above, it is clear that decisions in the Assembly of Kosovo are taken, as a rule, by a simple majority of votes, except in cases where it is specifically determined otherwise. The case of the election of KPC non-members, taking into account that the Constitution has not determined otherwise, falls within the framework of Article 80 of the Constitution,

279. The same is the case with the election of the members of the KJC. The Constitution stipulates that six (6) out of thirteen (13) members of the KJC are elected by the Assembly, whereas four (4) of them represent, respectively are elected by the deputies of the Assembly holding seats guaranteed for representatives of the Serbian community or other non-majority communities. Regarding the election of two (2) members of the KJC from the deputies holding seats attributed during the general distribution of seats, the Constitution does not specify the necessary majority, and consequently, the majority is determined based on paragraph 1 of Article 80 of the Constitution, according to which, as explained above, laws, decisions and other acts are adopted by the Assembly

by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.

280. Having said that, the Court must nevertheless emphasize that, notwithstanding Article 80 of the Constitution, the legislative power has determined also high majorities for the election of KJC and KPC members through the laws adopted over the years. More precisely, (i) Article 10 of the Basic Law determines the majority of votes of all the deputies of the Assembly, namely at least sixty-one (61) votes, for the dismissal of the non-prosecutor members of the Council; and (ii) article 3 and article 6 of the 2015 Law, determine the majority of votes of all deputies of the Assembly, namely at least sixty-one (61) votes for the election of non-prosecutor members of the Council and the same majority for their dismissal. Similarly, (i) Article 10 of the Law on the KJC, determines the majority of votes of all the deputies of the Assembly, namely at least sixty-one (61) votes, for the dismissal of the members of the KJC elected by the Assembly; and (ii) Article 4 of the 2015 Law on the KJC, determines the majority of votes of all the deputies of the Assembly, namely at least sixty-one (61) votes for the election of the members of the KJC by the Assembly, specifying the subsequent unblocking mechanism, namely the majority of deputies present and voting. Moreover, based on Article 13 (Dismissal of the Ombudsperson and his/her deputies from their function) of the Law on the Ombudsman, even the deputies of the Ombudsman are dismissed by the Assembly with the majority of all the deputies of the Assembly. Such an approach, through which the members of the respective councils would be elected by qualified majority or even other proportional voting systems and which would ensure that the election of a non-prosecutor member in the councils would not only represent the governing majority represented in the Assembly, has been continuously recommended by the Venice Commission, as already clarified in this Judgment.

281. However, and taking into account (i) paragraph 1 of Article 80 of the Constitution, according to which the Assembly decides by a majority vote of the deputies present and voting, except in cases where it is otherwise determined by this Constitution; and (ii) the fact that this is not the case with regard to the election of KPC non-prosecutor members by the Assembly, the Court finds that paragraph 12 of Article 7 [untitled] of the contested Law amending Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law is not contrary to the Constitution.

3. Constitutional review of Article 8 [untitled] of the contested Law amending, namely supplementing Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law, namely new Article 10/A (Lay member appointed by the Ombudsperson) of the contested Law is added

282. The Court recalls that Article 8 [untitled] of the contested Law, namely the new Article 10/A (Lay member appointed by the Ombudsperson) of the contested Law, determines the manner of "*appointment/election*" of the non-prosecutor member by the Ombudsperson.

283. However, considering that the Court has already found that point 1.3.2 of paragraph 1 of Article 6 [untitled] of the contested Law, amending and supplementing Article 9 (Composition of Council members) of the Basic Law, is not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 10 of Article 65 [Competences of the Assembly] and Article 132 [[Role and Competencies of the Ombudsperson] of the Constitution, , the Court does not consider it necessary to further address the constitutionality of Article 8 of the contested Law, namely the new Article 10/A of the contested Law.

284. The latter is not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 10 of Article 65 [Competences of the Assembly] and Article 132 [[Role and Competencies of the Ombudsperson] of the Constitution, for the reasons detailed in paragraphs 208-267 of this Judgment.

4. Constitutional review of Article 13 [untitled] of the contested Law amending and supplementing Article 15 (Quorum and decision-making) of the Basic Law

285. To begin with and for the purposes of the constitutional review of Article 13 of the Contested Law, namely its paragraph 2 supplementing Article 15 of the Basic Law, adding new paragraph 2/a, the Court will present in the following: (i) the essence of the Applicants' allegations and the supporting comments submitted by the interested parties, as well as the essence of the arguments of the opposing party (see, paragraphs 47-138 of this Judgment for a detailed overview of the arguments and respective counterarguments); and (ii) Court's response to those allegations pertaining to the unconstitutionality of the respective article.

(i) The essence of the allegations/arguments and counterarguments of the Applicants and of the interested parties

286. The Applicants allege that the way how the quorum and respective decision-making majority at the KPC is determined, among other things, violates the independence of the Council, stipulated by Article 110 of the Constitution and separation and balance of powers, stipulated by Article 4 of the Constitution. In this context, the Applicants, among other things, state that (i) besides the necessary condition of the decision making quorum of five (5) members, the new paragraph 2/a, that has been added to Article 15 of the Basic Law, through Article 13 of the Contested Law, for every important decision making of KPC, requires qualified majority of votes which must include two (2) votes of the members from the ranks of the non-prosecutor members, that is the votes of two (2) or at least one of the two (2) non-prosecutor members elected by simple majority by the Assembly or/and the vote of the non-prosecutor member appointed by decision of the Ombudsperson; (ii) in case of failure to reach the necessary majority on the first round of voting, for the second round of voting, it is required the qualified majority of two thirds (2/3) of all members of KPC, which is in essence conditioned with the inclusion of at least one (1) vote of one of the two (2) non-prosecutor members, elected by simple majority by the Assembly and/or the vote of the member appointed by decision of the Ombudsperson; (iii) in such circumstances, not only would the Council's decision making be blocked, but the non-prosecutor members will take a decisive role in every decision of the KPC, thereby politicizing extremely not only its work, but also the proposing of the future candidates for prosecutors or heads of the prosecutions; and (iv) the determined manner of quorum and the decision making majority at the KPC, which depends on the participation and /or the vote of the non-prosecutor members of the Council, jeopardizes the substantial functioning and blocking of the KPC work on key issues, such as: (i) election of the Chief State Prosecutor, chief prosecutors of the prosecutions of the Republic of Kosovo; and (ii) procedures of discipline, transfer and promotion of the prosecutors. According to the Applicants, independent powers may be subject to reciprocal control, however such control may never result in superimposition of the other power over an independent power, whereas the requirement for a qualified majority effectively provides the non-prosecutor members the right to veto, thereby establishing the legislator's control over the KPC.

287. On the other hand, the Ministry of Justice disputes the above allegations, stating, among other things, that (i) such voting is foreseen only for the first round of voting and

that on the second round of voting the two thirds (2/3) of the votes of all members are sufficient, which means that the votes of four (4) prosecutors and of the member appointed by the Ombudsperson are sufficient for making certain decisions; (ii) the purpose of the necessary inclusion of at least one (1) non-prosecutor member for making certain decisions is to eliminate the risk of "*corporatism*" of KPC, by making it impossible for the prosecutors to make decisions on their own; (iii) "*it has been praised*" by the Venice Commission for the fact that the prosecutors are not enabled to govern on their own and that precisely the Venice Commission had proposed "*anti-deadlock mechanism*", which according to the Ministry of Justice has been addressed during the review at the Assembly; and (iv) this form of quorum and voting by the KPC members makes it possible for it to function as a pluralist body and to exercise its constitutional competences and that this is by no means in contradiction with Articles 4, 109 or 110 of the Constitution.

(ii) The assessment of the Court

288. The Court first recalls that Article 15 (Quorum and Decision Making) of the Basic Law, determines that (i) the quorum of the Council is formed by nine (9) members; and (ii) decisions of the Council are taken by a simple majority vote of the members present, unless otherwise provided by law. The circumstances in which the law provides otherwise, are provided in Article 19 (Disciplinary procedures for Council members) of the Basic Law, which in case of dismissal of the members of the Council determines a majority of two thirds (2/3) of members of the Council.

289. Through Article 9 of the first draft of the proposed draft-law supplementing and amending the Basic Law, which was subject to the first analysis of the Venice Commission, which resulted in the first Opinion of the Venice Commission, the amended/ supplemented Article 15 of the Basic Law, determined that the decision-making quorum of the KPC would be composed of five (5) members. Whereas, through Article 14 of this draft of the draft-law supplementing the Basic Law with, among other things, the new Article 36/C, (i) the decision-making quorum was reduced to only four (4) members, respectively to only four (4) non-prosecutor members, until the prosecutor members would be elected according to the provisions of the new law; and (ii) determined the decision-making quorum to five (5) members for handling disciplinary issues, and the decision-making for these cases, by simple majority.

290. The Court recalls that through the first Opinion, the Venice Commission treated the issues related to the decision-making majority within the Council at the level of general principles and mainly in the context of election of non-prosecutor members and the respective balance with prosecutor members, emphasizing, among other things, that (i) "*reforming the KPC should not lead to its subordination to the ruling majority in the Assembly. What is important is that the composition of the KPC is pluralistic enough to ensure that the prosecutors cannot govern alone, and, at the same time, that the lay members whose election was secured by the votes of the majority or who represent the executive cannot easily outvote them* (see, *First Opinion*, paragraph 28); (ii) "*Another model consists of providing for a proportionate system of election of the lay members, where some of them would be elected with the voices of the opposition. In such a model the prosecutorial members should get support from a certain number of lay members to pass decisions, and, on the other hand, lay members affiliated with the majority could not govern alone but should get support of either some prosecutorial members or some "opposition" members*" (see, ibid, paragraph 31); and (iii) "*Thus, the first recommendation of the Venice Commission would be to ensure that lay members in the future composition of the KPC are elected in a manner which ensures sufficient pluralism in the composition of the KPC and "counterbalances" the members appointed with the votes of the ruling*

majority. (see, ibid, paragraph 35).

291. Based on the above, it results that, in principle, according to the Venice Commission (i) while the possibility of the prosecutors to govern alone should be avoided, just as much should be avoided the possibility that the non-prosecutor members elected by the ruling majority in the Assembly can outvote the prosecutor members of the Council; consequently suggesting that (ii) the manner of election of non-prosecutor members by the Assembly should be by a qualified majority and/or through a proportional system enabling the representation in the Council of non-prosecutor members who are not necessarily elected by the ruling majority represented in the Assembly.

292. Later, and after the first Opinion of the Venice Commission, through Article 13 of the second draft of the draft law proposed to supplement and amend Article 15 of the Basic Law, through new paragraph 2/a, it was determined that (i) the decision-making quorum shall consist of five (5) members of the Council, unless otherwise determined by law; and (ii) the decision-making majority, concerning all cases related to the Chief State Prosecutor, chief prosecutors of prosecutor's offices, disciplinary matters, as well as the adoption of by-laws regulating the election of chief prosecutors and the appointment, transfer, discipline and promotion of prosecutors, is as much as the quorum, namely five (5) supporting votes, with the condition that two (2) of them represent votes of non-prosecutor members.

293. The Second Opinion of the Venice Commission, in evaluating the aforementioned solution, emphasized that it took into account the First opinion, which addressed, among other things, the risk of the great weight of the participation of the Chief Prosecutor in a Council dominated by prosecutors, the influence of the Chief Prosecutor in the decision-making of the KPC on disciplinary matters could be limited, through the determination of the qualified majority of five (5) members, including two (2) non-prosecutor members. The Venice Commission, in the Second opinion, had described this as a "*useful additional*" solution, in the context of reducing the influence of the Chief Prosecutor in the field of disciplinary matters" (see, Second opinion, paragraphs 14 and 33).

294. However, the Venice Commission had emphasized that the "special majority" criterion specified in Article 2/a requires attention because (i) as long as it does not allow the prosecutor members to decide alone and which is positive; on the other hand (ii) this mechanism prevents the possibility of continuous blockades, if the members of the Council appointed by the Assembly, vote together and block certain decisions, including the decision to elect the Chief State Prosecutor; thus as a consequence (iii) "*it would be advisable to provide for an anti-deadlock mechanism for such cases, which would permit the KPC to take such decisions if the prosecutorial and lay members cannot find a compromise. The specific parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders*" (see, Second Opinion, paragraph 15).

295. Subsequently, after the second Opinion of the Venice Commission, Article 13 of the contested Law was amended in the Assembly, adding an additional sentence to paragraph 2/a, through which the second round of voting in the Council was determined with the majority of two thirds (2/3) of the members of the Council. More precisely, according to this article amended in the Assembly, and which has not been subjected to further evaluation by the Venice Commission, decision-making in the Council would be organized with two rounds of voting, namely (i) in the first round with five (5) votes, provided that two (2) of them are non-prosecutor members; while (ii) in the second round of voting, with a qualified majority of two thirds (2/3) of the members of the Council.

296. The Court initially and in the context of the contested provision, recalls that the issues related to the quorum and decision-making have been regulated in different ways through the laws of 2010, 2015 and 2019, depending on the changes in the composition of the KPC. More precisely, (i) Article 12 (Residency of the Council, Quorum, and Public Nature of Meetings) of the 2010 Law, in a Council structure that consisted of five (5) prosecutor members and four (4) non-prosecutor members, had determined the quorum of six (6) members, while the decision-making, by a simple majority of the members present, unless the law had stipulated otherwise; (ii) Article 8 [untitled] of the Law of 2015 amending and supplementing the Law of 2010, in a structure of the Council consisting of ten (10) prosecutor members and three (3) non-prosecutor members, had determined the quorum of nine (9) members, while decision-making is by a simple majority of the members present, unless the law stipulated otherwise; and (iii) Article 15 (Quorum and Decision Making) of the 2019 Law, in a structure of the Council that consisted of ten (10) prosecutor members and three (3) non-prosecutor members, the quorum was again determined of nine (9) members, while the decision-making was by a simple majority of the members present, unless the law stipulated otherwise. In all three cases, the reference to the exception to the rule of decision-making by a simple majority, through Article 11 (Disciplinary Procedures for Council Members), Article 8 (Termination of the term) and Article 19 (Disciplinary Measures for Council Members) of the laws of 2010, 2015 and 2019, respectively, was related to the decision-making regarding the dismissal of the members of the Council, in which case a two-thirds (2/3) majority of the members of the Council was required. Similarly, in the case of the KJC, decisions are made by a simple majority of votes of the members present, unless the law provides otherwise, while based on Article 19 (Disciplinary Procedures for Council Members) of the Law on the KJC, this exception applies to the decision-making of the KJC on the dismissal of its member, in which case a qualified majority of two-thirds (2/3) of the members of the KJC is required.

297. Based on the aforementioned clarification, the Court notes that throughout the laws on the KPC, (i) the decision-making quorum has not always been consistent and has changed depending on the structure and composition of the KPC; (ii) unanimous decision-making is subject to a simple majority; and (iii) the only exceptions are related to the dismissal of the members of the KPC and the KJC, respectively, cases in which decision-making was subject to a qualified majority of two-thirds (2/3) of the members of the respective Councils.

298. Having said that, and in the context of the clarifications as above and the claims of the applicants and the respective responses of the interested parties, the Court will in the following examine two essential issues in the context of Article 13 of the contested Law, (i) quorum; and (ii) the decision-making majority, respectively.

(a) Regarding the quorum

299. Regarding the decision-making quorum, the Court initially emphasizes that (i) paragraph 1 of Article 4 (Independence and impartiality of Council members) of the Basic Law of 2019 foresees that the members of the KPC, i.e. regardless of the way of election, exercise their duties in an independent, professional and impartial manner, and this means that they do not in any way represent the interests of the authorities that elected them; (ii) the members of the KPC have an obligation to participate in the functions and decision-making of the KPC, just as all public officials of the Republic in the relevant institutions have this obligation and that this principle has already been clarified through the case law of the Court, including but not limited to the Court's Judgment in the case KO29/11, with Applicant *Sabri Hamiti and other Deputies* regarding the constitutional review of the Decision of the Assembly of the Republic of

Kosovo, no. 04-V-04, concerning the election of the President of the Republic of Kosovo, dated 22 February 2011 (hereinafter: Judgment of the Court in case KO29/11); (iii) based on Article 13 of the Basic Law, failure to exercise the function in accordance with the Constitution and the law, including failure to participate in the decision-making and function of the KPC, constitutes the basis for disciplinary procedures and dismissal from the KPC; and (iv) the current laws related to the functioning of the KPC and the KJC, although exceptionally, have also defined a decision-making quorum of two-thirds (2/3) as is the case with decisions on dismissal of members of the respective councils, including in cases where this majority has exceeded the proportion of prosecutor and non-prosecutor members.

300. Taking into account the aforementioned, including paragraph 4 of Article 110 of the Constitution, according to which, among other things, the rules of procedure of the KPC are regulated by law, the Court considers that the determination of the quorum to five (5) members of the Council, as specified in paragraph 1 of Article 13 of the contested Law, which amends and complements Article 15 of the Basic Law, does not infringe the independence of the KPC specified through paragraph 1 of Article 110 of the Constitution.

(b) Regarding the decision-making

301. In assessing the constitutionality of the provision defining the necessary majority for the decision-making of the Council, the Court should emphasize two issues: (i) the structure, namely the composition of the Council, including the way of electing non-prosecutor members by the Assembly; and (ii) the nature of the issues which are subject to the relevant decision-making in the Council.

302. In this context and initially, the Court recalls that paragraph 2/a of Article 13 of the Contested Law, stipulates decision-making (i) by five (5) votes of Council members, of which two (2) votes of non-prosecutor members in the first round of voting; and (ii) by a qualified majority of two-thirds (2/3) of the members of the Council in the second round of voting. The Court recalls that the solution regarding the second round of voting, was added through amendments in the Assembly, after the Second opinion of the Venice Commission, and which, in relation to the decision-making majority specified in the first round of voting, among other things, had emphasized the possibility of decision-making blockage in the KPC and consequently recommended the inclusion of an anti-deadlock mechanism, emphasizing that *"the specific parameters of such an anti-deadlock mechanism could be identified by the legislator in dialogue with the international partners and main stakeholders*" (paragraph 15).

303. In the context of the above-mentioned solution specified through paragraph 2/a of Article 13 of the contested Law, the Court notes that in fact, the decision-making of the Council is determined by a majority of two-thirds (2/3) in both rounds of voting. More precisely, (i) in the first round of voting for the issues specified in this article, a decision can be taken with five (5) votes, namely a two-thirds (2/3) majority in a composition of seven (7) members, a majority that must also include two (2) votes of non-prosecutor members; and (ii) in the second round of voting for the issues specified in this article, a decision can be taken again with five (5) votes, namely a two-thirds (2/3) majority in a composition of seven (7) members, a majority that implies also one (1) vote of non-prosecutor members.

304. Regarding the issues for which the Council decision-making is subject to a qualified majority, respectively five (5) votes or two-thirds (2/3) of the members of the Council, in two rounds of voting, namely "*voting for the positions of Chief State Prosecutor and Chief Prosecutors [of Prosecutor's Offices]*" and "*the adoption of sub-legal acts which*

regulate the appointment of chief prosecutors, and appointment, transfer, discipline and promotion of prosecutors", the Court emphasizes that both categories of cases constitute the most essential functions of the Council, as specified in the Constitution. More precisely the Court recalls that (i) election and proposal of the Chief State Prosecutor is one of the most basic functions of the KPC according to paragraph 7 of Article 109 of the Constitution; and (ii) issues pertaining to the recruitment, proposal, promotion, transfer and discipline of prosecutors, are also essential competences of the KPC, based on paragraph 1, 2 and 3 of Article 110 of the Constitution. The Court emphasizes that in exercising these constitutional competences, according to paragraph 1 of Article 110 of the Constitution and as explained above, the KPC has full constitutional independence.

305. Having said that, the Court notes that based on paragraph 4 of Article 110 of the Constitution, among other things, the organizational structure and rules of procedure of the KPC are to be regulated by a law adopted by the Assembly. This also includes the manner of decision-making of the Council, certainly, to the extent that constitutional guarantees for the decision-making independence of the KPC are not violated, as provided in paragraph 1 of Article 110 of the Constitution. Consequently, the Court must assess whether (i) determining the qualified majority of two-thirds (2/3) in two rounds of voting, on condition that in the first rounds there must be two (2) votes of non-prosecutor members and in the second rounds, one (1) vote of non-prosecutor members, in the context of the latter being elected with a simple majority vote in the Assembly and in relation to essential functions of the Council, as stipulated in paragraph 7 of Article 109 of the Constitution and paragraph 1, 2 and 3 of Article 110 of the Constitution, violates the independence of the functioning of the KPC, as defined through paragraph 1 of Article 110 of the Constitution.

306. In this context and initially, the Court, as explained in paragraphs 276-277 of this Judgment, recalls that the Constitution, but also the laws of the Republic of Kosovo, recognize the various decision-making majorities, including (i) the simple majority of the members present and voting; (ii) a simple majority of all members; (iii) a qualified majority of two-thirds (2/3) of the members present and voting; and (iv) qualified majority of two-thirds (2/3) of all members. From these categories of decision-making majorities, there are also exceptions, in which the decision-making is conditioned by the vote of certain members of the relevant institutions. In the context of the Constitution, and as explained above, there are two (2) categories of such exceptions. The first one is related to all those cases where decision-making is conditioned by the vote of representatives of non-majority communities in Kosovo's institutions, including but not limited to the cases clarified in this Judgment, which are related to constitutional changes or even the adoption of laws of vital interest. While the second one is precisely related to the decision-making in the Judicial Council with temporary composition, which also included prosecutor members and performed functions related to the prosecutorial system, until the establishment of the KPC, in accordance with Article 110 of the Constitution, through the Law of 2010. The decision-making of the KJC with temporary composition, during the supervised independence of the Republic of Kosovo, was conditioned by the participation and/or voting of one of the international members.

307. More precisely, the Court reiterates that Article 151 [Temporary Composition of the Judicial Council of Kosovo] of the Constitution, defined a temporary composition of the KJC, including, judges, prosecutors, members elected by the Assembly in the manner defined in this article, as well as two (2) international members chosen by the International Civilian Representative, according to the proposal of the European Mission for Security and Defense Policy, one of whom had to be a judge. The quorum and decision-making of the KJC with temporary composition was not specified in this

constitutional provision, however, based on the law that originates from the same, namely Law no. 03/L-123 on the Temporary Composition of the Judicial Council of Kosovo (hereinafter: Law on the Temporary Composition of the Council), namely Articles 4 (Membership of the Council), 5 (Composition of the Council during the appointment process) and 6 (Quorum and voting) of it, the quorum and decision-making of the Council were specified, determining that the same (i) in the first phase of the composition of the Council, was subjected to the simple majority, with the condition that one of the two (2) members chosen by the International Civilian Representative to be part of the majority; (ii) in the second phase of the composition of the Council, the quorum consisting of five (5) members, was subject to the condition of the participation of one of the two (2) members chosen by the International Civilian Representative, while voting was by simple majority and the vote of the Chairman of the Council was decisive; and (iii) in the third phase of the composition of the Council, the quorum consisting of seven (7) members, was subject to the condition of the participation of one of the two (2) members chosen by the International Civilian Representative, while voting was by simple majority and the Chairman of the Council had the deciding vote.

308. Based on the above, the Court notes that the function of the KPC since its establishment, recognizes two exceptions in terms of qualified decision-making and conditional on the relevant laws adopted under Article 151 and 110 of the Constitution, respectively. According to the former, temporary composition of the Kosovo Judicial Council, which prosecutors were also part of and until the ending of the supervised independence, the quorum and decision-making of the relevant Council was conditional on the participation and/or vote of international members. While according to the latter, namely the KPC laws of 2010, 2015 and 2019, respectively, adopted based on paragraph 4 of Article 110 of the Constitution, the only exception to the decision-making by simple majority was the voting for the dismissal of the Council members by a majority of two thirds (2/3) of the votes.

309. Furthermore, the Court emphasizes (i) that the proposal for the appointment and dismissal of the Chief State Prosecutor is a constitutional category, stipulated by paragraph 7 of Article 109 of the Constitution. Unlike other constitutional provisions in which the Constitution has specified the necessary majority for the election of members or/representatives of constitutional institutions, this is not the case with the Chief State Prosecutor; moreover (ii) in the constitutional amendments proposed by the Assembly in 2012, reviewed by the Court through Judgment in Case KO29/12 and KO48/12, the decision-making majority in the Council was determined to two-thirds (2/3) of the members of the Council, in the context of the repeated proposal of the Chief Prosecutor in the circumstances whereby the President would refuse, respectively return the proposed candidate for reconsideration to the KPC only once (see, paragraphs 210 to 212 of Judgment of the Court in Case KO 29/12 and KO48/12).

310. Having said that, the Court emphasizes that paragraph 2/a of Article 13 of the contested Law, and the corresponding qualified majority stipulated with regard to the decision-making about the essential functions of the Council, as specified in the Constitution, must be evaluated in the context of the structure and composition of KPC according to the contested Law.

311. In this context, the Court must return to the principles elaborated by the Venice Commission, in the relevant reports and opinions, including those for Kosovo, based on which, among other things, is emphasized that one of the most delicate issues of balancing the composition of prosecutorial councils is (i) the ratio between prosecutor and non-prosecutor members, including the method of their election; and (ii) decision-making in these councils, in order to avoid, on the one hand, the possibility that the member prosecutors manage themselves, which results in an institutional culture of

corporatism or such a perception, taking into account the "*hierarchical organization of the prosecutorial system and the culture of subordination*" and at the same time avoid the possibility that non-prosecutor members, who are elected by the ruling majority in the Assembly, block this decision (See, among others, the first Opinion on Kosovo, paragraph 35 and the Opinion of the Venice Commission on the Draft Amendments to the Law on State Prosecution Service and the Draft Law on Prosecutor's Office for Organized Crime and Corruption of Montenegro -CDL-AD(2021) 012, paragraph 36).

312. The Court also recalls that the compilation of the Venice Commission reports is related precisely to the manner of decision-making by qualified majority and the relevant anti-deadlock mechanisms, although mostly in the context of the necessary majority in the Assembly, which refers to the election of members of the Constitutional Court, the chief prosecutor, members of the prosecutorial and/or judicial council as well as the ombudsman, among other things, it was emphasized that "*institutions that cannot fulfil their constitutional objectives and give bad name to democracy. Hence, it is crucial to have anti-deadlock mechanisms*" (see the Summary of the Venice Commission pertaining to the qualified majorities and anti-deadlock mechanisms, p. 3); (ii) "*the Commission stressed the importance of providing for qualified majorities, but warned about the risk of stalemates and recommended to devise effective and solid anti-deadlock mechanisms, giving some examples of possible options (ibid.) and (iii) The Venice Commission is aware of the difficulty of designing appropriate and effective antideadlock mechanisms, for which there is no single model. One option is to provide for different, decreasing majorities in subsequent rounds of voting, but this has the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. Other, perhaps preferable, solutions include the use of proportional methods of voting, having recourse to the involvement of different institutional actors or establishing new relations between state institutions. Each state has to devise its own formula*" (ibid, p. 13).

313. With respect to the importance of the qualified majority, but also the necessary balance with its respective anti-deadlock mechanism, the Venice Commission had stressed that: "*Qualified majorities aim to ensure that a broad agreement is found in parliament, as they require the majority to seek a compromise with the minority. For this reason, qualified majorities are normally required in the most sensitive areas, notably in the elections of office-holders in state institutions. However, there is a risk that the requirement to reach a qualified majority may lead to a stalemate, which, if not addressed adequately and in time, may lead to a paralysis of the relevant institutions. An anti-deadlock mechanism aims to avoid such stalemate. However, the primary function of the anti-deadlock mechanism is precisely that of making the original procedure work, by pushing both the majority and the minority to find a compromise in order to avoid the anti-deadlock mechanism. Indeed, qualified majorities strengthen the position of the parliamentary minority, while anti-deadlock mechanisms correct the balance back. Obviously, such mechanisms should not act as a disincentive to reaching agreement based on a qualified majority in the first instance. It may assist the process of encouraging agreement if the anti-deadlock mechanism is one that is unattractive to both the majority and the minority* (see the Summary of the Venice Commission pertaining to the qualified majorities and anti-deadlock mechanisms, p. 13).

314. Based on these principles and always in the function of constitutional institutions, the Court emphasizes that (i) a qualified majority is always useful, but it must always be followed by an anti-deadlock mechanism, in order to ensure the regular functioning of the relevant institution; and (ii) the anti-deadlock mechanism should create incentive the attainment of this majority and not merely avoid it, so that the decision is taken, however, by a simple majority. Therefore, in the aforementioned Summary Report, the

Venice Commission recommends different solutions depending on the specifics of individual countries and institutions, including a qualified majority of three-fifths (3/5), proportional voting systems or even a simple majority. That being said, a two-thirds (2/3) majority is not what constitutes an anti-deadlock mechanism, but it is the initial majority that is then followed by the anti-deadlock mechanisms, in the form of a lower majority, or other mechanisms that unblock decision-making by the relevant institutions. Such an example is also reflected in the Constitution of Kosovo, i.e. its Article 86 [Election of the President], which foresees two (2) rounds of voting for the election of the President, for which a two-thirds majority (2/3) of all members of the Assembly is required, whereas in the end, the third round of voting stipulates the anti-deadlock mechanism by majority vote of all members of the Assembly.

315. In the case of the new paragraph 2/a, added through paragraph 2 of Article 13 of the contested law, a qualified majority of five (5) votes, i.e. a two-thirds majority (2/3) provides both in the first and second round of voting, despite the recommendation of the Opinion of Venice Commission, as clarified above, that the first round of voting is followed by an effective antideadlock mechanism In such circumstances, (i) neither prosecutors nor non-prosecutor members can decide for themselves; (ii) the non-prosecutor members must have the support of at least two (2) members of the prosecutor members to make a decision; while (iii) prosecutor members must have the support of at least one (1) non-prosecutor member in order to make a decision.

316. The Court notes that in the context of the structure/composition of the KPC according to the contested Law, (i) in case of simple majority voting, it would be possible for the prosecutor members to govern alone, and such a solution, also according to the Opinions of the Venice Commission, it would increase the risk of corporatization, taking into account the hierarchical nature of prosecutorial systems and potentially, the organizational culture subordinating to the Chief Prosecutor; while (ii) in case of voting by a qualified majority of two-thirds (2/3) and taking into account that the Court has already determined that the competence of the Ombudsperson to appoint/elect a KPC member is not in compliance with the Constitution, it would increase the risk of politicization of the KPC, because the decision-making would depend on the vote of at least one (1) non-prosecutor member elected by a simple majority in the Assembly. Therefore, as the Venice Commission emphasized, the Court underlines the fact that the decision-making manner of the KPC is related to its structure/composition, and that a "*pluralistic*" KPC means a composition of its own, which equally limits the possibility of prosecutor members to decide themselves, also limits the possibility that decision-making would depend on the non-prosecutor members elected by a ruling majority represented in the Assembly.

317. In this context, the Court reiterates that issues related to the organizational structure and rules of procedure, according to paragraph 4 of Article 110 of the Constitution, in the case of the KPC, are regulated by the law adopted by the Assembly of the Republic. Having said that, the Court emphasizes that the laws of the Assembly adopted based on paragraph 4 of Article 110 of the Constitution, cannot infringe the full independence of the KPC in the exercise of its functions, as stipulated by paragraph 1 of Article 110 of the Constitution. Such an approach has been emphasized by the Court repeatedly through its case-law, including the Judgment in Case KO219/19, in which the Court, among other things, has emphasized that (i) all powers without exception have a constitutional obligation to cooperate with each other and perform public duties for the general 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*"; (ii) 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; (iii) 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; and (iv) 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 (see, Judgment in Case KO219/19, cited above, paragraph 332).

318. Therefore, and based on the above elaborated principles and given clarifications, the Court recalls that in the context of the new Article 2/a, a two-thirds (2/3) majority is expected in both rounds of voting, for two categories of issues that form the core of the functions of the KPC, as stipulated by Articles 109 and 110 of the Constitution. This majority, in the first round of voting, is conditioned by two (2) votes, while in the second round only one (1) vote of non-prosecutor members. The latter, taking into account that the Court has already determined that the competence of the ombudsman to "*appoint/elect*" one member of the KPC is in violation with the Constitution, are elected by a simple majority of the deputies of the Assembly. In such circumstances, and in a composition of the KPC of only prosecutor members elected by the prosecutorial system itself and non-prosecutor members who are elected by the Assembly with a simple majority, any decision-making of the KPC in the categories of certain cases, depending on the order of voting, would be conditioned by the vote of one (1) or two (2) non-prosecutor members, who were elected by a simple majority in the Assembly. As a consequence, to the extent that the impossibility of prosecutors to govern alone, would be counter-balanced in this way, a goal that can be legitimate in order to counter-balance the possible influence of the chief state prosecutor, taking into account the structure and characteristics of the prosecutorial system, at the same time, the possibility of politicization of the Council in the performance of its most important functions could be increased, since its decision-making, in essence, would depend on one (1) non-prosecutor member, who is elected by the ruling majority represented in the Assembly.

319. Moreover, that (i) Article 2/a does not specify an anti-deadlock mechanism as the Venice Commission has also recommended, but keeps the necessary majority of decision-making of five (5) votes, respectively two-thirds (2/3) in the two rounds of voting; and (ii) any way of determining the Council's decision-making should be assessed in the light of its composition, avoiding both the governance of prosecutors and the politicization of the Council, with emphasis on its functionality, because the functioning or ineffectiveness of a constitutional institution such as the KPC has a tremendous impact on the rule of law and the functioning of the state of law. Therefore and based on the above clarifications, such a solution adopted through paragraph 2/a of the contested article, with respect to the most essential constitutional functions of the KPC and in the context of the proposed composition of the KPC and the manner of election of its non-prosecutor members would infringe the functional "*full independence*" of the Council, established by paragraph 1 of Article 110 of the Constitution, which would also violate the principles of separation and balance of powers, established by Article 4 of the Constitution.

320. Considering the aforementioned as a whole, the Court determines that paragraph 2/a of Article 13 of the Contested Law amending and supplementing Article 15 of the Basic Law is not in compliance with paragraph 1 of Article 4 and paragraph 1 of Article 110 of the Constitution.

5. Constitutional review of Article 16 [untitled] of the contested Law through which Article 19 (Disciplinary procedures for Council members) of the Basic Law is amended and supplemented, and Article 18 [untitled] of the contested Law through which is added Article 23/A (Judicial Protection) of the contested Law

321. The Court first emphasizes that it in view of their connection, it will review jointly Article 16 [untitled] of the contested Law amending and supplementing Article 19 (Disciplinary procedures for Council members) of the Basic Law is and amending Article 18 [untitled] of the contested Law, namely supplementing Article 23 (Appointment and re-appointment of prosecutors) of the Basic Law, namely adding Article 23/A (Judicial Protection) of the contested Law. As was also stated in the constitutional review of other provisions of the contested Law, the Court recalls that for the purposes of reviewing of the constitutionality of Articles 16 and 18 of the contested Law, respectively, the Court will first present: (i) the essence of the applicants' allegations and supporting comments submitted by the interested parties as well as the essence of arguments of the opposing party (see paragraphs 46-137 of this Judgment for a detailed description of the relevant arguments and counterarguments); and (iii) the Court's response regarding these allegations pertaining to the unconstitutionality of the relevant article.

(i) The essence of the allegations/arguments and counterarguments of the Applicants and of the interested parties

322. The applicants allege that through the amendment and supplementation of Article 19 of the Basic Law, the right of non-prosecutor members of the KPC to equality before the law is violated, among other things, because (i) the right to appeal in case of dismissal is recognized only to prosecutor members of the Council and not to non-prosecutor members, also violating the right to a legal remedy, as provided by Articles 32 and 54 of the Constitution for the non-prosecutor members of the Council because for the non-prosecutor members, the contested Law does not provide for the possibility of appeal before the Supreme Court as provided for prosecutor members; and (ii) as a consequence, it will make possible the subjecting of the same, namely the non-prosecutor members of the Council to external political pressures, more specifically from the parliamentary majority that elects them. In addition, the Applicants also allege a violation of the principles of legal certainty, emphasizing (i) the contradiction established in the relevant deadlines for the Supreme Court to decide on appeals of the prosecutors, because according to Article 23/A of the contested Law, the Supreme Court must decide within ninety (90) days, while according to Article 15 (Complaint against disciplinary decisions) of the Law on Disciplinary Liability of Judges and Prosecutors, which regulates the same matter, the Supreme Court must decide within thirty (30) days. Regarding this allegation, the KPC also states that Article 18 of the contested Law adding Article 23/A of the Basic Law providing that the prosecutor has the right to submit an appeal directly to the Supreme Court against the decisions of the Council for (i) dismissal; and (ii) "*decisions related to the evaluation of the performance of prosecutors, as well as disciplinary decisions, which as a consequence have the demotion in duty of prosecutors*", contradicts the Judgment of the Constitutional Court (without specifying the case), since the evaluation of the performance of prosecutors is the mandate of the Council and that with this provision this right is transferred to the Supreme Court.

323. On the other hand, the Ministry of Justice opposes the allegations, emphasizing, among other things, that the fact that the non-prosecutor members of the Council do not have the right to appeal directly to the Supreme Court regarding the decision on dismissal is justifiable because (i) the appointment procedure non-prosecutor members in this case

differs from the manner of appointment of prosecutor members, therefore also the procedure for their dismissal differs; (ii) it has been made possible for the prosecutor members to appeal directly to the Supreme Court, taking into account the unification with the regular disciplinary system for prosecutors according to the Law on Disciplinary Liability; and (iii) the contested Law has not limited the judicial protection to the non-prosecutor members of the Council as they can contest the decisions on dismissal before the regular courts through the administrative conflict mechanism or "*directly in the Constitutional Court*" Whereas, in relation to the contradicting deadlines set forth in Article 18 of the contested Law in relation to Article 15 of the Law on Disciplinary Liability of Judges and Prosecutors, the Ministry of Justice, among other things, emphasizes that (i) the same ninety (90) day deadline is also included in the Law on the Judicial Council; and (ii) it has formed a working group that will propose amending the deadline in the Law on Disciplinary Liability of Judges and Prosecutors to harmonize it with the ninety (90) day deadline, as the thirty (30) day deadline set forth in the abovementioned law is too short to decide on these appeals.

(ii) The assessment of the Court

a) Regarding the equality of members of the Council concerning legal remedy and judicial protection of rights

324. The Court first emphasizes that Article 19 (Disciplinary procedures for Council members) of the Basic Law, provides that (i) The Council shall determine and publish the rules and disciplinary procedures applicable to its members, including the procedures governing the investigation, suspension or recommendation for dismissal of any Council member; (ii) A committee established by the Council composed of three (3) members, one of whom shall be a prosecutor member of the Council, and two other prosecutors, shall decide on disciplinary measures and sanctions, including suspension and dismissal of any member of the Council; and (iii) on the recommendation of the Committee, a member of the Council may be dismissed by two-thirds (2/3) of the votes of the members of the Council; and (iv) One (1) member of the Council who has been dismissed has the right to appeal against the Council's decision directly to the Supreme Court within fifteen (15) days from the decision to dismissal. On the other hand, Article 10 (Procedure of proposal, election and dismissal of members elected by the Assembly) of the Basic Law, among other things, stipulates the procedure of dismissal of members of the Council elected by the Assembly, specifying that the dismissal of non-prosecutor members of the Council shall be done by the Assembly with the majority of votes of all members of the Assembly, upon the proposal of the respective Committee or Council. Based on paragraph 4 of Article 19 of the Basic Law, all members of the Council have the right to appeal to the Supreme Court, against the respective decision on dismissal. Moreover, based on paragraph 5 of Article 15 of the Law on Disciplinary Liability, judges and prosecutors have the right to appeal against the disciplinary decisions of the respective Councils, directly to the Supreme Court, which, within thirty (30) days, reviews and decides on the complaint. The Court also notes the accentuated role of the Ombudsperson in the disciplinary proceedings as stipulated through the Law on Disciplinary Liability, including (i) the right of natural and legal persons to file a complaint against a judge or prosecutor with the Ombudsperson; (ii) the duty of the competent authority to notify the Ombudsperson in cases where the alleged disciplinary violation contains elements of a criminal offense; (iii) the competence of the Ombudsperson to request the Council to initiate disciplinary investigations against a Court President or the Chief Prosecutor or judges and prosecutors in the circumstances specified in this law; and (iv) the right to appeal to the Supreme Court for the relevant Council's failure to act as specified in the law.

325. Through the amendments and supplements to the Basic Law, through Article 16 of the contested Law, respectively, (i) the majority required for the dismissal of the prosecutor members of the Council is defined, namely the majority of two thirds (2/3) of the members of the Council for the dismissal of the KPC prosecutor member, but not defining the required majority for the recommendation of the Council's non-prosecutor member, thus limiting the proposal for the dismissal of the non-prosecutor member only to the recommendation of the Committee of three (3) members; (ii) defines the required majority in the Assembly for the dismissal of the non-prosecutor member of the Council to the majority of the deputies present and voting, unlike the Basic law in which this majority is defined as the majority of votes of all the deputies; (iii) in addition to the Assembly, it also gives the Ombudsperson the competence to dismiss the respective member of the Council by his/her decision upon the recommendation of the three (3) member Committee, which is a competence of the Ombudsman that has already been dealt with in this Judgment; and (iv) provides the right to appeal to the Supreme Court only to the prosecutor members of the Council, thereby excluding non-prosecutor members from this right, and not providing explicitly the legal remedy available to them.

326. The Court notes that such a distinction between prosecutor and non-prosecutor members of the KPC in terms of available legal remedies in case of their dismissal as members of the Council, was not made in the previous laws, namely in the Laws of 2010, 2015 and in the Basic Law of 2019. According to all three of these laws, KPC members, without distinction, have been provided direct access to the Supreme Court to appeal the decision, namely the proposal on dismissal as members of the KPC.

327. More precisely, the 2010 Law, through Article 11 (Disciplinary Procedures for Council Members), specified, among other things, that the members of the KPC, regardless of whether they are a prosecutor or non-prosecutor member, can be dismissed upon the recommendation of the committee established by the Council, by two-thirds (2/3) vote of the KPC members. Paragraph 4 of Article 11 (Disciplinary Procedures for Council Members) of the 2010 Law provided for the right of Council members, without distinction, to appeal against the Council's decision on dismissal, directly to the Supreme Court, within fifteen (15) days from the day of receipt of the dismissal decision. On the other hand, the 2015 Law amended and supplemented the 2010 Law, among other things, making a difference regarding the procedure for the dismissal of prosecutor and non-prosecutor members of the KPC. More precisely, according to Article 6 [untitled] of the Law of 2015, which supplemented and amended Article 8 (Termination of Mandate) of the Law of 2010, the prosecutor members, who are referred to by this law in this article as "*Council members*", continued to be dismissed according to the same mechanism, that is, by the a two-thirds (2/3) vote of the Council members, whereas, the three (3) non-prosecutor members elected by the Assembly were dismissed on the proposal of the KPC and by the majority of votes of all deputies of the Assembly. Finally, the 2015 Law does not provide any amendment or supplement to Article 11 of the 2010 Law as a basic law, which also provided for the right of Council members, without distinction, to appeal against the Council's decision on dismissal, directly to the Supreme Court, within fifteen (15) days from the day of receipt of the dismissal decision.

328. From the foregoing, the Court notes that (i) the Laws of 2010, 2015 and 2019 made available to the members of the KPC, without distinction, the legal remedy of appeal against the decision on dismissal as a member of the Council, directly to the Supreme Court, within a fifteen (15) days from the day of receipt of the decision; (ii) despite the fact that the 2015 Law provided for different procedures for the dismissal of prosecutor and non-prosecutor members of the KPC, the legal remedy against the decision on dismissal, without specifying whether it was the decision on dismissal by the KPC or by the Assembly, was the same for both categories of members; and (iii) The laws of 2015

and 2019, respectively, stipulated the required majority in the Assembly for the dismissal of non-prosecutor members of the KPC to the majority of votes of all the deputies of the Assembly, as opposed to the majority of the votes of the deputies who are present and voting, as provided by the contested Law.

329. Regarding this issue, the Court notes that the two Opinions of the Venice Commission on Kosovo with respect to the contested Law did not deal with the issue of the right to appeal of prosecutor and non-prosecutor members of the Council in case of their dismissal. Other Opinions of the Venice Commission, including the Compilation of Opinions and Reports of the Venice Commission concerning Prosecutors CDL-PI(2022)23 (pages 45 and 110), while they do not specifically define any requirement for the judicial institution that is to examine appeals against decisions on the dismissal of the Council members, specifically require that the appeal related to the dismissal of members of the prosecutorial councils be examined by a court, which means that in cases of dismissal of members of the prosecutorial councils, judicial protection must be provided. Such an issue was also considered in the respective Opinions on Bosnia and Herzegovina and Montenegro, clarifying in the case of the former, among others, that "an appeal to a court of law would be essential, at least for cases where a serious penalty was imposed.". (see the Opinion of the Venice Commission on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina CDL-AD(2014)008, of 24 March 2014, paragraph 110), while in the latter case, among others, that "*under the present Article 32(4), the decision of the Prosecutorial Council on a complaint is final and cannot be challenged in court. The amendment introduces an appeal to an administrative court against a decision of the Prosecutorial Council. This is an improvement, which is in line with the practice in many European countries* (see the Opinion of the Venice Commission on the Draft Amendments to the Law on the State Prosecutor of Montenegro, CDL-AD(2008)005, of 18 March 2008, paragraph 37).

330. Based on the above clarifications, it is not contentious that the members of the respective Councils should have the right to judicial protection of their rights in case of decisions/proposals on dismissal. Contentious remains whether Article 16 of the contested Law treats prosecutor and non-prosecutor members of the KPC equally in terms of the right to a legal remedy, namely to judicial protection of rights. In the context of this matter, the Court also points out that it is not contentious that the contested Law provides legal remedies against the decisions of the Council to prosecutor members of the Council who are dismissed, directly to the Supreme Court, while it is silent regarding the right to appeal against decisions on the dismissal of non-prosecutor members of the Council by the Assembly and/or the Ombudsperson, respectively. Having said that, the fact that the contested Law is silent regarding the legal remedy against the dismissal of non-prosecutor members, does not necessarily mean that they cannot challenge the decisions on their dismissal. In this respect, the Court has reiterated in its case-law that "*actions of public administration bodies"* can be challenged in administrative proceedings, as established by Law no. 03/L-202 on Administrative Conflicts, as clarified through its case-law, including but not limited to, recently, in Court cases KI57/22 and KI79/22, Applicants *Shqipdon Fazliu and Armend Hamiti*, Resolution on Inadmissibility, of 4 July 2022; and the Judgment of the Court in case KI214/21, Applicant *Avni Kastrati*, Judgment of 7 December 2022.

331. In this context, as it pertains to the non-prosecutor members, based on its case-law referred to above, the Court must reiterate that (i) the legal remedy exists; and (ii) that the same is an effective legal remedy, as long as the applicants do not argue, including through the case law of regular courts, that this is not the case. Therefore, the Court emphasizes that in the circumstances of Article 16 of the contested Law, the right to legal remedy and judicial protection of the rights guaranteed through Articles 32 and 54 of the Constitution, respectively, is not necessarily contentious, but contentious

remains whether prosecutor members and non-prosecutor members have been treated equally in terms of the right to a legal remedy in accordance with the right to equality before the law, as specified in Article 24 of the Constitution.

332. The Court emphasizes that its case-law in the context of Article 24 of the Constitution, including in conjunction with Article 14 (Prohibition of discrimination) of the ECHR and Article 1 of Protocol no. 12 (General prohibition of discrimination) to the ECHR, is consolidated based on the relevant case-law of the ECtHR and has been clarified, among others, through Court Judgments in cases (i) KO01/17, applicant *Aida Dërguti and 23 other Deputies of the Assembly*, Constitutional review of the Law on amending and supplementing Law no. 04/L-261 on War Veterans of the Kosovo Liberation Army, Judgment of 28 March 2017; (ii) KO157/18, applicant *the Supreme Court*, 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; (iii) KO93/21, applicant *Blerta Deliu-Kodra and 12 other Deputies of the Assembly of the Republic of Kosovo*, Constitutional review of the Recommendations of the Assembly of the Republic of Kosovo, No. 08-R-01, of 6 May 2021, Judgment of 28 December 2021; and (iv) KO190/19, applicant *Supreme Court*, evaluation of the constitutionality of Article 8, paragraph 2, of Law no. 04/L-131 on Pension Schemes Financed by the State in conjunction with Articles 5 and 6 of the Administrative Instruction (MLSW) No. 09/2015 on Categorization of Beneficiaries of Contribute Paying Pensions According to Qualification Structure and Duration of Payment of Contributions, Judgment of 30 December 2022.

333. Through these Judgments, it has been clarified that the test applied to determine whether an act issued by a public authority is in violation of the right to equality before the law as guaranteed by Article 24 of the Constitution, includes initially an assessment (i) whether there was "*a difference in treatment*" of persons in "*analogous or relatively similar situations*" or failure to treat persons differently in relatively different situations; and if this is the case, (ii) assessing whether such difference or lack of difference is objectively justified, namely whether the limitation is "*prescribed by law*", pursued "*a legitimate aim*" and the measure taken was "*proportional*" to the purpose that was intended to be achieved.

334. In the circumstances of this particular case, it is not contentious that the prosecutor and non-prosecutor members of the KPC are in "*analogous situations or relatively similar situations*", because (i) they are all members of the same Council; (ii) exercise the same functions as defined in the Constitution and the relevant law on the KPC; and (iii) have the obligation to exercise their functions in an independent, professional and impartial manner and in the interest of the functioning of the KPC and not the authorities that appointed/elected them, regardless of the fact that the method of their election is not the same. Moreover, it is also not contentious that in the circumstances of the prosecutor and non-prosecutor members of the Council, there is a *"difference in treatment*" in the context of the legal remedy available to contest the respective dismissal decisions. The first group, namely the prosecutor members, has been given direct access to the Supreme Court, which is obliged to decide within the deadlines specified in the applicable law, while the second group, namely the non-prosecutor members, although they are not denied the right in the legal remedy, the latter in their case is the administrative dispute initiated in the Basic Court without a specified deadline for the relevant decision-making. However, as clarified in the judicial practice of the Court and cited above, the fact that there is a "*difference in treatment*" does not necessarily result in a violation of Article 24 of the Constitution, because it must first be assessed whether this "*difference in treatment*" has "*an objective and reasonable justification*", and more precisely if (i) it is "*prescribed by law*"; (ii) pursues "a *legitimate purpose*"; and (iii) is *"proportional*".

335. In assessing whether the "*relevant difference in treatment*" is "*prescribed by law*", the Court recalls that the right to a legal remedy directly in the Supreme Court has been recognized to the prosecutor members of the Council through paragraph 5 of Article 16 of the contested Law, but such a right has not been recognized to the non-prosecutor members of the Council, who, although in "*similar or analogous*" circumstances to the prosecutor members, must use the right to appeal through other legislation in force while addressing the Basic Court to contest the respective dismissal decisions, therefore, the difference in treatment between the two aforementioned categories of KPC members is "*prescribed by law*", namely in paragraph 5 of Article 16 of the contested Law. Consequently, and in the following, the Court must proceed with the assessment of whether the above-mentioned "*difference in treatment*" and "*prescribed by law*" pursued a *"legitimate purpose*", and if this is the case, it must proceed with the assessment of whether the measures undertaken were "*proportional*" with the aim of achieving the goal.

336. In the context of assessing whether the relevant purpose in the "*difference in treatment*" between prosecutor and non-prosecutor members of the KPC pursues "*a legitimate purpose",* the Court emphasizes that based on paragraph 3 of Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution but also the principles stemming from the judicial practice of the ECtHR and the Court, it is determined that the limitations of the rights and freedoms guaranteed by the Constitution "*cannot be made for purposes other than those for which they are defined*". According to this paragraph, as interpreted through the Court's consolidated practice and cited above, in principle, the purpose of a limitation must be clearly defined and no public authority may limit any right or freedom on the basis of a purpose other than what is already defined in the law in which the relevant limitation is allowed/specified. In principle, and in the context of the circumstances of the concrete case, based on this case law, it is up to the Ministry of Justice as the sponsor of the contested Law and the Assembly that approved the contested Law to show that the difference was justified (see, *inter alia*, ECtHR case, *D.H and others vs Czech Republic*, no. 57325/00, Judgment of 13 November 2007, paragraph 177; see also the Court case KO190/19, cited above, paragraphs 206 and 208 and references therein). For this purpose, the Court recalls that in its response submitted to the Court, the Ministry of Justice had emphasized that (i) prosecutor members were given the possibility to appeal directly to the Supreme Court, taking into account the unification with the regular disciplinary system for prosecutors according to Article 15 of the Law on Disciplinary Liability, which stipulates that prosecutors have the right to appeal directly to the Supreme Court against disciplinary decisions; and (iii) The contested Law has not limited the judicial protection to the non-prosecutor members of the Council since the same can contest the dismissal decisions in regular courts *"through administrative conflict or directly in the Constitutional Court"*.

337. However, neither in the answers received by the Ministry of Justice nor by the contested Law itself does it appear to have a "*legitimate purpose*" that justifies the impossibility of the non-prosecutor members of the Council to appeal directly to the Supreme Court in case of their dismissal same as their colleague prosecutors. In the context of the response of the Ministry of Justice, the Court emphasizes that (i) as long as the legal remedy determined through the administrative conflict is an effective legal remedy and consequently (ii) any approach of individuals to the Constitutional Court is subject to the obligation to exhaust this legal remedy, as has been continuously clarified through the case law of the Court, the existence of this legal remedy does not constitute a legitimate justification for the "*difference in treatment*" between prosecutor and non-prosecutor members of the KPC. In this context, the Court reiterates that all members of the KPC, regardless of whether they are prosecutors or non-prosecutors, exercise the

same functions and have the same obligations and rights during the exercise of their mandate as members of the KPC and they have no obligation towards the institutions that have elected them, but only the obligation to exercise their function in accordance with the Constitution and applicable laws of the Republic of Kosovo.

338. As a consequence, based on the above, and taking into account that the Court already found that the "*difference in treatment*" between the two categories of Council members, namely prosecutors and non-prosecutors, does not pursue a "*legitimate purpose*", based on case law of the ECtHR and that of the Court, the analysis of the proportionality between the means used and the goal to be achieved is unnecessary (see, inter alia, Court case KO01/17, cited above, paragraph 99; and KO157/18, cited above, paragraph 114).

339. Finally, the Court finds that paragraph 5 of Article 16 [untitled] of the contested Law on amending and supplementing Article 19 (Disciplinary Procedures for Council members) of the Basic Law, is not in compliance with Article 24 of Constitution.

b) Regarding the legal certainty in the context of the legal remedy and the judicial protection of the rights of the prosecutors against the decisions of the Council

340. The Court also recalls that the Applicants allege a violation of the principles of legal certainty, considering that Article 18 of the contested Law on supplementing the Basic Law, through which Article 23/A regarding judicial protection is added, is in contradiction with Article 15 of the Law on Disciplinary Liability and that both articles regulate the same issues in a different way and based on different deadlines, respectively contradictory.

341. In this context, the Court firstly recalls that the prosecutors' right to appeal against the decisions of the Council is not defined through the Basic Law, but is regulated in detail through the Law on Disciplinary Liability. The latter, in Article 1 (Purpose and scopes) specifies that the relevant law defines (i) disciplinary offences; (ii) the procedure of initiating the investigation of alleges disciplinary violations of judges and prosecutors; (iii) disciplinary procedure before the Kosovo Judicial Council and the Kosovo Prosecutorial Council; and (iv) disciplinary sanctions and legal remedies related to disciplinary offences before the Supreme Court. Moreover, in its Article 15, it specifies, among other things, that (i) the parties, namely prosecutors and judges, 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 receipt of the decision; and (ii) the Supreme Court, in a trial panel composed of three members, elected by the President of the Supreme Court shall, within thirty (30) days, review and decide on the appeal.

342. The Court recalls that Article 18 of the contested Law, which adds Article 23/A in relation to the Basic Law, determines that the prosecutor has the right to submit a direct appeal to the Supreme Court against (i) the decision of the Council on dismissal; and (ii) "*decisions related to the performance assessment of prosecutors*" as well as (iii) *"disciplinary decisions, which as a consequence have the demotion of prosecutors*" and regarding which, the Supreme Court decides within ninety (90) days from the receipt of the appeal.

343. The Court, also, recalls that this issue was not specifically addressed by the two Opinions of the Venice Commission regarding the contested Law, however, the first Opinion regarding the contested Law states that "*Some of these amendments are clearly positive. Thus, Article 23A introduces the right of appeal before the Supreme Court against decisions on appointment or reappointment of the prosecutors."* That being said, these rights of prosecutors to appeal directly to the Supreme Court have been

specifically prescribed by the respective laws over the years, including the Law on Disciplinary Liability of Judges and Prosecutors.

344. The Court recalls that taking into account the specific regulation of the latter, the purpose of the new Article 23/A of the contested Law is unclear. The same is not related to the right to appeal of members of the KPC, but of prosecutors in general, these rights specified by the Law on Disciplinary Liability of Judges and Prosecutors. The only differences that Article 23/A defines are (i) the change of the relevant deadline for the Supreme Court's decision-making in case of relevant appeals from thirty (30) days as defined in paragraph 5 of Article 15 of the Law on Disciplinary Liability, to ninety (90) days under the condition that it is not *"provided otherwise by law*"; (ii) determining the mechanism of the appeal to the Supreme Court, regarding *"decisions related to the evaluation of the performance of prosecutors*", this is currently the competence of the KPC according to paragraph 3 of Article 27 (Performance assessment of Prosecutors) of the Basic Law; and (iii) the determination of the mechanism of appeal to the Supreme Court regarding "*disciplinary decisions that have as a consequence the demotion of prosecutors"* which, although it is no longer formulated in the same language, coincides with the disciplinary measure defined in Article 7 (Disciplinary Sanctions) of the Law on Disciplinary Liability, namely *"temporary or permanent transfer to a lower court or prosecution office"*.

345. In the joint interpretation of Article 23/A and the relevant provisions of the Law on Disciplinary Liability, its relevant Articles 7 and 15, but also Article 27 of the Basic Law and taking into account the definition of Article 23/A of the Contested Law that the deadlines of this law apply only if "*provided otherwise by law*", it follows that (i) the ninety (90) day deadline defined in Article 23/A applies only to *decisions related to the assessment of the performance of prosecutors*" as defined in paragraph 1 of Article 23/A of the contested Law, while for other disciplinary decisions is subject to different, respectively conflicting decision-making deadlines, namely ninety (90) days according to Article 23/A of the contested Law and thirty (30) days according to Article 15 of the Law on Disciplinary Liability.

346. In the context of the above clarification, the Court recalls Article 32 [Right to Legal Remedies] and 54 [Judicial Protection of Rights] of the Constitution. The first determines that "*every person has the right to use legal remedies against judicial and administrative decisions that violate his/her rights or interests in the manner defined by law*."; while the second, that "*Everyone enjoys the right to judicial protection in case of violation or denial of any right guaranteed by this Constitution or by law, as well as the right to effective legal remedies if it is established that such a right has been violated*." As defined in the case-law of the Court and which is based on the case-law of the ECtHR, in principle and in their entirety, Article 54 of the Constitution on the judicial protection of rights, Article 32 of the Constitution on the right to a legal remedy and Article 13 of the ECHR on the right to an effective remedy, guarantee: (i) the right to judicial protection in case of violation or denial of any right guaranteed by the Constitution or by law; (ii) the right to use a legal remedy against judicial and administrative decisions which violate the guaranteed rights in the manner defined by law; (iii) the right to effective legal remedies if it is established that a right has been violated; and (iv) the right to an effective solution at the national level if a right guaranteed by the ECHR has been violated (see, in this context and among others, Court case KI48/18, applicants: *Arban Abrashi and the Democratic League of Kosovo*, Judgment of 23 January 2019, paragraph 198).

347. In the context of the right to legal remedies, the Court emphasizes that the principle of legal certainty, which is embodied in all the articles of the ECHR, requires that rights and obligations be "*prescribed by law*". However, *"prescribed by law"* requires that, in

addition to the measure taken having a legal basis in state legislation, it also requires that the relevant provisions of the law be *"clear, accessible and predictable"* (see, in this context, the cases ECtHR, Beyeler v. Italy, No. 33202/96. Judgment of 5 January 2000, para. 109; Hentrich v. France, No. 1361/88, Judgment of 22 September 1994, para. 42; and 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 110). The Court also notes that according to the Rule of Law Checklist of the Venice Commission, *"foreseeability of the law"* is an essential part of the principle of legal certainty. In this context, "*foreseeability*" means, among other things, that the law must be formulated with appropriate precision and clarity to enable legal entities to regulate their behavior in accordance with the law. (see, *Rule of Law Checklist of the Venice Commission*, CDL-Ad(2016)007, Strasbourg, 18 March 2016, paragraphs 58 and 59).

348. Having said this and taking into account the aforementioned principles related to the " *foreseeability*" of the law and the importance of this concept for the principle of legal certainty, the Court reiterates that the joint reading of Article18 of the contested Law in conjunction with Articles 7 and 15 of The Law on Disciplinary Liability and Article 27 of the Basic Law, results that in the case of disciplinary decisions/sanctions specified in Article 7 (Disciplinary Sanctions) of the Law on Disciplinary Liability, with the exception of the dismissal proposal, the decision-making period in the Supreme Court is clear and the same is thirty (30)) days based on paragraph 5 of article 15 of the Law on Disciplinary Liability.

349. Having said that, both laws, namely Article 23/A of the contested Law and Article 15 of the Law on Disciplinary Liability, define two different deadlines regarding the disciplinary decisions, including the proposals of the Council for the dismissal of prosecutors, because (i) the proposal for dismissal is a disciplinary measure determined through Article 7 of the Law on Disciplinary Liability and consequently appealable based on Article 15 of the aforementioned Law and in relation to which the Supreme Court is obliged to decide within thirty (30) days; while (ii) "*decision of the Council on dismissal*", as referred to in Article 23/A of the contested Law, which in fact should have been formulated as the Council's proposal for dismissal of prosecutors because the Council has only the power to propose the respective dismissal of prosecutors according to the Constitution, including according to paragraph 18 of Article 84 of the Constitution, in addition to the thirty (30) day deadline defined in the Law on Disciplinary Liability of Judges and Prosecutors, it has also determined the (90) day deadline for the Supreme Court's decision-making in the context of the same nature of decision-making; and (iii) furthermore, while Article 23/A has defined the possibility of appeal to the Supreme Court regarding the "*decision regarding performance assessment of prosecutors"*, Article 27 of the Basic Law defines the same as the competence of the KPC.

350. Based on the aforementioned principles regarding the principle of legal certainty, and the importance that the relevant provisions of the law are "*clear, accessible and predictable*", according to the principles summarized by the relevant reports of the Venice Commission, but also the case law of the ECtHR, the Court assesses that the formulation of Article 23/A of the contested Law results in contradictory deadlines and powers as explained above, and as a consequence, among others, prevents legal entities, including the Supreme Court but also the KPC, to regulate their behavior in accordance with the law.

351. Finally and as a consequence, the Court concludes that Article 18 of the contested Law, supplementing, respectively adding, Article 23/A to the Basic Law, is not compatible with Article 32 and Article 54 of the Constitution.

6. Constitutional review of Article 20 [untitled] of the contested Law on Amending and Supplementing Article 36 (Continuance of duty) of the Basic Law also in conjunction with paragraph 3 of Article 11 [untitled] of the contested Law on Amending and Supplementing Article 13 (Termination of the term) of the Basic Law

352. Initially and for the purposes of reviewing the constitutionality of Article 20 of the contested Law, the Court will present: (i) the essence of the applicants' allegations and supporting comments submitted by the interested parties as well as the essence of the arguments of the opposing party (see paragraphs 46-137 of this Judgment for a detailed description of the relevant arguments and counterarguments); and (ii) the Court's response regarding these allegations pertaining to the unconstitutionality of the relevant article.

(i) The essence of the allegations/arguments and counterarguments of the Applicants and of the interested parties

353. The applicants allege that Article 20 [untitled] of the contested Law is in contradiction with Articles 4, 32, 54 and 110 of the Constitution, because the same and in essence, (i) by changing the structure of the KPC, including the termination of the mandate of KPC members and their replacement with non-prosecutor members elected with a simple majority by the Assembly, in fact, is intended to influence the election of the Chief State Prosecutor for the next seven (7) year mandate; (ii) through the arbitrary termination of the mandate, it is violated the constitutional, institutional and functional independence of the KPC, as stipulated by Article 110 of the Constitution, which provides that the KPC is a "*fully independent institution in the performance of its functions in accordance with law*"; (iii) terminating the mandate of the KPC members in an arbitrary manner and exceeding all the bases and criteria laid down through Article 13 (Termination of the mandate) of the Basic Law, namely the law in force; (iv) is contrary to the UN Basic Principles on the Independence of the Judiciary, the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2010) 12, the basic principles on the independence of the judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders by Resolutions 40/32 of the General Assembly of 29 November 1985 and 40/146 of 13 December 1985 as well as the case-law of the ECtHR, among others, in the cases *Baka v. Hungary* and *Grzeda v. Poland* and the Opinions of the Venice Commission, including Opinion no. 811/2015 related to the draft amendments to the Law on Prosecutors of Georgia, but also the case-law of the Court, including Judgment KO29/12 and KO48/12 regarding the issue of the security of mandates; (v) it is in contradiction with the Opinion of the Venice Commission on Kosovo, according to which, "*Replacement of the currently sitting members with the new ones may be exceptionally justified only if it leads to a major improvement in the current system (in particular, its depoliticisation).*", but that according to the Applicants "*The political assessments or the Government's perceptions of the work and image of the KPC cannot be transformed into legal norms and the mandate of the majority of the current prosecutorial members of the KPC (including the current non-prosecutor member) be terminated without reason, because this would constitute an extremely dangerous practice for the constitutional, institutional and functional independence of the KPC, as it would serve any new government and parliamentary majority, the intervention in the structure, composition and decision-making of this institution, according to its assessment and perception of KPC*"; and (vi) it reduces the number of prosecutor members who are elected by the prosecutors themselves from nine (9) to three (3) members, and through a procedure of drawing lots organized by the President of the Supreme Court together with the Chairperson of the Judicial Council and the

Ombudsperson according to the provisions of the contested Law, it terminates the acquired five (5) year mandates for which they were elected, , thereby also violating their right to a legal remedy and judicial protection of rights, as guaranteed by Articles 32 and 54 of the Constitution, respectively. KPC and Chamber of Advocates supports the Applicants' allegations.

354. The Ministry of Justice, on the other hand, regarding the aforementioned allegation, among other things, states that (i) the mandate of the KPC members is not a constitutional but a law category; (ii) that the judicial power is different from the prosecutorial power and this is mentioned in the Court's Judgment in Case KO29/12 and KO48/12, referred to by the applicants; (iii) the continuation of the current composition of the KPC "*with the risk of corporatization and with an imbalance of 10 prosecutor members and only 1 non-prosecutor member for another [four] 4 years, would prevent the KPC from implementing its constitutional competences*"; (iv) also based on the evaluation of the Venice Commission, the principle of "*security of tenure*" is not absolute and therefore the termination of the mandate of the members of the Council can be justified if *it leads to a significant improvement of the overall system*" and in this sense "*there is no logic for the law that enters into force now to wait another [four] 4 years for implementation*"; (v) none of the members of the KPC whose mandate is terminated by drawing lots is not restricted in his/her right to use legal remedies related to the termination of his/her mandate; and finally (vi) "*the premature termination of the mandate to some of the current members of the KPC does not violate Article 110 of the Constitution. On the contrary, the continuation of the current composition of the KPC with the risk of 'corporatism' and with an imbalance of 10 prosecutor members and only 1 non-prosecutor member for another 4 years, would prevent the KPC from implementing its constitutional powers".*

(ii) The assessment of the Court

355. In the context of the Applicants' allegations and the respective arguments and counter-arguments, the Court first notes that based on Article 12 (Mandate of the Members of the Council) of the 2019 Law, namely the Basic Law, the members of the Council shall remain in office for a five (5) year mandate, without the right of re-election and the term of office of the elected members of the Council commences from the date of their election as members of the Council. On the other hand, and as explained in the general principles part of this Judgment, based on Article 13 (Termination of the term) of the Basic Law, the mandate at the KPC may end upon (i) death; (ii) loss of capacity to act; (iii) repeated failure to attend the Council activities for more than three (3) months, without certified justification; (iv) termination of the status on which the appointment is based; (v) expiration of the mandate; (vi) resignation, by submitting to the Council a notice of thirty (30) days in advance; (vii) reaching the retirement age; and (viii) when convicted for a criminal offense, with the exception of criminal offenses committed by negligence. Moreover, and based on the same article, the Basic Law determines the possibility of dismissal before the expiration of the mandate in two circumstances, namely if (i) he/she fails to perform the function of the Council member in accordance with the Constitution and the law; and if (ii) he/she exercises the function contrary to the duties and responsibilities. In addition, and despite the fact that the 2019 Law changed the structure of the KPC in the manner already clarified by this Judgment, its Article 36 (Continuance of duty), specified that the elected members of the Council, who exercise this function at the time of entry into force of this law, may remain in office until the end of their current mandate.

356. The Court recalls that initially through Article 4 of the first draft proposed by the Government to supplement and amend the Basic Law and which was subject to the first analysis of the Venice Commission, as a result of which the Venice Commission drafted

the first Opinion, it was proposed the amending/supplementing of Article 12 of the Basic Law, amendments which, in essence, did not affect its content. Having said that, (i) Article 14 of the first proposed draft proposed the amending and supplementing Article 36 (Continuance of duty) of the Basic Law, determining that the members of the KPC would continue to exercise the functions in which they were elected until they have been replaced according to the provisions of the Contested Law; and (ii) article 15 of the first proposed draft, adds three more articles, articles 36/A, 36/B and 36/C, respectively, according to which, among other things, the procedure of election of new members will be initiated by the Assembly through a call for applications thirty (30) days after the entry into force of the law, while the prosecutor members elected by the relevant prosecutions will be elected only after the election of the non-prosecutor members by the Assembly and until the prosecutor members are elected, the KPC will function with four (4) non-prosecutor members elected by the Assembly.

357. The Court emphasizes that in the context of the contested provision, the First Opinion of the Venice Commission also addresses the premature termination of the members' mandate, as well as the replacement of the existing members of the KPC through the proposed amendments and supplements of the draft-law. Regarding the former , the relevant Opinion, in principle, clarifies that (i) the early termination of the mandate of a member of a council (where it is not due to the voluntary resignation, abolition of the whole institution, or to other similar reasons) should always be related to an identifiable wrongdoing or the failure to perform his or her duty (see, First Opinion of the Venice Commission, paragraph 54); and that (ii) Members of the KPC should not be "*impeached*" simply because the parliamentary majority or their colleagues disapprove of the decisions they take (see, First Opinion of the Venice Commission, paragraph 54). Whereas, pertaining to the replacement of the current members of the KPC, the First Opinion of the Venice Commission initially states that the Government's proposal that the establishment of the proposed KPC take place in three phases, the first of which determines that the KPC will initially operate with only four (4) non-prosecutor members until the new prosecutor members are elected, and who can "*decide on the election of the Chief Prosecutor*", among other things, raises concerns, emphasizing that "*the proposed amendments run counter international and European standards: they effectively remove prosecutors from the governance of the system at the most critical moment when both the Chief Prosecutor and the prosecutorial members are to be elected (*see, First Opinion of the Venice Commission, paragraph 58).

358. Moreover, the first Opinion also deals with the proposal of the draft-law regarding the premature termination of the mandates of the current members of the KPC. In this respect, the First Opinion of the Venice Commission, among other things, emphasized that (i) the Constitution does not fix the term of office of the members of the KPC, but authorizes it to be determined by law (see, First Opinion of the Venice Commission, paragraph 59).; however, (ii) this does not mean that the legislature may reduce the duration of a mandate or interrupt it at will, as the security of tenure should be respected, just as it would be "*incorrect to allow for a complete renewal of the composition of a prosecutorial council following each parliamentary election, when the ruling majority changes*" (see, First Opinion of the Venice Commission, paragraph 59).

359. However, the First Opinion also emphasized that the principle of security of tenure is not absolute, as early termination of mandates may sometimes be justified. Referring to the report of the Venice Commission on Montenegro, the Commission also emphasized that (i) as a general rule even when the prosecutorial council is reformed, its current members should normally be allowed to terminate their mandate (see, First Opinion of the Venice Commission, paragraph 59); however (ii) the determination of some new ineligibility criteria which would strengthen the independence and political

detachment of respective members may arguably justify replacement of those members who do not correspond to those criteria (see, First Opinion of Venice Commission, paragraph 60); finally noting that (iii) "*in simple words, the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system*" (see, First Opinion of the Venice Commission, paragraph 60).

360. In dealing more concretely with the proposal of the draft-law on the early termination of the mandate of the current members of the KPC, the Venice Commission emphasized, in essence, that (i) in theory, the goal of the Ministry of Justice to "*to combat corporatism within the KPC, by increasing representation of lay members therein ... may be achieved by adding to the current composition of the KPC a certain number of additional lay members. That would allow the current prosecutorial members to remain in the KPC until the expiry of their mandates*" (see, First Opinion of the Venice Commission, paragraph 61)); however (i) in this scenario, "*the KPC would become too big (with more than 20 members), considering the relatively small number of prosecutors in Kosovo"* And *"this solution would be certainly very expensive, given that the amendments also provide for the full-time employment of all members of the KPC*" (see, First Opinion of the Venice Commission, paragraph 61)); therefore (iii) instead of the simultaneous termination of the mandates of all members, some alternative models of the renewal of the composition of the KPC might be explored, including for example, "*three of the prosecutorial members, selected by lot, might remain on the KPC*" as this would at least respect their security of tenure and, at the same time, permit the KPC to start functioning with the new composition immediately (see, First Opinion of the Venice Commission, paragraph 62).

361. Finally, regarding the premature termination of the mandates of the current members of the KPC, the Venice Commission through its First Opinion, in essence, established that (i) the transitional provisions providing for the early termination of mandates of all the current members of the KPC, and allowing the renewed KPC to function only with the lay members in its composition, "*are dangerous for the prosecutorial independence and must be reviewed*", therefore, "*the new KPC may start functioning only when all members are elected*" (see, First Opinion of the Venice Commission, paragraph 72); while (ii) the replacement of the currently sitting members with the new ones may be exceptionally justified only if it leads to a major improvement in the current system, therefore, "*currently sitting prosecutorial members should be allowed serving their mandates*" (see, Opinion of the First Venice Commission, paragraph 64). According to the first Opinion, "*they can be removed prematurely only if the Governments demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system*" (see, First Opinion of the Venice Commission, paragraph 64).

362. Having said that, Article 20 of the second proposed draft amends and supplements Article 36 (Continuance of duty) of the Basic Law, prematurely terminating the mandate of a part of the membership of the KPC, specifying, among other things, that (i) according to the deadlines defined in this article, the procedure for electing new members of the KPC begins with the Assembly and the Ombudsperson, while seven (7) days after the election of non-prosecutor members, the President of the Supreme Court, the President of the Judicial Council and Ombudsperson organize the lot procedure through which it is determined which members of the KPC continue the their mandates acquired according to the Basic Law; (ii) the lot procedure will determine which members of the KPC from the Appellate and Special Prosecutor's Office will continue their mandate and which of the two (2) members of the KPC from the basic prosecutions will continue the respective mandates; and (iii) the mandate of all other prosecutor members will end after the lot procedure, while the mandates of current non-prosecutor members will end with the election of new non-prosecutor members.

363. The Second Opinion of the Venice Commission examined the revised proposal of the draft-law, through which the idea of replacing all the mandates of the KPC members was changed, determining the possibility of drawing lots through which three (3) of the current members of the KPC would be allowed to finish their current mandates. In this regard, the Second Opinion, among other things, emphasizes that (i) the revised draft allows three (3) of the nine (9) current members of the KPC to keep their seats, "*which is much better than a complete renewal of its composition*" (see, Second Opinion of the Venice Commission, paragraph 35)); and (ii) "*even though, as a rule, the Venice Commission is not in favour of an automatic early termination of mandates of members of a prosecutorial council due to an institutional reform, the new transitional provisions are more respectful of the security of tenure of the members of the existing KPC than the previous model*" (see, Second Opinion of the Venice Commission, paragraph 31).

364. Finally, the Second Opinion of the Venice Commission, emphasizes that the new transitional provisions are "*more respectful*" of the security of tenure of the members of the existing KPC than the previous model, namely the one evaluated in the First Opinion (see, Second Opinion Venice Commission, paragraph 31). Furthermore, the Second Opinion also underlines that (i) "*the implementation of those more specific recommendations contained in this opinion and in the December* opinion *should be left to the discretion of the Ministry and the Assembly, in dialogue with the national stakeholders, experts, and the international partners of Kosovo*" (see, Second Opinion of the Venice Commission, paragraph 37); and (ii) "*while it understands the urgency of the reform, the Commission would nevertheless call the authorities to ensure a genuine involvement of the prosecutors of Kosovo in the deliberations on the revised amendments in the Parliament*" (see, Second Opinion of the Venice Commission, paragraph 7).

365. In addition to the two Opinions on Kosovo, the Venice Commission, as specified in paragraphs 188-200 of this Judgment, has addressed the issue of premature termination of the mandates of members of the Prosecutorial Councils in at least five (5) other Opinions, three (3) of which in the case of Montenegro and two (2) others, in the cases of Moldova and Serbia, respectively.

366. In the three (3) respective Opinions in the case of Montenegro, the Venice Commission, among other things, emphasized that (i) while, in some exceptional situations, a law may have a direct effect on the mandate of an officeholder, institutional reforms should not be launched with the sole purpose of replacing individuals in key positions (see, Opinion CDL_AD(2021)012, paragraph 29); (ii) while it is legitimate to replace ministers or other holders of political offices following elections, in cases where an institution enjoys some sort of autonomy or, *a fortiori*, is defined as "*independent*", replacing key office holders in such an institution on account of the change in the political majority and under the pretext of a legislative reform runs counter to the Constitution and the Rule of Law (see, Opinion CDL_AD(2021)012, paragraph 30); (iii) cases of unprofessional behavior in such Councils should be handled through the relevant disciplinary procedures and not dismissed through the pretext of legal changes (see, Opinion CDL_AD(2021)012, paragraph 31); and (iv) the renewal of the members may be justified on the condition of changing the way of their election from a simple majority to a qualified majority in order to reduce the risk of politicization of the Council or even through the introduction of ineligibility criteria and which will be able to be proportional and justify their immediate application on a case-by-case basis for the current members of the Council, without violating the principle of trust in the integrity of the mandates (see, Opinion CDL_AD(2021)012, paragraphs 46 and 49). On the other hand, in the case of the Opinion on Moldova, in which, among other things, the

termination of mandates was also related to the determination/reduction of the retirement age, the Venice Commission, among other things, emphasized that (i) "*an age limit should not be introduced with the effect to terminate mandates of specific individuals, elected under the previously existing rules. The Venice Commission criticised such measures in an opinion on Poland, and repeats this in the context of the Republic of Moldova.* […]" (see, Opinion CDL_AD(2021)047, paragraph 56); and (ii) "*it is true that the security of tenure of members of the SCP is not guaranteed by the Constitution (which is silent on the duration of their mandate, age-limit, etc.). However, the appointment as a member of a constitutional body – which, according to the Constitution, is the main guarantor of the independence of the prosecutorial system, creates at least some legitimate expectation that the mandate will not be interrupted mid-term without a very good reason*"(see, Opinion CDL_AD(2021)047, paragraph 60*)*. Whereas and in the end, in the Opinion regarding Serbia, the Commission in the context of the termination of mandates, among other things, emphasized that (i) "*the mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for* disciplinary *reasons* (see, Opinion CDL_AD(2014)029, paragraph 38); (ii) "*A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of "lack of confidence" […] must therefore only focus on the question whether the SPC member failed to perform his or her duties "in compliance with the constitution and law"*. (see, Opinion CDL_AD(2014)029, paragraph 53); and (iii) "[…] *Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced.* (see, Opinion CDL_AD(2014)029, paragraph 56).

367. Based on the above clarifications, it results that based on the common denominator of the Opinions of the Venice Commission, including the two Opinions on Kosovo, in principle, (i) the security of tenure must be respected regardless of whether they are specified in the Constitution or stipulated in the law in relation to constitutional independent institutions; (ii) the acquired mandates must end based on the relevant constitutional and/or legal provisions according to which the mandates were acquired, including through relevant disciplinary proceedings; (iii) the early termination of mandates through new laws cannot serve as a vote of no confidence in relation to independent institutions because through such precedents, any parliamentary majority could influence the premature termination of the respective mandates, resulting in political influence on, among others, constitutional independent institutions; and (iv) the respective tenures are not necessarily absolute and the same may be subject to premature termination in exceptional circumstances, including when an institutional reform is designed to significantly improve the system, including cases where the majority, through which the respective members are elected, changes from simple majorities to qualified ones, thereby reducing the possibility of politicization of the respective Councils or when new criteria are introduced with respect to the ineligibility that strengthen the independence and political detachment of the respective members.

368. Furthermore, and beyond the standards specified through the Opinions of the Venice Commission, the Court will (i) recall its case-law regarding the security of tenure; and (ii) the case-law of the ECtHR, based on which it is obliged to interpret fundamental rights and freedoms under Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

369. In the context of its case-law regarding the security of tenure, the Court recalls two of its Judgments, namely the Judgment in case KO29/12 and KO48/12 and the Judgment

in case KO127/21, with Applicant *Abelard Tahiri and 10 other members of the Assembly of the Republic of Kosovo*, regarding the review of the constitutionality of Decision no. 08-V-29 of the Assembly of the Republic of Kosovo of 30 June 2021, for the dismissal of five (5) members of the Independent Oversight Board for the Civil Service of Kosovo (hereinafter: Court Judgment in case KO127/21).

370. The Court recalls that through its Judgment in Case KO29/12 and KO48/12, it reviewed the constitutionality of the proposed constitutional amendments, and which, through amendment No. 10 regarding the announcement of the first presidential elections, had proposed the election of the President of the Republic directly by the people, unlike the existing system in which the relevant election is made by the Assembly, and in this context, it was proposed that the elections for the President of the Republic be held within six (6) months from the date of entry into force of the constitutional amendments and that the mandate of the existing President elected by the Assembly will continue until the new President is elected and sworn (see Court case KO29/12 and KO48/12, paragraphs 248-271). The Court found that this proposed amendment is in contradiction, namely diminishes the rights and freedoms defined in chapter II of the Constitution, emphasizing that the mandate is inviolable to ensure respect for the principle of the separation of powers and to maintain security in legal and constitutional order (for detailed reasoning, see paragraphs 248-271of Judgment KO29/12 and KO48/12).

371. While the aforementioned Judgment is related to the circumstances of the proposal for the termination of a constitutional mandate through constitutional amendments, in the circumstances of the Judgment in the case KO127/21, the Court had assessed the constitutionality of the relevant decision of the Assembly for the premature termination of the mandate of a constitutionally independent institution, but mandates of which were regulated by law. Even in this case, the Court found a constitutional violation, and, among other things, emphasized that (i) the members of the relevant Board can be dismissed by the Assembly based on the relevant provisions of the applicable law on the basis of which they were elected, namely Law no. 06/ L-048 for the Independent Oversight Board; and that, specific to the circumstances of the case, (ii) the member of the Board cannot be dismissed because of his/her decision-making, namely his/her way of voting (see Court's case KO127/21, paragraphs 98 and 99).

372. The Court emphasizes that, through these two aforementioned judgments, emphasis is placed on the importance of functions, namely constitutional and/or legal mandates, with an emphasis on independent constitutional institutions, and their security, certainly insofar as the constitutional and/or legal basis criteria have not been met of which they were acquired, for their premature termination. In principle, the premature termination of the respective mandates through constitutional and/or legal amendments is not in accordance with the principle of legal certainty, despite the fact that the security of the mandate, depending on the relevant institution and/or the nature of the proposed amendments, is not necessarily absolute.

373. In this context, the Court also, beyond its case law, refers to the case law of the ECtHR, in two cases, *Baka v. Hungary* no. 20261/12, Judgment of 23 June 2016) and *Grzeda v.* Poland no. 43572/18, Judgment of 15 March 2022.

374. In the first case, namely, *Baka v.* Hungary, through the decision of 23 June 2016, the ECtHR found that Hungary had violated Articles 6 (Right to a fair trial) and 10 (Freedom of expression) of the ECHR, in the case of the termination of the mandate of the relevant President of the Hungarian Supreme Court, through legal reforms and which had directly affected him, among others, for the reason that (i) according to the Judgment, he had criticized the reforms undertaken in relation to the justice system by

the Hungarian Government; and (ii) no legal remedy was established to contest his dismissal under the operation of law. The context of the relevant case, unlike the circumstances of this particular case, was also related to the assessment of whether the Hungarian Government had interfered with the freedom of expression of the applicant, namely the former President of the Supreme Court, contrary to the guarantees of Article 10 of the ECHR, finding that this was the case.

375. Having said that, in assessing whether the dismissal of the former President of the Supreme Court pursued a legal/legitimate purpose, the ECtHR also analyzed the issue of judicial mandates and their inviolability. The ECtHR observed that according to the law applicable to the organization and administration of the courts, the presidents of the courts, including the President of the Supreme Court, were distinguished as "*executive officials of the courts*". The law in question defined a six (6) year mandate for the presidents of the courts, as well as exhaustively defined that, unless the mandate ended as a result of the expiration of the judicial mandate of the person in question, the grounds for the termination of the mandate of the presidents of the courts were termination by mutual agreement, resignation and dismissal due to incompetence to perform managerial functions. In the event of dismissal, a president of a court had the right of appeal to the Service Tribunal. The court further emphasized that the applicant's right to serve until the end of his term as the President of the Supreme Court was also supported by the constitutional principles of judicial independence and the non-dismissal of judges (see the ECtHR case, *Baka v. Hungary*, paragraphs 107 and 108).

376. In this context, the ECtHR assessed that amending the rules for the election of the President of the Supreme Court in order to strengthen the independence of the person who holds that position, can be related to the legitimate aim of maintaining the authority and the impartiality of the judiciary (see, the case of the ECtHR, *Baka v. Hungary*, paragraph 156). However, referring to the independence of the judiciary in order to justify the measure of premature termination of the mandate of a court president for reasons that have not been established by law in advance and that are not related to grounds of professional incompetence or misconduct, in the circumstances of the concrete case, according to the ECtHR, it did not serve the legitimate aim of increasing the independence of the judiciary. On the contrary, the premature termination of the applicant's mandate as the President of the Supreme Court was inconsistent with that aim (see, ECtHR case, *Baka v. Hungary,* paragraph 156). Further, the ECtHR also rejected the Hungarian Government's argument that the applicant's function as the President of the Supreme Court was more administrative than judicial in nature and, therefore, his removal should be considered under the rules applicable to the dismissal of political appointees and not of judges. The ECtHR emphasized the importance of the principle of the irremovability of judges, which protects judicial independence, and found that the removal of Mr. Baka, not only did not serve, but was contrary to the purpose of maintaining the independence of the judiciary (see ECtHR case, *Baka v. Hungary, paragraph 172*).

377. Furthermore, the ECtHR also reviewed whether the applicant's right to access to the court had been violated since according to the new law, namely its transitional provisions, he had been denied the right recognized by the previous law, on the basis of which he had acquired the mandate, to file an appeal against the dismissal before the Service Tribunal (see ECtHR case, *Baka v. Hungary*, paragraph 115). In the case in question, the premature termination of the applicant's mandate as President of the Supreme Court was not subject to a judicial review, nor was there a possibility of review by a regular court or any body with judicial powers (see, the case of the ECtHR, *Baka v. Hungary*, paragraph 121). As a result, in the absence of a legal remedy against dismissal that he would otherwise have under the previous law, the ECtHR found a violation of

the applicant's right of access to the court, guaranteed under paragraph 1 of Article 6 of the ECHR (see, the case of ECtHR, *Baka v. Hungary*, paragraph 122).

378. In the second case, namely *Grzeda v. Poland*, the Grand Chamber of the ECtHR found that the dismissal of Mr. Grzeda, at that time a judge in the Supreme Court, from the function of a member of the National Council of the Judiciary (hereinafter: NCJ) before the end of the regular mandate and the impossibility to appeal against that decision, constituted a violation of the applicant's right to a fair trial, namely access to the court. The premature termination of the mandate of the relevant applicant had come through a legal reform, which had changed the manner of selection of members of the NCJ and as a result, it was foreseen to prematurely terminate the mandates of all fifteen (15) members of the NCJ at the time when the relevant law entered into force.

379. Through this case, the ECtHR emphasized the importance of the constitutional mandate of the NCJ as a body to protect judicial independence and analyzed the close connection between the integrity of judicial appointments and the requirements of judicial independence (see ECtHR case, *Grzęda v. Poland*, paragraphs 269, 345). The ECtHR, *inter alia*, emphasized that the values of the rule of law and the ECHR can be respected and applied by judges, as long as the domestic law does not violate the guarantees of the ECHR regarding issues that directly affect the independence of their individual impartiality (see ECtHR case, *Grzęda v. Poland*, paragraphs 264, 302). As a result, the ECtHR emphasized that the issue of judicial independence should be understood comprehensively, so it, as a principle, applies not only to judges when exercising their adjudicating function, but also when they exercise other judicial functions, such as membership in judicial councils (see ECtHR case, *Grzęda v. Poland*, paragraph 303). Moreover, the ECtHR had also observed that in a similar reform in 2011 related to the same law that this time prematurely terminated the mandate of the relevant applicant, through transitional provisions, the mandate of the members of the NJC was preserved. In the same spirit, the ECtHR observed that through Article 238 of the Constitution of Poland of 1997, through transitional provisions, the mandate of the constitutional bodies and their individual members, who were elected on the basis applicable before the entry into force of the Constitution, had been preserved. These examples, according to the ECtHR, were indicative of the importance that domestic law had placed on the security of tenure of constitutional bodies and their members, including the NCJ (see ECtHR case, *Grzęda v. Poland*, no. 43572/18, Judgment of 15 March 2022, paragraph 274).

380. The ECtHR also noted that according to the domestic law, the NCJ was a body mandated by the Constitution to protect the independence of courts and judges. Therefore, the effective exercise of such an essential role is only possible if this body is sufficiently independent from the executive and legislative powers (see the ECtHR case, *Grzęda v. Poland*, cited above, paragraph 304). Furthermore, the ECtHR was not persuaded by the arguments of the Government of Poland that the Decision of the Polish Constitutional Court of 20 June 2017, which had declared constitutional the law that provided for the termination of the mandate of Mr. Grzeda, could not be implemented without shortening the mandate of the current composition of the NCJ. The ECtHR also rejected the argument of the Government of Poland that a system without such shortening of mandates would take too long and complicate the reform process. According to the ECtHR, there were clearly alternative methods that would respect the general rule of preserving the 4-year term of office for the members of the NCJ. The alternative, according to the ECtHR and as proposed by the Venice Commission and GRECO, would have been if the judicial members would have remained in their positions until their original term of office expired, while the new members could have been elected for a shorter period. Considering the immediate termination of the mandates of all judicial members of the NCJ as a non-proportional measure, the ECtHR

emphasized that the changes should have been accompanied by an appropriate adaptation period or, alternatively, should have applied from the beginning of the new term of office (see ECtHR case, *Grzęda v. Poland*, paragraph 279).

381. In reviewing the applicant's allegation that his right of access to a court was violated, the ECtHR made a distinction between the case in question and the *Baka* case, in which, as detailed above, found a violation of the applicant's right guaranteed under paragraph 1 of Article 6 of the ECHR, because the new law, unlike the previous law on the basis of which the applicant acquired the mandate, did not provide a legal remedy against dismissal (see ECtHR case, *Grzeda v. Poland*, paragraph 290). In the *Grzeda* case, the Court examined whether the applicant concerned had ever had a legal remedy available against the dismissal decision, despite the changes under the new law. This issue was examined through the application of the Eskelinen test, according to which, in order to exclude the applicability of Article 6 of the ECHR, it must be argued that the domestic law excludes in its entirety the right to a remedy in a particular type of disputes, and if such exclusion is based on objective reasons of state interest (see the ECtHR case, *Grzęda v. Poland*, paragraph 290). In conclusion, finding that Article 6 of the ECHR was applicable in the present case because the exclusion of its applicability could not be argued in the light of the state interest, the Court emphasized that members of the judiciary, like all other citizens, must be protected from the arbitrariness of the legislative and the executive powers, and only oversight by an independent judicial body of the legality of a measure such as the case of the applicant's removal from office, is able to render such effective protection (see the ECtHR case, *Grzęda v. Poland*, paragraphs 326 and 327). As a result, the Court also found that the lack of legal remedy interfered with the essence of the applicant's right of access to a court (see ECtHR case, *Grzęda v. Poland*, paragraph 349).

382. In addition and further, beyond the case law of the ECtHR, the Court will also refer to two decisions of the Court of Justice of the European Union (hereinafter: ECJ), namely C-619/18, *European Commission v. Poland* (ECJ case C-619/18, *Commission v. Poland* [2019] ECR, Judgment of 24 June 2019) and C-192/18, *European Commission v. Poland* (ECJ case C-192/18, *Commission v. Poland* [2019] ECR, Judgment of 5 November 2019) and which are related, among other things, to initiatives and legal reforms with the consequence of the premature termination of the mandates of judges, mainly as a result of lowering/changing the retirement age.

383. In case C-619/18, *the European* Commission *v. Poland*, CJEU found that Poland had failed to fulfill its obligations under European Union law, more precisely paragraph 1 of Article 19 of the Treaty on European Union, referring to the rule of law and effective legal protection in areas covered by EU law, through the issuance of a law that established a younger and lower retirement age for current judges of the Supreme Court, which consequently resulted in early termination of their mandate and as such, it was contrary to the principle of non-removal/non-dismissal of judges.

384. According to the CJEU, and *inter alia*, in order to ensure the independence and impartiality of judges, some suitable guarantees are necessary, and among them is the guarantee against removal from office, i.e. dismissal (see, ECJ case the *European* Commission *v. Poland*, paragraph 75 and references therein). According to this principle, judges can remain in office until they have reached the mandatory age for retirement or until their mandate has expired, in case it is limited. Although this principle is not an absolute principle, there may be exceptions only if they are based on legitimate and convincing grounds and in accordance with the principle of proportionality. Therefore, it is widely accepted that judges can be dismissed if they are deemed unfit to perform their duties, due to incompetence or serious breach of their

obligations, provided that appropriate procedures have been followed (see, ECJ case, *the European Commission v. Poland*, paragraph 76).

385. According to the CJEU, the implementation of the contested law, which provided for a younger retirement age for Supreme Court judges, would apply to all current judges, thus resulting in premature termination of their mandate, a situation that raises serious concerns regarding compliance with the principle of non-removal/non-dismissal of judges (see the ECJ case *European Commission v. Poland*, paragraph 78). The application of such a measure would be acceptable only if it is justified by a legitimate objective, is proportionate in light of that objective and inasmuch as it is not such as to raise reasonable doubts in society regarding the imperviousness of the courts to external factors and their neutrality with respect to the interests before it (see the ECJ case *European Commission v. Poland*, paragraph 79). In addition, the ECJ had emphasized that this reform also foresees the competence of the President of the State to decide, on a discretionary basis, to extend the already shortened period of the judges' mandate, for another six (6) consecutive years (see, the ECJ case *European Commission v. Poland*, paragraph 83).

386. Therefore, the possibility of extending the mandate of judges for another six (6) years and at the same time shortening the regular mandate for five (5) years due to the lower retirement age for judges of the Supreme Court, according to the ECJ, raises reasonable doubts as to the fact that the reform made genuinely seeks to standardize the retirement age of judges with all other employees and if it improves the age balance among senior judges (see the ECJ case *European Commission v. Poland*, paragraph 84). The combination of these two measures that the contested law defines, according to the ECJ, gives the impression that their aim might be to exclude a predetermined group of judges of the Supreme Court, given that the President, notwithstanding the application of the measure lowering the retirement age for all judges of the Supreme Court who were in post when the law in question entered into force, retains the discretion to keep in office some of the persons of the group concerned (see, the ECJ case *European Commission v. Poland*, paragraph 85). Moreover, the ECJ has emphasized that, as it has found in several cases, national provisions that immediately and compulsorily lower the retirement age limit and terminate the mandate of judges, without introducing transitional measures that protect their legitimate expectations for duration of the mandate, contradict the principle of proportionality (see ECJ case *European Commission v. Poland*, paragraph 91 and references used therein).

387. On the other hand, in case C-192/18, European *Commission v. Poland*, Judgment of 5 November 2019, ECtHR found that Poland had failed to fulfill its obligations under European Union law when it had adopted a law establishing the age of the retirement age for Supreme Court judges, respectively lowered it and also, different retirement ages for male and female judges. According to this law, male judges retired when they reached the age of 65, while female judges when they reached the age of 60, unlike the previous law that had set the retirement age for both sexes at 67. This law also determined the discretionary competence of the Minister of Justice to extend the retirement age of judges of his choice, up to 70 years. Referring to the first issue, effectively the premature shortening of the mandate, the ECJ emphasized that, as is already clear from a number of decisions issued, the necessary freedom for judges from any external influence or pressure requires adequate guarantees for the protection of those individuals exercising judicial functions, such as guarantees that they cannot be removed from office prematurely (see ECJ case *European Commission v. Poland*, paragraph 112 and references used therein). The ECJ had also pointed out that the reform provided for the discretionary power of the Minister of Justice and as such, could cause reasonable suspicion among citizens that the new system was intended to enable the Minister of Justice to remove a certain group of judges, using his discretion to keep

other judges in position (see ECJ case *European Commission v. Poland*, paragraph 127).

388. In this spirit, according to the ECtHR, the principle that judges are irremovable/undismissible means that judges can continue to remain in office, until they have reached the retirement age or until their mandate has expired, in case that they have a fixed-term mandate. While this principle is not completely absolute, there may be exceptions as long as they are based on legitimate and convincing grounds and coincide with the principle of proportionality. Consequently, it is widely accepted that judges can be dismissed if they are deemed unfit to perform their duties, due to incompetence or serious breach of their obligations, provided that appropriate procedures have been followed (see, ECtHR case *European Commission v. Poland*, paragraph 113, and references therein). Finally, and according to the ECtHR, given the fundamental importance of the principle of non-removal/non-dismissal, an exception to this principle is only admissible if it is justified by an objective aim and is proportionate in light of that aim, as long as it is not such as to raise reasonable doubts in society regarding the imperviousness of the courts to external factors and their neutrality with respect to the interests before it (see the ECtHR case *European Commission v. Poland*, paragraph 15).

389. In the context of four (4) Judgments referred to above, which include the case law of the ECtHR and the ECJ, the Court first notes that, unlike the circumstances of the concrete case, (i) they relate to judges and not to prosecutors and in this context, however, recalls the differences and similarities in exercising the two functions also according to the principles of the Venice Commission; (ii) in the case of *Baka v. Hungary*, where the circumstances of the case concerned the additional function of a judge as the president of a court, namely that of the President of the Supreme Court, the mandate of the relevant applicant was terminated by the operation of the law, through a legal reform with effect specifically to the position that he was holding, among others, due to the criticisms he had made regarding the relevant reforms in the justice system; and (iii) in the case of *Grzeda v. Poland*, the applicant's mandate as a member of the NCJ was prematurely terminated, by operation of law and through a legal reform that immediately terminated the mandates of all members of the NCJ. Having said this, the Court also notes that similar to the circumstances of the concrete case, (i) the premature termination of mandates in ECtHR cases, the connection with administrative functions of the respective judges, namely the exercise of additional functions as the President of the Supreme Court and /or the relevant judicial council; and (ii) premature termination of mandates in all cases followed as a result of the adoption of new laws in the name of reforms in the justice system.

390. Taking into account the similarities, differences, but also the specific factual circumstances in which the aforementioned Judgments were issued, the Court emphasizes that the aforementioned case law of the ECtHR and the ECJ results in several basic principles which, among other things, determine: (i) the security of constitutional and legal tenure and their premature termination only based on the relevant provisions and procedures specified on the Constitutions and/or laws on the basis of which they were acquired; (ii) implementation of the principle of non-dismissal/non-removal of judges in the context of circumstances of relevant cases, but even when they exercise justice administration functions, due to the direct correlation of these functions with the preservation of the independence of the system they represent; (iii) the importance of effective legal remedies to contest relevant decisions based on which mandates have been prematurely terminated; and (iv) the possibility that the acquired mandates may be terminated prematurely because the security of tenure is not necessarily absolute, however any legal initiative/reform which may result

in the premature termination of the respective mandates must convincingly pursue a legitimate aim and be proportional to the aim pursued.

391. The Court also recalls that in the case of *Grzeda v. Poland*, the ECtHR, *inter alia*, took into account the previous legal changes and the corresponding transitional provisions through which the mandate of the respective bodies and the mandate of their members had been continuously preserved, emphasizing that such an approach was indicative of the importance that the domestic law had devoted to the security of tenure. In this context, and as explained in paragraphs 296-297 of this Judgment, the Court also recalls that despite continuous reforms regarding the KPC over the years, including when the KPC was functional for the first time pursuant to Article 110 of the Constitution through the Law of 2010 after the declaration of independence of the Republic of Kosovo and the entry into force of the Constitution of the Republic of Kosovo, the mandates of the members of the KPC were not terminated prematurely through the applicable laws, even though the relevant legal changes, over the years, had resulted in the change of the structure of the KPC, included in the context of the ratio between prosecutor and non-prosecutor members.

392. More precisely, and firstly, the Court emphasizes that all the respective laws related to the KPC, had maintained the mandates of the members of the Judicial and/or Prosecutorial Council previously acquired. This was also the case with the establishment of the Prosecutorial Council according to Article 110 of the Constitution, because through Article 53 (Transition of the Prosecutorial Council) of Law 03/L-223 on the Judicial Council of Kosovo, it was determined that the prosecutors who are members of the Council at the same time that the Prosecutorial Council is established, they are transferred to the Prosecutorial Council and remain there until the natural expiration of their mandate. The same was defined through the first Law establishing the KPC pursuant to Article 110 of the Constitution, namely Law no. 03/L-224 for the Kosovo Prosecutorial Council of 2010, which through articles 41 (Validity of Prior Actions of the Council established under UNMIK Administrative Regulation 2005/52 and the Law on the Temporary Composition of the Kosovo Judicial Council), 42 (Initial Composition of the Council) and 43 (Transfer of Competences), respectively, had determined the transfer of powers from the Kosovo Judicial Council to the newly established Prosecutorial Council, specifying that the prosecutors who at the time of the establishment of this Council, were members of the Judicial Council of Kosovo, are transferred to the Prosecutorial Council of Kosovo and remain there until the natural expiration of their mandate.

393. Secondly, the mandates acquired through the 2010 Law were maintained until their natural expiration through paragraph 3 of Article 6 [untitled] of the 2015 Law, despite the fact that the latter had changed the structure of the Prosecutorial Council not only by increasing the number of prosecutor members in the Council, but also by eliminating the ex-officio representation of the Minister of Justice in the KPC and by transferring the administration of the competition for the civil society member from the KPC to the Assembly. In this context, the Court notes that (i) through this Law, the *ex officio* representation of the Minister of Justice in the KPC was terminated, but that the elimination of the representation of the Ministry of Justice in the KPC was proposed by the Ministry of Justice itself, and consequently, this issue was never contested nor subjected to judicial and/or constitutional review; and (ii) through the KPC's own decision, and not by operation of the law, the five (5) year mandate of the member of the civil society was prematurely terminated and he contested this decision in the Constitutional Court, which had declared the referral inadmissible due to non-exhaustion of legal remedies (see, Resolution on Inadmissibility in case KI145/15, with applicant *Florent Mucaj*, review of constitutionality of the Decision of the Kosovo Prosecutorial Council, no. 321/2015 of 5 November 2015) and then continued the

procedures in regular courts and which, through two Judgments, [A.nr.1992/15] and [AA.nr.413/2021], of the Basic Court in Prishtina and the Court of Appeals, respectively, have assessed that the premature termination of the mandate of the civil society member represented in the KPC was done unlawfully by the KPC.

394. Thirdly and finally, the mandates acquired through the 2015 Law were preserved until their natural expiration through paragraph 1 of Article 36 (Continuation of duty) thereof, despite the fact that the same had also made changes to the structure of KPC, as explained in this Judgment.

395. Based on the abovementioned, the Court emphasizes that, throughout all the legal reforms that have affected the structure of KPC since its establishment, with the effect of the law, only the representation of the Minister of Justice in the KPC was terminated in 2015, proposal this of the relevant Ministry and as a result, as clarified above, the representation and/or absence of ex-officio representation of the Minister of Justice in the KPC was never contested. Having said that, despite continuous legal reforms that have affected the structure of KPC, the mandates acquired based on the previous laws have always been preserved through the transitional provisions of the new laws, including the most profound reform in the structure of KPC, namely its establishment based on Article 110 of the Constitution, after the entry into force of the same. Such an approach of the Republic of Kosovo, over the years, as the ECtHR has emphasized in case *Grzęda v. Poland*, is a clear indication of the importance that the state has accorded to the preservation and respect of the security of tenure of the members of an independent constitutional institution.

396. In the context of the clarifications above, the Court once again emphasizes that Article 20 of the contested Law, among other things, defines the lot procedure led by the President of the Supreme Court, the President of the Judicial Council and the Ombudsperson, through which it is determined which members of the KPC continue their mandate acquired according to the Basic Law; (ii) the lot procedure will determine which members of the KPC from the Appellate and Special Prosecutor's Office will continue the mandate and which two (2) members of the KPC from the basic prosecutions will continue the respective mandates; and (iii) the mandates of all other prosecutor members will end after the lot procedure, while the mandates of current non-prosecutor members will end with the election of new non-prosecutor members. As explained in detail throughout this Judgment, in both Opinions of the Venice Commission, the same was stated that, in principle, it was against the premature termination of the mandates of the Prosecutorial Council, despite the fact that it had emphasized that such a position was not absolute and that (i) *"In simple words, the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system";* and (ii) "*Even though, as a rule, the Venice Commission is not in favour of an automatic early termination of mandates of members of a prosecutorial council due to an institutional reform, the new transitional provisions are more respectful of the security of tenure of the members of the existing KPC than the previous model",* however, the same Opinions also point out that (i) "*They can be removed prematurely only if the Governments demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system*"; and that (ii) in principle, "*demonstrates convincingly the overall improvement of the system*" and the corresponding reform "*should be left to the discretion of the Ministry and the Assembly, in dialogue with the national stakeholders, experts, and the international partners of Kosovo*" and also "*while it understands the urgency of the reform, the Commission would nevertheless call the authorities to ensure a genuine involvement of the prosecutors of Kosovo in the deliberations on the revised amendments in the Parliament".*

397. The Court also recalls that in both Opinions on Kosovo, but also in other opinions and reports of the Venice Commission, it is constantly emphasized that the premature termination of mandates in the context of "*significant improvement of the system*" could be related to changes in the way of voting, namely changing from simple voting to qualified voting in the Assembly for the election of the members of the relevant Council and/or the establishment of new criteria of incompatibility with the function and which could result in the significant improvement of the function of the relevant Council, including its de-politicization, two circumstances that are not related to the contested Law. Moreover, and as long as the approach that the mandates are not necessarily absolute is also maintained by the case-law of the ECtHR and the ECJ, respectively, the same in the four (4) above-mentioned Judgments, have found violations of the ECHR and the EU law, respectively, when the respective mandates are terminated prematurely through legal reforms, emphasizing, in principle, that the security of tenure is not necessarily absolute, however any legal initiative/reform which may result in the premature termination of the respective mandates, must pursue a legitimate aim and be proportionate to the aim pursued.

398. In the circumstances of the specific case, the Court first emphasizes that the aim of the reform of the prosecutorial system by the Ministry of Justice, with an emphasis on reducing the possibility of "*corporatism*" of the Prosecutorial Council and increasing "*pluralism*" in the representation of the same is a legitimate aim and which, despite the lack of an exact common denominator in international practice regarding the composition of prosecutorial councils, is in accordance with the standards summarized by the Venice Commission, as clarified by the same. This is important, precisely, considering the hierarchical structure of prosecutorial systems, and the possibility that in the decision-making of the Prosecutorial Councils, the members elected by the prosecutor's office may be subject to the will of the Chief State Prosecutor. Having said that, and as clarified in this Judgment, as much as legitimate and necessary initiatives designed to establish the right balance between prosecutorial and non-prosecutorial members of the Prosecutorial Council may be, it is equally important that such initiatives are proportional, constantly emphasizing that the same do not result in the politicization of the Councils, increasing the possibilities of influencing the legislative and/or executive power and consequently do not result in the infringement of the respective independence and which, the KPC, has been accorded by the Constitution.

399. The Court recalls that based on paragraph 1 of Article 110 of the Constitution, the KPC is a completely independent institution in the performance of its functions, in accordance with the law. The Court also recalls that according to the same article, namely its paragraph 4, the composition of the KPC, as well as the provisions for appointment, dismissal, mandate, organizational structure and rules of procedure, are regulated by law. The Assembly of the Republic has the competence to adopt the latter based on paragraph 1 of Article 65 of the Constitution. Having said that, this competence cannot be exercised in a way that violates the functional independence that the Constitution has provided for the KPC based on paragraph 1 of Article 110 of the Constitution.

400. The Court also recalls that one of the basic principles of maintaining the independence of an independent constitutional institution is the security of tenure of its members and the respective immunity regarding decision-making. Both of these principles, as already clarified through this Judgment, have been confirmed, over the years, through the case law of the Court. The independence of a constitutional institution and/or its member is absolutely vulnerable, if another power, beyond the constitutional and legal provisions based on which these institutions were established and the respective mandates were acquired, undertakes legal initiatives and/or adopts a new law, based on which, prematurely terminates the respective mandates. Such a precedent, in a constitutional

democratic system, would be dangerous because it would enable the political forces represented in the executive and/or legislative power to change the structure, including the mandates of members of independent institutions, depending on their beliefs and political goals. Such an approach does not coincide with values of a democratic state based on the separation and balance of power.

401. Moreover, any premature termination of the mandate, in accordance with the principle of legal certainty, must, in principle, be in accordance with the constitutional and/or legal provisions on the basis of which it was acquired. The Basic Law, namely its Article 13 (Termination of mandate), precisely defines the bases on which a mandate of a member of the Council can end prematurely, and adoption of a new law by the Assembly is not one of these bases. Furthermore, any premature termination of the mandate must be accompanied by the corresponding effective legal remedy, through which the procedure followed in relation to the premature termination of the mandate can be contested in court proceedings. The latter has been confirmed by the case law of the ECtHR in cases of: *Baka v. Hungary* and *Grzeda v. Poland*. Exceptions to these principles, namely such precedents, would violate the principle of security of tenure and directly the independence and impartiality of the members of the relevant institutions and, as a result, the independent functioning of the institution they represent in violation of the constitutional principles in the case of independent constitutional institutions such as the case of the KPC. The fact that the mandates of the members of the respective Councils, regardless of whether their composition is specifically regulated by the Constitution or delegated by law, have never been terminated through the laws of the Assembly and in the case of the Prosecutorial Council even when it did undergo its deepest reform, namely its establishment pursuant to Article 110 of the Constitution after the declaration of Kosovo's independence, is a clear indicator of the importance of the security of tenure of independent constitutional institutions. Such an approach, as explained in this Judgment, is in full accordance with the case law of the Court, the ECtHR, the ECJ, but also the principles elaborated by the Venice Commission.

402. Having said that, the Court notes that from these principles, there are exceptions and which, according to the ECtHR and the ECJ, would be possible if they are based *"on legitimate and convincing grounds and in accordance with the principle of proportionality*" and according to the Opinions of the Venice Commission, specifically in the case of Kosovo, (i) " *the early termination of the mandates of some members may be justified if it leads to a significant improvement of the overall system* " and (ii) "*They can be removed prematurely only if the Governments demonstrates convincingly that their replacement serves a vital public interest and leads to the overall improvement in the system*". In both cases, convincing and legitimate reasons that significantly improve the prosecutorial system are necessary. As clarified through this Judgment, the improvement of the structure of the KPC by balancing the ratio between prosecutor and non-prosecutor members and contributing to the democratic legitimacy of the same, always with the necessary mechanisms to disable political influence on the same, certainly pursues an appropriate legitimate aim. Having said that, the realization of the same should also be proportional, and among other things, as clarified in *Grzeda v. Poland*, should be considered all alternative methods that would respect the general rule of maintaining the mandate of the members of the Council until its end, according to the provisions of the law on the basis of which the same was acquired.

403. In the circumstances of a Law, and which according to the Court's assessment through this Judgment, is unconstitutional in its essential parts, namely (i) point 1.3.2 of paragraph 1 of Article 6 [untitled] and Article 8 [untitled], namely Article 10/A of the Contested Law, through which amends and supplements Article 9 (Composition of Council members) of the Basic Law, are not in compliance with paragraph 1 of Article 4

[Form of Government and Separation of Power], paragraph 10 of Article 65 of the Constitution, and Article 132 [Role and Competencies of the Ombudsperson] of the Constitution;; (ii) paragraph 2/a of Article 13 [untitled] of the contested Law, through which Article 15 (Quorum and decision-making) of the Basic Law is amended and supplemented, is not in compliance with paragraph 1 of Article 110 and paragraph 1 of Article 4 of the Constitution; (iii) paragraph 5 of Article 16 [untitled] of the Contested Law, through which Article 19 (Disciplinary procedures for Council members) of the Basic Law is amended and supplemented, is not in compliance with Article 24 of the Constitution, and (iv) Article 18 of the Contested Law supplementing, namely adding Article 23/A of the Basic Law, is not compatible with Article 32 and Article 54 of the Constitution, even the termination of the mandate of only a part of the members of the Council through the relevant lot drawing and in the complete absence of an effective legal remedy which in ECtHR cases referred to above resulted in violation of Article 6 of the ECHR, (i) violates the security of tenure of members of the Prosecutorial Council and consequently also the complete independence of the Prosecutorial Council in exercising its functions in violation of paragraph 1 of Article 110 of the Constitution and taking into account the status of the Prosecutorial Council in the legal order of the Republic of Kosovo, as clarified in this Judgment, also in violation of paragraph 1 of Article 4 of the Constitution; and (ii) it cannot even serve as a convincing reason that could serve a legitimate and proportionate aim and on the basis of which the termination of the mandates of an independent constitutional institution could be exceptionally authorized, creating thus a precedent with consequences for the security and independence of exercising the function of constitutional independent institutions and consequently also for the democratic order and the rule of law in the Republic of Kosovo.

404. Consequently and finally, the Court finds that Article 20 [untitled] of the contested Law amending and supplementing Article 36 (Standing in office) of the Basic Law and paragraph 3 of Article 11 [untitled] of the contested Law amending and supplementing Article 13 (End of mandate) of the Basic Law, is not compatible with paragraph 1 of Article 110, paragraph 1 of Article 4 and Articles 32 and 54 of the Constitution.

405. Finally, the Court recalls that the Referrals of the applicants were submitted to the Court based on paragraph 5 of Article 113 of the Constitution. This category of Referrals has a suspensive effect because, based on Article 43 (Deadline) of the Law on the Constitutional Court, such a law can be sent to the President of the Republic of Kosovo for promulgation only after the decision of the Court and in accordance with the modalities defined in the final decision of Court on the contested case.

406. In the case-law of the Court regarding the category of Referrals under paragraph 5 of Article 113 of the Constitution, in case of finding that certain provisions of the contested law are not compatible with the Constitution, the Court, (i) declared invalid only the provisions deemed in contradiction to the Constitution, while the rest of the law has been sent to the President for promulgation in accordance with the modalities of the Court's judgment, as is the case with the Court's Judgments in case KO01/17, with the Applicant *Aida Dërguti and 23 deputies of others of the Assembly of the Republic of Kosovo* regarding the constitutional review of the Law on amending and supplementing the Law no. 04/L-261 on the War Veterans of the Kosovo Liberation Army or the case KO108/13, with the Applicant *Albulena Haxhiu and 12 other deputies of the Assembly of the Republic of Kosovo* regarding the constitutional review of the Law no. 04/L-209 on Amnesty; or (ii) in case of assessment that the provisions declared as contrary to the Constitution are of fundamental importance for the law in question and as a consequence, its promulgation or entry into force would render it unenforceable, has annulled the relevant law in its entirety, as is the case with the Court's Judgment in case

KO43/19 (cited above) regarding the Law on Duties, Responsibilities and Competencies of the State Delegation of the Republic of Kosovo in the Dialogue Process with Serbia.

407. In the circumstances of the concrete case, the Court has found that essential provisions of the Contested Law are not in compliance with the Constitution. As a result, and taking into account that the rest of the contested Law would be difficult to apply after declaring the aforementioned provisions invalid, the Court considers that the contested Law should be declared invalid, in its entirety.

IV. The request for Interim Measure

408. The Court recalls that the Applicants have requested the Court to impose an interim measure, to suspend the entry into force and implementation of the contested Law, until the final decision on the respective requests is taken.

409. The Court, in this context, emphasizes that paragraph 2 of Article 43 [Deadline] of the Law, determines the suspensive effect of the entry into force of the laws that are contested pursuant to paragraph 5 of Article 113 of the Constitution, stating that "*In the event that a law* or *decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, Paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with modalities determined in the final decision of the Constitutional Court on this contest*".

410. Based on the abovementioned provision, on 4 July 2022 the Court requested from the President of the Assembly, the President and the Secretary of the Assembly to take into consideration the requirements of paragraph 2 of Article 43 of the Law.

411. Therefore, taking into account that based on paragraph 2 of Article 43 of the Law, the contested Law pursuant to paragraph 5 of Article 113 of the Constitution cannot be decreed, enter into force, or produce legal effects before the decision is rendered by the Court, as well as in accordance with Article 27 (Interim Measures)] of the Law and Rule 57 [Decision on Interim Measures] of the Rules of Procedure, the request for an interim measure is without object of review and, as such, is rejected (see, *mutatis mutandis*, the Court's Judgment in Case KO43/19, quoted above, paragraph 113).

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Articles 113 (5) and 116 (2) of the Constitution, Articles 20, 27 and 42 of the Law and pursuant to Rules 57, 59 (1) and 74 of the Rules of Procedure, on 24 March 2023, unanimously:

DECIDES

I. TO DECLARE the Referral admissible;

II. TO HOLD that item 1.3.2 of paragraph 1 of Article 6 and Article 8, respectively Article 10/A of the Contested Law are not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 10 of Article 65 [Competences of the Assembly] and Article 132 [Role and Competencies of the Ombudsperson] of the Constitution;

III. TO HOLD that paragraph 2/a of Article 13 of the Contested Law is not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power] and paragraph 1 of Article 110 [Kosovo Prosecutorial Council] of the Constitution;

IV. TO HOLD that paragraph 5 of Article 16 of the Contested Law is not compatible with paragraph 1 of Article 24 [Equality before the Law] of the Constitution;

V. TO HOLD that Article 18, respectively 23/A of the Contested Law is not compatible with Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution;

VI. TO HOLD that paragraph 3 of Article 11 and Article 20 of the Contested Law are not compatible with paragraph 1 of Article 4 [Form of Government and Separation of Power], Article 32 [Right to Legal Remedies], Article 54 [Judicial Protection of Rights] and paragraph 1 of Article 110 [Kosovo Prosecutorial Council] of the Constitution and of the Constitution;

VII. TO DECLARE null and void in its entirety Law no.08/L-136 on amending and supplementing the Law no.06/L-056 on Kosovo Prosecutorial Council;

VIII. TO REJECT the request for an interim measure;

IX. TO NOTIFY this Judgment to the Parties;

X. TO HOLD that this Judgment enters into force on the day of its publication in the Official Gazette of the Republic of Kosovo, in accordance with Article 20 (5) of the Law.

Judge Rapporteur	**President of the Constitutional Court**
Bajram Ljatifi	Gresa Caka-Nimani

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