Prishtina, 15 July 2024
Ref. no.:MK 2477/24

CONCURING AND DISSENTING OPINION

of Judge

RADOMIR LABAN

in

joint cases no. KO114/23, KO192/23, KO227/23 and KO229/23

Applicant

The Supreme Court of the Republic of Kosovo

Constitutional review of paragraph 2 of article 4, paragraph 4 of article 432 and paragraph 2 of article 438 of the Criminal Procedure Code of the Republic of Kosovo no. 08/L-032

Expressing at the outset my respect to the opinion of the majority of judges in this case in which the Court found as follows:

I. TO DECLARE, unanimously, the referral admissible;

II. TO HOLD, unanimously, that the wording "*or terminating*" of paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the Code no. 08/L-032 of the Criminal Procedure, is not contrary to item 2 of paragraph 1 of Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights;

III. TO HOLD, unanimously, that paragraph 2 of article 4 (Ne Bis In Idem) of Code no. 08/L-032 of Criminal Procedure is not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

IV. TO HOLD, with five (5) votes for and four (4) against, that the wording "*unless if the final decision is manifestly inappropriate or based on serious error*" of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 of Criminal Procedure, is not contrary to Article 34 [Right not to

be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

As a judge, I fully agree with the opinion of the majority of judges in this case with paragraph I of this judgment that the case is admissible for review.

Furthermore, I, as a judge, agree with the enacting clause of paragraph II and paragraph III of the judgment, but I disagree with the legal analysis and reasonng of these paragraphs, and I will present my concurring opinion regarding them.

At the same time, I do not agree with the enacting clause of paragraph IV, as well as with the legal analysis and reasoning thereof, and I will present my dissenting opinion regarding item IV.

As a judge, I agree with the factual situation as stated and presented in the judgment and I accept the same factual situation as correct. I also agree with the way the applicant's allegations were stated and presented in the judgment, as well as the comments of various interested parties.

Due to the above, and in accordance with Rules 56 and 57 of the Rules of Procedure of the Constitutional Court, I will present my concurring and dissenting opinion in writing.

Due to the above, in order to follow the reasoning of my concurring and dissenting opinion as easily and clearly as possible, I will reason in detail **(A)** Merits of the referral **(B)** Constitutional review of the relevant provisions of the contested law in the context of detention - joint cases KO114/23 and KO227/23 **(C)** Conduct constitutional review of paragraph 4 of Article 432 of the contested law **(D)** Present the context of the joint cases KO192/23 and KO229/23 where the principle „ne bis in idem“ is applied **(E)** Present the general principles regarding the legal institute Ne bis in idem on the basis of the case law of the ECtHR. **(F)** Conduct constitutional review of paragraph 2 of Article 4 (Ne Bis In Idem) in the context of the dismissal of the indictment, namely the modification of the final decision ending the criminal proceedings in the -joint cases KO192/23 and KO229/23. **(G)** Conduct constitutional review of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) in the context of the dismissal of the indictment, namely the modification of the final decision ending the criminal proceedings in the - joint cases KO192/23 and KO229/23 **(H)** Present the conclusion in conjunction with alleged violations of the Constitution.

A) Merits of the referral

1. I recall that the referring Court, during the examination of present cases, raised doubts about the incompatibility of paragraph 2 of Article 4 (Ne Bis In Idem), paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) and paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the contested law, with Articles 29 [Right to Liberty and Security], 34 [Right not to be Tried Twice for the Same Criminal Act] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

2. I recall that in order to assess the constitutionality of the relevant provisions of the Law, one must first clarify the legal basis that refers to the right of the state prosecutor to submit a request for protection of legality to the detriment of the defendant in cases of detention, objection of evidence and dismissal of the indictment and the final judgment ending the criminal procedure.

3. In this context, I note that paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law establishes: (i) *2. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code;* (ii) paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the contested law establishes: (ii) *4.* "*Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand*"; (iii) paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the contested law which stipulates that: *2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*".

4. I also note that Article 53 [Interpretation of Human Rights Provisions] of the Constitution will be taken into account by the Court only if the request for the protection of legality submitted by the state prosecutor against the annulment of detention, the objection of evidence and the rejection of the indictment and the final judgment ending the criminal proceedings is or is not in accordance with the court decisions of the European Court of Human Rights (hereinafter: ECtHR).

5. In this context, I assess that the subject of the constitutional review in this referral is paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law. establishes: (i) *2. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code;* (ii) paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the contested law establishes: (ii) *4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand;* (iii) paragraph 2 of article 438.(Judgment on Request for Protection of Legality) of the contested law establishes: *2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*. that is, whether they are in accordance with the human rights guaranteed by Articles 29 [Right to Liberty and Security] and 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 5 (Right to liberty and security) and Article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights (hereinafter: ECHR).

6. I emphasize that the joint cases KO114/23, KO192/23, KO227/23 and KO229/23 will be assessed based on their characteristics. In this context, I note that the joint cases KO114/23 and KO227/23 represent detention cases, which will be assessed only in terms of Article 29 [Right to Liberty and Security], of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR.

7. On the other hand, the joint referrals KO192/23 and KO229/23 refer to the objection of evidence and dismissal of indictment, namely, the final decision ending the criminal proceedings. Accordingly, I emphasize that the joint referrals KO192/23 and KO229/23 will be assessed in the context of the principle „*Ne bis in idem*" guaranteed by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the ECHR.

8. I also clarify that in accordance with Article 53 (Decision) of the Law, the latter decides only on the compatibility of the legal provision with the Constitution and does not decide on other factual or legal issues related to the dispute under consideration before the referring Court. In other words, the Court assesses only if the contested legal provision is in compliance with the constitutional norm. I also recall that it is up to the referring Court to apply the finding of the Court in the circumstances of the case before it.

9. In the following text, before assessing the constitutionality of the relevant provisions of the contested law, I will present: **(i)** Background of the criminal procedure law; **(ii)** The principle of legal certainty from the consolidated case law of the ECtHR and the Venice Commission.

Background of criminal procedure law

10. I note that in this context it is necessary to present the relevant provisions of the criminal procedure laws that preceded the contested law in order to give a more general context regarding detention, extraordinary legal remedies and the rights of the defendant in criminal proceedings.

11. From the foregoing, I note that paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the Code no. 04/L-123 repealed by the contested law, provided that a request for the protection of legality can be filed against final decisions related to the imposition or extension of court detention; (ii) that Article 441 (Constitution of the Republic of Kosovo, European Convention on Human Rights and European Court of Human Rights) of the Code no. 04/L-123 repealed by the contested law provided that a request for an extraordinary legal remedy can be submitted based on the rights guaranteed by this Code and protected by the Constitution, the ECHR, as well as the decisions of the ECtHR; (iii) that paragraph 4 of Article 451 (No title) of the Provisional Law on Criminal Procedure of Kosovo UNMIK/REG/2003/26 repealed by Code no. 04/L-123 on criminal procedure provided that a request for protection of legality can be submitted against final court decisions related to the imposition or extension of court detention; (iv) that Article 460 (No title) of the Provisional Law on Criminal Procedure of Kosovo UNMIK/REG/2003/26 repealed by Code no. 04/L-123 on criminal procedure provided that a request for an extraordinary legal remedy from this chapter can be submitted based on a decision of the ECtHR in accordance with the procedures prescribed by law.

12. Based on the previously elaborated paragraph, I recall that the laws on criminal procedure that preceded the contested law (i) in cases of detention allowed the use of an extraordinary legal remedy, but only in favor of the defendant, namely only in connection with decisions imposing or extending detention, but not against decisions terminating detention; (ii) a request for an extraordinary remedy can be submitted on the basis of the rights guaranteed by the law on criminal procedure and protected by the Constitution, the ECHR, as well as the decisions of the ECtHR.

13. I note that unlike the previous laws on criminal procedure, the contested law, namely paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality), established that a request for protection of legality can be submitted against final decisions on imposition, extension or termination of detention, that is, it is allowed that this extraordinary legal remedy can be used to the detriment of the defendant against the decision on termination of his detention.

14. I note that, as a common point, the previous procedural laws and the contested law introduce **(i)** the principle of the presumption of innocence of the defendant, *in dubio pro reo*, by establishing that doubts regarding the existence of facts that are important

to the case or on which the application of some provisions of the criminal law depends are interpreted in a way that is more favorable for the defendant and his rights according to the law on criminal procedure and the Constitution (see Article 3 of the Criminal Procedure Code No. 04/L-123 and Article 4 of the contested law); and, that **(ii)** a request for an extraordinary remedy can be submitted based on the rights guaranteed by the law on criminal procedure and protected by the Constitution, the ECHR, as well as the decisions of the ECtHR (see Article 441 of the Code No. 04/L-123 on Criminal Procedure and Article 440 of the contested law).

Principle of legal certainty from the consolidated case law of the ECtHR and the Venice Commission

15. Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the ECHR, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (*Khlaifia and Others v. Italy* no. 16483/12, judgment of 15 December 2016, paragraph 92; *Del Río Prada v. Spain* no. 42750/09, judgment of 21 October 2013, paragraph 125).

16. Article 5 (1) of the ECHR thus does not merely refer back to domestic law, it also relates to the "quality of the law" which implies that where a national law authorizes deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application. Factors relevant to this assessment of the "quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention (see case of the ECtHR *J.N. v. The United Kingdom,* no. 37289/12, judgment of 19 May 2016, paragraph 77). For example, the practice of keeping a person in detention under a bill of indictment without any specific basis in the national legislation or case-law is in breach of Article 5 (1) of the ECHR (see case of the ECtHR *Baranowski v. Poland*, no. 28358/95, judgment of 28 March 2000, paragraphs 50-58). Likewise, the practice of automatically renewing pre-trial detention without any precise legislative foundation is contrary to Article 5 (1) of the ECHR (see case of the ECtHR *Svipsta v. Latvia*, no. 66820/01, judgment of 9 March 2006, paragraph 86).

17. In addition, any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see case of the ECtHR *S., V. and A. v. Denmark*, no. 35553/12, 36678/12 and 36711/12, judgment of 22 October 2018, paragraph 74) The notion of "arbitrariness" in Article 5 (1) of the ECHR extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the ECHR (see cases of the ECtHR *Creangă v. Romania*, no. 29226/03, judgment of 23 February 2012, paragraph 84; *A. and Others v. The United Kingdom*, no. 3455/05, judgment of 19 February 2009, paragraph 164).

18. As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases (CDL-PI(2022)004, Compilation of Venice Commission Opinions and Reports concerning Legal Certainty, paragraph 57).

19. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be

formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it (CDL-PI(2022)004, Compilation of Venice Commission Opinions and Reports concerning Legal Certainty, paragraph 58).

20. Res judicata implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them (CDL-PI(2022)004, Compilation of Venice Commission Opinions and Reports concerning Legal Certainty, paragraph 63).

21. As regards legal certainty, the Venice Commission observed that it is "essential to the confidence in the judicial system and the rule of law", it "requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. Retroactivity goes against the principle of legal certainty, at least in criminal law (Article 7 of the ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests (CDL-AD(2014)021, Opinion of the Venice Commission on the Draft Law on Introducing Amendments and Addenda to the Judicial Code of Armenia, paragraph 18).

B) Constitutional review of relevant provisions of the contested law in the context of detention - joint cases KO114/23 and KO227/23

22. As a preliminary question regarding the assessment of the constitutionality of the provisions of the contested law in the context of detention - in the joint cases KO114/23 and KO227/23, I assess that Article 4 (Ne Bis In Idem) of the contested law in conjunction with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution represent questions that fall outside the scope of the constitutional review of these joint referrals because it is obvious that the request for the protection of legality submitted by the state prosecutor in these two joint referrals does not refer to the investigation, accusation or new trial against the defendant, but only to final decisions related to imposing, extending and terminating the detention.

23. In this context, I assess that the subject of the constitutional review of the provisions of the contested law in the context of detention in the joint cases KO114/23 and KO227/23 is paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the contested law, if the latter is compatible with the right to liberty and security, as understood and guaranteed by Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights (hereinafter: ECHR).

C) Constitutional review of paragraph 4 of article 432 of the contested law

24. I recall that paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the contested law establishes the following: "*4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand ".*

25. I further recall that the requirement of procedural fairness under Article 5 para. 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that Article 5 para. 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (A. and Others v. the United Kingdom [GC], 2009, § 203; Idalov v. Russia [GC], 2012, § 161).

26. It is necessary to hold a hearing in the case of a person whose deprivation of liberty falls under the scope of Article 5, paragraph 1.c (Nikolova v. Bulgaria [GC], paragraph 58). The opportunity for a person deprived of liberty to be heard, either in person or through a representative, is one of the basic guarantees of the procedure applied in matters related to deprivation of liberty (Kampanis v. Greece, para. 47). However, Article 5, para. 4 does not impose an obligation to hear a person deprived of his liberty every time he files an appeal against a decision extending his deprivation of liberty, but he must be given the opportunity to be heard at reasonable intervals (Çatal v. Turkey, para. 33; Altınok v. Turkey, para. 45).

27. The proceedings must be adversarial and must always ensure "equality of arms" between the parties (Reinprecht v. Austria, 2005, para. 31; A. and Others v. the United Kingdom [GC], 2009, para. 204). In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears to have a bearing on the continuing lawfulness of the detention (Ţurcan v. Moldova, 2007, paras. 67-70)

28. Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (Ovsjannikov v. Estonia, 2014, para. 72; Fodale v. Italy, 2006, para. 41; and Korneykova v. Ukraine, 2012, para. 68). It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer (Cernák v. Slovakia, 2013, para. 78).

29. The principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court see paras. 33-34 in case Çatal v. Turkey, 2012, and the cases referred to therein).

30. I assess that from the answers received from the member states' courts of the Forum of the Venice Commission, depending on the legal system of the given state, it follows: (i) that the claimant does not have an extraordinary legal remedy at his disposal to challenge the final decisions of regular courts; (ii) that the claimant can only file a regular legal remedy during the proceedings; and, (iii) that even in judicial systems that allow the claimant to use extraordinary remedies, courts only make decisions of a declaratory nature if the claim is grounded, but do not modify the decision to the detriment of the defendant. (For example: i) in the Albanian judicial system, extraordinary remedies of requests for the protection of legality have not existed since 1997; (ii) in the Swedish legal system, there is no request for an extraordinary legal remedy to protect legality and that in practice detention cases are always contested by regular legal remedies; (iii) in the legal system of Liechtenstein, an appeal to the Supreme Court is allowed in the context of an ordinary remedy, while there is no extraordinary remedy similar to a request for protection of legality; (iv) in the Slovak judicial system, the Supreme Court can overturn detention decisions made in favor of the accused, but this issue has never been challenged before the Constitutional Court of the Slovak Republic; (v) in the Austrian legal system, the claimant may file a legal action with the Supreme Court, which may issue a decision of a declaratory nature establishing a violation of the law, but the decision of the Supreme Court can never be reversed to the detriment of the defendant; (vi) the legal system of the Czech Republic does not provide for an extraordinary legal remedy such as a request for protection of legality; (vii) Kazakhstan responded that the category of extraordinary protection of legality was not considered by the Constitutional Court of Kazakhstan; (viii) in the Croatian legal system, the claimant can submit a

request for the protection of legality, but the Supreme Court can make a decision on violation of legality without affecting the rights of the defendant; (ix) in the Turkish legal system, the prosecutor does not have the possibility to submit an extraordinary appeal to the Court of Cassation regarding the termination of the defendant's detention; (x) The German legal system does not contain an extraordinary remedy corresponding to the request for the protection of legality in cases relating to detention; (xi) the legal system of North Macedonia has an extraordinary remedy and can be filed against the accused, but the Supreme Court can only find a violation of the law but will not interfere in the final decision)

31. I further recall that it is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release (Assanidze v. Georgia [GC], 2004, para. 173). The Court however recognizes that some delay in carrying out a decision to release a detainee is understandable and often inevitable. Nevertheless, the national authorities must attempt to keep it to a minimum (Giulia Manzoni v. Italy, 1997, para. 25). A delay of eleven hours in executing a decision to release the applicant "forthwith" was found to be incompatible with Article 5 para. 1 of the Convention (ibid.; Quinn v. France, paras. 39-43).

32. I emphasize again that the key purpose of Article 29 of the Constitution and Article 5 of the ECHR is to prevent arbitrary or unjustified deprivations of liberty of an individual (see cases of the ECtHR *Selahattin Demirtaş v. Turkey* (no. 2), no. 14305/17, judgment of 22 December 2020, paragraph 311; *S., V. and A. V. Denmark*, no. 35553/12, 36678/12 and 36711/12, judgment of 22 October 2018, paragraph 73; *McKay v. The United Kingdom*, no. 543/03, judgment of 3 October 2006, paragraph 30). The right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Constitution and the ECtHR (see cases of the ECtHR *Medvedyev and others v. France*, no. 3394/03, judgment of 29 March 2010, paragraph 76; *Ladent v. Poland*, no. 11036/03, judgment of 18 March 2008, paragraph 45).

33. I note that the Constitutional Court of Croatia, in connection with the purpose of detention as the strictest measure against the defendant, explained: " *Detention, as a legal measure of deprivation of the fundamental human right to personal freedom in the period before a final court judgment on guilt is rendered, is not a punishment, nor can it be turned into a punishment for the detainee. Therefore, detention is permitted only in a case in which there is a high degree of probability of finding guilt and imposing a sentence, that is, in which there is a „reasonable suspicion" that a person has committed a criminal offense and, in principle, only in order to ensure the initiation and conduct of criminal proceedings*" (see the decision of the Constitutional Court of Croatia no. U-III-3698/2003 of 28 September 2004).

34. I also note that the Constitutional Court of Croatia explained regarding the principle of proportionality in detention cases: „*The principle of proportionality in imposing detention, and especially when considering the grounds and justification of its extension after the lapse of time specified by law, is particularly important, because it is the most difficult legal measure to ensure the presence of the defendant (in this case, the accused) in the criminal proceedings. Namely, only the measure of detention leads to the deprivation of an individual's freedom, unlike other measures that only limit his freedom*" (see the decision of the Constitutional Court of Croatia no. U-III-3698/2003, cited above).

35. In this regard, the Court notes that Article 171 (Authorized Measures to Ensure Presence of Defendant) of the Criminal Procedure Code, has defined detention as a measure to ensure the presence of the defendant in the proceedings and successful implementation of the criminal procedure, foresees other more lenient measures, such as: (i) summon;

(ii) order for arrest; (iii) the defendant's promise that he will not leave his place of residence; (iv) prohibition to approach the specified place or person; (v) attendance at the police station; (vi) bail; and (vii) house arrest.

36. I assess that with the passage of time, after conducting and confirming the investigation and taking statements, keeping the defendant in custody cannot be justified, but other milder measures should be applied to ensure his presence in the criminal proceedings, which measures are provided for by law and are in accordance with the basic guarantees Article 29 of the Constitution and Article 5 of the ECHR (see, *mutatis mutandis*, ECtHR case *Clooth v. Belgium*, judgment of 12 December 1991, para. 44).

37. I assess that, looking objectively, if the defendant is sentenced to a measure that is milder than custody after being questioned by the first-instance court and the court with appellate jurisdiction, then this implies that those courts have collected and assessed all the evidence, accepted the statements, assessed that due to the past over time, the danger that the defendant will obstruct the proper course of the criminal proceedings is reduced and that his presence in the criminal proceedings can be ensured by a milder measure that has a restrictive character, in contrast to detention, which is the strictest measure by which liberty is denied (see the decision of the Constitutional Court of Croatia U-III-3698/2003, cited above). In the context of the relevant provisions of the contested law, I assess that giving the state prosecutor the opportunity to challenge the final decision on the termination of the defendant's custody worsens the position of the defendant in the criminal proceedings because it is contrary to the principle of foreseeability and the prohibition of the retroactive effect of legal instruments (CDL-AD(2014)021, Opinion Venice Commission on the Draft Law on Amendments to the Judicial Code of Armenia, para. 19).

38. I also consider that the modification of the decision on the termination of detention to the detriment of the defendant by means of an extraordinary legal remedy - a request for the protection of legality by the state prosecutor is unacceptable in a democratic society characterized by the rule of law for the reason that: **(i)** in a subjective sense, it worsens the position of the defendant in the criminal procedure; while **(ii)** in an objective sense, the freedom and security of the individual is violated, which is considered a right of the highest importance in a „democratic society" (see ECtHR cases *Medvedyev and Others v. France*, cited above, paragraph 76; *Ladent v. Poland*, cited above, paragraph 45); and, **b)** is contrary to the main purpose of Article 29 of the Constitution and Article 5 of the ECHR to prevent arbitrary or unjustified deprivation of an individual's liberty (see ECHR cases (see cases of ECtHR *Selahattin Demirtaş v. Turkey* (no. 2), cited above, paragraph 311; *S., V. and A. v. Denmark*, cited above, paragraph 30).

39. In this context, I assess that based on the principle of equality of parties in criminal proceedings, the state prosecutor should be given the opportunity to submit an extraordinary legal remedy - a request for the protection of legality and that after that, if the request is founded, the relevant court, as the highest judicial authority (see Article 103.2 of the Constitution) is limited only to the finding that there has been a violation of the law, but this decision can only be of a declarative nature and the Supreme Court cannot change the decision of a lower court to the detriment of the defendant.

40. Based on the above, I find that the wording „*or terminating*" from paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the Code no. 08/L-032 on criminal proceedings, is not contrary to Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights;

D) The context of the joint cases KO192/23 and KO229/23 where the principle "*ne bis in idem*" applies

41. On the other hand, the joint referrals KO192/23 and KO229/23 refer to the objection of the evidence and dismissal of the indictment, that is, the final decision ending the criminal proceedings. Accordingly, I emphasize that the joint referrals KO192/23 and KO229/23 will be assessed in the context of the principle "*Ne bis in idem*" guaranteed by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (Right not to be tried or punished twice) of Protocol No. 7 of the ECHR.

42. I recall that the referring Court in the case KO193/23 emphasizes that the judges of the criminal department of the Supreme Court of Kosovo, after the meeting, assessed that in this case it is necessary to start the incidental control procedure, since they are not certain *"whether the legal provision from Article 438, paragraph 2 of the CPC (which refers to the request for the protection of legality submitted to the detriment of the defendant), is in accordance with the provisions of the Constitution of the Republic of Kosovo and with the court decisions of the European Court of Human Rights, while such an interpretation is important in order to decide on this criminal matter."*

43. Furthermore, the Relevant Court considers that the Constitutional Court should clarify three (3) important things, namely: (i) first, what is meant by the term used by the legislation "*manifestly inappropriate or based on a serious error*", since this may cause ambiguities in interpretation; (ii) secondly, how should the court proceed after establishing that it is a "*manifestly inappropriate or based on a serious error*" since this is not clarified by this legal provision or (iii) third, this way of deciding to the detriment of the defendant, upon request for protection of the legality of the Chief State Prosecutor, by an extraordinary legal remedy, whether it is in accordance with the constitutional principles and provisions, as well as with the decisions of the European Court of Human Rights.

44. In the end, the Relevant Court in referral KO229/23 points out that "*in the present case, in addition to the defendants' defense, the state prosecutor also filed a request for protection of legality against the final decision, taking into account that in the request he proposed that on the grounds of serious errors the case should be remanded for retrial, the question that is posed is whether the final decision can be changed with the request for protection of legality as an extraordinary legal remedy to the detriment of defendants and are the provisions of article 4 par. 2, article 432 par. 4 and 438 par. 2 of the CPC in compliance with articles 30, 31, 34 and 53 of the Constitution of the Republic of Kosovo*."

45. In this context of the joint cases KO192/23 and KO229/23 where the principle "*Ne bis in idem*" is applied, I assess that the subject of the constitutional review is paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law, which establishes: (i) 2 "*A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code*"; and (ii) paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the contested law stipulates: 2. *If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*. that is, whether they are in accordance with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) of Protocol no. 7 of the European Convention on Human Rights (hereinafter: ECHR).

46. From the above, I will first outline the general principles related to the legal institute "*Ne bis in idem*" based on the case law of the ECtHR, and then apply these principles to present cases in the context of the contested law and the joint cases KO192/23 and KO229/23, and assess the constitutionality of paragraph 2 of Article 4 (Ne Bis In Idem) and paragraph 2 of Article 438 (Judgment on Request for Protection of Legality).

E) General principles regarding the legal institute Ne bis in idem based on the case law of the ECtHR

47. Protocol No. 7 to the Convention was drafted in 1984. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision (Ne bis in idem).

48. According to the Court's case-law, the guarantee enshrined in Article 4 of Protocol No. 7 occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency (Mihalache v. Romania [GC], 2019, § 47).

49. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings (Ibid., § 48). However, as Article 4 of Protocol No. 7 is separate from Article 6 of the Convention, complaints under the former will be declared inadmissible if the State in question has not ratified the protocol (Blokker v. the Netherlands (dec.), 2000).

50. Article 4 of Protocol No. 7 to the Convention enshrines a fundamental right guaranteeing that no one is to be tried or punished in criminal proceedings for an offence of which he or she has already been finally convicted or acquitted (Marguš v. Croatia [GC], 2014, § 114; Sergey Zolotukhin v. Russia [GC], 2009, § 58; Nikitin v. Russia, 2004, § 35; and Kadusic v. Switzerland, 2018, § 82). The repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7 (Nikitin v. Russia, 2004, § 35).

Structure of the Article

Article 4 of Protocol no. 7 - The right not to be tried or punished twice in the same matter

> *"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
> *3. No derogation from this Article shall be made under Article 15 of the Convention."*

51. Article 4 consists of three paragraphs. The first paragraph sets out the three key components of the ne bis in idem principle (*Mihalache v. Romania* [GC], 2019, § 49):
    a. whether both proceedings were "criminal" in nature",
    b. whether the offence was the same in both proceedings, and
    c. whether there was a duplication of proceedings.

The third component in turn consists of three separate sub-issues:
    i. whether there were new proceedings;

ii. if so, whether the first set of proceedings was concluded by a final decision; and
iii. whether the exception in the second paragraph is applicable.

I. Whether there were new proceedings

52. Article 4 of Protocol No. 7 prohibits the repetition of criminal proceedings that have been concluded by a "final" decision. Article 4 of Protocol No. 7 is not only confined to the right not to be punished twice but also extends to the right not to be prosecuted or tried twice. It applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction (Sergey Zolotukhin v. Russia [GC], 2009, §§ 110-111, in respect of an acquittal following the second set of proceedings).

53. The Court has held that Article 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated (Sergey Zolotukhin v. Russia, 2009).

54. However, Article 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings (litis pendens). In such a situation it cannot be said that an applicant is prosecuted several times "for an offence for which he has already been finally acquitted or convicted" (Garaudy v. France (dec.), 2003). There is no problem from the Convention point of view also when, in a situation of two parallel sets of proceedings, the second set of proceedings is discontinued after the first set of proceedings has become final (Zigarella v. Italy (dec.), 2002). But, when no such discontinuation occurs, the Court has found that there was a duplication of proceedings in violation of Article 4 of Protocol No. 7 (Tomasović v. Croatia, 2011, §§ 29-32; Muslija v. Bosnia and Herzegovina, 2014, §§ 36-37; Nykänen v. Finland, 2014, §§ 47-54; Glantz v. Finland, 2014, §§ 57-64).

55. However, the Court has also found, in its case-law concerning withdrawal of driving licenses, that although different sanctions (criminal sanctions and withdrawal of driving licences) concerning the same matter (drunken driving or driving in excess of the speed limit) had been imposed by different authorities in different proceedings, there had been a sufficiently close connection between them, in substance and in time (Nilsson v. Sweden (dec.), 2005; Maszni v. Romania, 2006, §§ 68-70). In those cases, the Court found that the applicants had not been tried or punished for an offence for which they had already been finally convicted in breach of Article 4 para. 1 of Protocol No. 7 to the Convention and that there had been thus no repetition of the proceedings. For instance, in Boman v. Finland, 2015, the applicant had been convicted of a traffic offence and subject to a temporary driving ban. Subsequently, the Police Authority and the administrative courts, in a separate process, prolonged the driving ban. The Court noted that the imposition of the latter driving ban presupposed that the applicant had already been found guilty of the traffic offence. Furthermore, it held that the decision, shortly after the judgment in the criminal proceedings, to impose the second driving ban was directly based on the applicant's final conviction by the District Court for traffic offences and thus did not contain a separate examination of the offence or conduct at issue by the police. Therefore, the Court concluded that the two proceedings were intrinsically linked, in substance and in time, and thus took place within a single set of proceedings for the purposes of Article 4 of Protocol No. 7 to the Convention (see also Rivard v. Switzerland, 2016, §§ 28-34).

56. Tax sanctions have been examined by the Court in several cases against Finland and Sweden. (Häkkä v. Finland, 2014; Nykänen v. Finland, 2014; Glantz v. Finland, 2014; Rinas v. Finland, 2015; Österlund v. Finland, 2015; Kiiveri v. Finland; 2015; Lucky Dev v. Sweden, 2014). In these cases the Court noted that, in the Finnish and Swedish systems the criminal and the administrative sanctions had been imposed by different authorities without the proceedings being in any way connected: both sets of

proceedings followed their own separate course and became final independently from each other. Moreover, the Court noted that neither of the sanctions had been taken into consideration by the other court or authority in determining the severity of the sanction, nor was there any other interaction between the relevant authorities. Furthermore, the Court observed that the tax surcharges had been imposed following an examination of an applicant's conduct and his or her liability under the relevant tax legislation which was independent from the assessments made in the criminal proceedings. This, the Court held, contrasted with the Court's earlier cases relating to driving licences, where the decision on withdrawal of the licence had been directly based on an expected or final conviction for a traffic offence and thus had not contained a separate examination of the offence or conduct at issue. Therefore, the Court concluded that there had not been a close connection, in substance and in time, between the criminal and the taxation proceedings.

57. The issue is then whether there has been a duplication of proceedings (bis). In case A and B v. Norway [GC], 2016, the Court examined the Norwegian system of dual criminal and administrative proceedings regarding incorrect information submitted in tax declarations. The Court developed further the principle of "sufficiently close connection in substance and in time" between the proceedings. It held that the surest manner of ensuring compliance with Article 4 of Protocol No. 7 was the provision of a single-track procedure enabling the parallel strands of legal regulation of the activity concerned to be brought together, so that the different needs of society in responding to the offence could be addressed within the framework of a single process. Nonetheless, Article 4 of Protocol No. 7 does not exclude the conduct of dual proceedings, even to their term, provided that certain conditions are fulfilled. The respondent State must demonstrate convincingly that the dual proceedings in question have been "sufficiently closely connected in substance and in time" (§ 130) based on several factors including (§ 132):

a) whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
b) whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct *(idem*);
c) whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;
- d) and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.

58. Furthermore, the Court stressed that the extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings, *inter alia* its stigmatising features, was an important factor. The Court explained that combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law" (§ 133; see, for instance, Velkov v. Bulgaria, 2020, where the A and B criteria were applied in the context of sports hooliganism; see also Goulandris and Vardinogianni v. Greece, 2022,, § 74, where the Court, for the purpose of the "connection in substance" criterion, examined the "hard core of criminal law" aspect in the context of the assessment whether the two sets

of proceedings (administrative and criminal) for unlawful construction pursued complementary purposes).

59. Moreover, where the connection in substance is sufficiently strong, the requirement of a connection in time must also be satisfied. The Court held that the two sets of proceedings do not have to be conducted simultaneously from beginning to end as it should be open to States to opt for conducting the proceedings progressively in instances, where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time, even where the relevant national system provides for an "integrated" scheme separating administrative and criminal components (§ 134).

60. Applying these principles to the facts of the cases, the Court was satisfied that, whilst different sanctions were imposed on the applicants by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, "to consider them as forming part of an integral scheme of sanctions under Norwegian law" for failure to provide information for their tax returns. The dual proceedings did not constitute therefore a proscribed duplication of proceedings so there had been no violation of Article 4 of Protocol No. 7 to the Convention (paragraphs 144-147 and 149-154).

61. On the contrary, in the case of Johannesson and Others v. Iceland, 2017, the Court found that even if the two proceedings pursued complementary purposes in addressing the issue of taxpayers' failure to comply with the legal requirements relating to the filing of tax returns (§ 51), there was no sufficiently closed connection between them, due to the limited overlap in time and the largely independent collection and assessment of evidence (§ 55). Consequently, the applicants suffered disproportionate prejudice as a result of having been tried and punished for the same or substantially the same conduct by different authorities in two different proceedings which lacked the required connection.

62. Similarly, in case Nodet v. France, 2019, § 53, concerning two parallel (administrative and criminal) sets of proceedings for market manipulation, the Court took into account the fact that these two sets of proceedings pursued the same purpose and involved, to a certain extent, independent collection of evidence, which led it to a conclusion that there was no sufficiently close connection in substance between them. Moreover, the Court found that there was no sufficient connection in time between the two sets of proceedings. Accordingly, the Court concluded that the applicant suffered disproportionate prejudice for having been tried and punished twice for the same offence.

63. In case Mihalache v. Romania [GC], 2019, § 84, the Court found that the two sets of proceedings – one before the prosecutor and the other before the relevant court – were not combined in an integrated manner such as to form a coherent whole. The Court had regard to the following facts: the applicant was prosecuted in "both" sets of proceedings for a single offence punishable by a single legal provision; the proceedings and the two penalties imposed on the applicant pursued the same general purpose; the "first" set of proceedings as a whole and the initial part of the "second" set of proceedings were conducted by the same authority; in "both" sets of proceedings the same evidence was produced; two penalties imposed on the applicant were not combined; and the "two" sets of proceedings took place one after the other and were not conducted simultaneously at any time.

64. Having reached the conclusion that the two sets of proceedings were not integrated manner such as to form a coherent whole, the Court considered that in order to determine whether, in the case at issue, there was duplication of proceedings ("bis") for the purposes of Article 4 of Protocol No. 7, it was required to examine whether the decision in the first set of proceedings constituted a "final" decision "acquitting or convicting" the applicant. It stressed that, in the affirmative, it should then establish whether a decision to set aside that "final decision" amounted to a reopening of the case compatible with Article 4 of Protocol No. 7 (Ibid., paras. 85-86).

65. In case Velkov v. Bulgaria, 2020, §§ 78-79, the Court found, *inter alia*, that there was no sufficient connection in substance between the administrative and criminal proceedings for sports hooliganism on the grounds that the sanction imposed in the administrative proceedings had not been taken into account when determining the sanction imposed in the criminal proceedings. By contrast, in Bajčić v. Croatia, 2020, para. 44, where in the context of the applicant's criminal conviction for causing a fatal road accident the criminal court did not take into account the sanction imposed in the minor offence proceedings, the Court considered that the sole fact that the criminal court did not refer *expressis verbis* to the sanction imposed in the minor offence proceedings might not of itself be sufficient to conclude that the proceedings were not interconnected in substance. In this connection, the Court laid emphasis on the fact that when taken together the penalties imposed did not exceed what was strictly necessary in relation to the seriousness of the offences concerned. The Court considered the two sanctions to be complementary and thus concluded that the applicant did not bear an excessive burden.

66. In case Galović v. Croatia, 2021, §§ 113-124, the Court applied, for the first time, the principles established in A and B v. Norway, 2016, regarding the conduct of dual proceedings, to the particular context of domestic violence. It took into account the specific context and dynamics of domestic violence when considering that the two proceedings in question (minor-offence proceedings under the Protection against Domestic Violence Act in respect of two separate incidents and criminal proceedings under the Criminal Code for the continuous offence of domestic violence) were sufficiently closely connected in substance and in time. It therefore found that the two proceedings in question formed a coherent and proportionate whole, which enabled both the individual acts committed by the applicant and his pattern of behaviour to be punished in an effective, proportionate and dissuasive manner, not amounting, consequently, to a duplication of punishment contrary to Article 4 of Protocol No. 7.

II. Whether there was a final decision

67. Article 4 of Protocol No. 7 states that the ne bis in idem principle is intended to protect persons who have already been "finally acquitted or convicted". The explanatory report on Protocol No. 7 states, as regards Article 4, that "[t]he principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned". For a person to qualify for protection under this Article, a final decision is therefore not sufficient; the final decision must also involve the person's acquittal or conviction. In each case, the Court must therefore determine whether there was an acquittal or conviction. If so, it must determine whether it was a "final" decision for the purposes of Article 4 of Protocol No. 7 (Mihalache v. Romania [GC], 2019, §§ 88-89).

The existence of an "acquittal or conviction "

68. As explained in Mihalache v. Romania [GC], 2019, §§ 95 and 97, in order to determine whether a particular decision constitutes an "acquittal" or a "conviction", the Court has to consider the actual content of the decision in issue and assess its effects on the applicant's situation. In this context, judicial intervention is unnecessary for the

existence of a "decision" and the decision in question does not have to take the form of a judgment (see Felix Guţu v. the Republic of Moldova, 2020, §§ 47-54, for the application of this case-law in the context of Article 6 para. 2).

69. Referring to the text of Article 4 of Protocol No. 7, the Court considered that the deliberate choice of the words "acquitted or convicted" implied that the accused's "criminal" responsibility has been established following an assessment of the circumstances of the case, in other words that there has been a determination as to the merits of the case. In order for such an assessment to take place, it is vital that the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case. The authority must then study or evaluate the evidence in the case file and assess the applicant's involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether "criminal" responsibility has been established (Mihalache v. Romania [GC], 2019, § 97).

70. Thus, the finding that there has been an assessment of the circumstances of the case and of the accused's guilt or innocence may be supported by the progress of the proceedings in a given case. Where a criminal investigation has been initiated after an accusation has been brought against the person in question, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, such factors are likely to lead to a finding that there has been a determination as to the merits of the case. Where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned, it can reasonably be considered that the competent authority had conducted a prior assessment of the circumstances of the case and whether or not the behaviour of the person concerned was lawful (Ibid., para. 98).

71. In case Mihalache (§§ 99-101), the Court referred to the fact that under domestic law the public prosecutor's office was called upon to participate in the administration of criminal justice. The prosecutor had jurisdiction to investigate the applicant's alleged actions, questioning a witness and the suspect to that end. Subsequently, he applied the relevant substantive rules laid down in domestic law; he had to assess whether the requirements were fulfilled for characterising the applicant's alleged acts as a criminal offence. On the basis of the evidence produced, the prosecutor carried out his own assessment of all the circumstances of the case, relating both to the applicant individually and to the specific factual situation. After carrying out that assessment, again in accordance with the powers conferred on him under domestic law, the prosecutor decided to discontinue the prosecution, while imposing a penalty on the applicant that had a punitive and deterrent purpose. The penalty imposed became enforceable on the expiry of the time-limit for an appeal by the applicant under domestic law. In these circumstances, the Court found that, irrespective of any judicial involvement, the prosecutor's decision amounted to a "conviction" within the meaning of Article 2 of Protocol No. 7.

72. In case Smoković v. Croatia (dec.), 2019, §§ 43-45, the Court did not consider that a ruling terminating the proceedings against the applicant on the basis of the expiry of the statutory limitation amounted to a "conviction" nor an "acquittal" for the purposes of Article 4 of Protocol No. 7 to the Convention. In particular, it was clear that the termination of the proceedings did not amount to a "conviction". As to the question whether the decision constituted an acquittal, the Court had regard to the following considerations: the decision was not based on any investigation into the charges brought against the applicant; it was not based on any findings of fact relevant for determining the applicant's guilt or innocence; it did not take cognisance of the facts, circumstances or evidence relating to the alleged acts, evaluate them or rule to acquit him; and it did

not amount to an assessment of whether the applicant bore responsibility for the impugned offence, which would normally precede an acquittal.

The „final“ decision

73. The aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings (ne bis in idem principle) that have been concluded by a “final” decision. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a decision is final if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them (Sergey Zolotukhin v. Russia [GC], 2009, § 107). Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired (§ 108). On the other hand, extraordinary remedies such as a request for the reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the “final” nature of the decision does not depend on their being used (§ 108).

74. In case Sundqvist v. Finland (dec.), 2005, the Court found that a decision by a prosecutor not to prosecute was not to be regarded as a “final” decision, in the light of the domestic law applicable. Accordingly, a subsequent decision by the Prosecutor General to prosecute the applicant and the following conviction did not amount to new proceedings falling under the sphere of Article 4 of Protocol No. 7. The Court has already held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 finds no application in that situation (Smirnova and Smirnova v. Russia (dec.), 2022, Harutyunyan v. Armenia (dec.), 2006, Marguš v. Croatia [GC], 2014, § 120; see also a provisional psychiatric internment ordered by the prosecutor in Horciag v. Romania (dec.), 2005). This provision is neither applicable to the termination of criminal proceedings on the basis of an amnesty for acts which amounted to grave breaches of fundamental rights, such as war crimes against the civilian population (Marguš v. Croatia [GC], 2014, §§ 122-141). The Court has held that granting amnesty in respect of the killing and ill-treatment of civilians would run contrary to the State’s obligations under Articles 2 and 3 of the Convention. It has also noted that there is growing tendency in international law to see the granting of amnesties in respect of grave breaches of human rights as unacceptable. Therefore, bringing a fresh indictment against a person who has been granted an amnesty for these acts should not fall within the ambit of Article 4 of Protocol No. 7.

75. In case Mihalache v. Romania [GC], 2019, § 115, the Court further clarified its methodology for the assessment of the finality of a decision. It explained that, in establishing the “ordinary” remedies in a particular case for the purpose of Article 4 of Protocol No. 7, it takes domestic law and procedure as its starting point. Domestic law – both substantive and procedural – must satisfy the principle of legal certainty, which requires that both the scope of a remedy for the purposes of Article 4 of Protocol No. 7 be clearly circumscribed in time and that the procedure for its use be clear for those parties that are permitted to avail themselves of the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence, a remedy must operate in a manner bringing clarity to the point in time when a decision becomes final. In particular, the requirement of a time-limit in order for a remedy to be regarded as “ordinary” is implicit in the wording of the explanatory report itself, which states that a

decision is irrevocable where the parties have permitted the "time-limit" to expire without availing themselves of such a remedy. A law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it, would run counter to the principle of legal certainty.

76. In case Mihalache (§§ 117-125), the Court examined a situation where a higher-ranking prosecutor's office had a possibility to examine of its own motion, in the context of hierarchical supervision, the merits of decisions taken by a lower-level prosecutor's office and to set it aside. The Court considered that a possibility to reopen the proceedings and reconsider the merits of a decision without being bound by any time-limit did not constitute an "ordinary remedy" and thus did not affect the question of finality of the decision taken by the lower-level prosecutor's office.

77. It has to be noted that, in some cases concerning two parallel sets of proceedings, the issue as to whether a proceedings is "final" or not may be devoid of relevance if there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole (Mihalache v. Romania [GC], 2019, § 82; Johannesson and Others v. Iceland, 2017, § 48). In Johannesson and Others v. Iceland, 2017, the Court did not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became "final" as this circumstance did not affect the assessment of the relationship between the proceedings at stake. Nevertheless, in Nodet v. France, 2019, § 46, the Court considered it relevant to determine the moment when one set of proceedings had become final. Similarly, in Korneyeva v. Russia, 2019, §§ 48 and 58, the Court examined the finality of the applicant's prior conviction. However, since it was clear that the two sets of proceedings could not be regarded as forming an integrated legal response to the applicant's conduct, the Court did consider it important to go further into the issue of the finality of the first set of proceedings and the duplication of prosecution.

III. Exceptions

78. Article 4 para. 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters. The requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 para. 2 of Protocol No. 7, which expressly permits Contracting States to reopen a case where new facts emerge, or where a fundamental defect is detected in the proceedings (Mihalache v. Romania [GC], 2019, § 129).

79. Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 para. 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings.

80. In case Nikitin v. Russia, 2004, the applicant was tried for treason through espionage and aggravated disclosure of an official secret. By judgment of the Supreme Court his acquittal became final. The Prosecutor General's subsequent request to the Presidium of the Supreme Court to review the case in supervisory proceedings (encompassing a reassessment of the applicable law, of the facts and evidence on the case file, and for its remittal for fresh investigation) was dismissed. The Court noted that national legislation allowed for such review on the grounds of a judicial error concerning points of law and procedure. As the ultimate effect of the supervisory review, if granted, would be to annul all decisions previously taken by courts and to determine the criminal charge in a new

decision, it was held to be a kind of reopening of the first trial which fell within the scope of Article 4 para. 2 of Protocol No. 7 (§§ 42-49; see also Bratyakin v. Russia (dec.), 2006, Fadin v. Russia, 2006, §§ 30-32, Goncharovy v. Russia (dec.), 2008, Savinskiy v. Ukraine (dec.), 2005, Xheraj v. Albania, 2008, §§ 71-74). In Korppoo v. Finland, 1995, the Commission held that in order to enable the prosecution to assess whether a reopening should be requested the police could not be prevented under Article 4 para. 1 of Protocol No. 7 from pursuing its investigation following the acquittal of a suspect.

81. In case Kadusic v. Switzerland, 2018, the applicant had been convicted of various offences and was serving a prison sentence. Following the re-assessment of the applicant's mental state, the domestic court ordered an institutional therapeutic measure, namely a change of punishment after the delivery of the initial judgement and during the term of the ensuing sentence and suspended the length of the sentence still to be served by the applicant. This therapeutic measure was based on the applicant's serious mental illness that was already present but not detected at the time of the initial judgment. The Court held that the measure did not breach Article 4 of Protocol No. 7. The domestic authorities had viewed the re-assessment of the applicant's mental state as a newly disclosed circumstance and had amended the original judgment by applying the rules on revision by analogy. The Court noted that the applicant had not explained in what sense the reopening of the case had not taken place "in accordance with the law and penal procedure of the State concerned" (para. 85).

82. In case W.A. v. Switzerland, 2021, (concerning the subsequent preventive detention of the applicant ordered in reopened proceedings on account of the applicant's mental health and the risk of reoffending), the Court clarified that a "reopening", for the purposes of Article 4 para. 2 of Protocol No. 7, usually leads to the initial judgment of the criminal court being annulled and the criminal charge being determined anew in a fresh decision. Therefore, in circumstances where the reopening does not require any new elements affecting the nature of the offences committed by the applicant or the extent of his guilt and no fresh determination of a criminal charge is, or is to be made, there can be no "reopening" within the meaning of Article 4 para. 2 of Protocol No. 7, and consequently, the new punishment ordered for the same offence amounts to a breach of Article 4 of Protocol No. 7 (ibid., §§ 71-72; see also § 42 concerning the interplay with Article 5 para. 1 and the required causal link between the initial conviction and new detention ordered in the reopened proceedings).

83. In case Mihalache v. Romania [GC], 2019, §§ 131-133, the Court clarified the concepts of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings. It explained that they are alternative and not cumulative conditions.

84. In particular, circumstances relating to the case which exist during the trial, but remain hidden from the judge, and become known only after the trial, are "newly discovered". Circumstances which concern the case but arise only after the trial are "new". Moreover, the term "new or newly discovered facts" includes new evidence relating to previously existing facts.

85. The concept of "fundamental defect" within the meaning of Article 4 para. 2 of Protocol No. 7 suggests that only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law. Consequently, in such cases, a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion. However, as regards situations where an accused has been found guilty and a reopening of proceedings might work to his advantage, Article 4 of Protocol No. 7 does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to

the benefit of the convicted person. In such situations, therefore, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice.

86. Lastly, the Court explained that in all cases, the grounds justifying the reopening of proceedings must, according to Article 4 para. 2 of Protocol No. 7 in fine, be such as to "affect the outcome of the case" either in favour of the person or to his or her detriment.

87. Against the above principles, in Mihalache (§§ 134-138), the Court did not accept the Government's argument that the need to harmonise prosecutorial practice fell under the exceptional circumstances referred to in Article 4 § 2 of Protocol No. 7, nor did it consider that a mere reassessment of the facts in the light of the applicable law constituted a "fundamental defect" in the previous proceedings (see also Stăvilă v. Romania, 2022, §§ 88-102).

88. In case Sabalić v. Croatia, 2021, § 114, the Court considered (in the context of examining the deficient compliance with the procedural obligation under Articles 3 and 14 of the Convention in a case concerning homophobic violence) that both the failure to investigate hate motives behind a violent attack and the failure to take into consideration such motives in determining the punishment for violent hate crimes, amounted to "fundamental defects" in the proceedings under Article 4 para. 2 of Protocol No. 7, therefore allowing for their reopening to the detriment of the accused. In such circumstances, the ne bis in idem principle cannot constitute a de jure obstacle to re-examining the case in compliance with the Convention standards.

Application of general principles (ne bis in idem) in the context of the contested law and the joint cases KO192/23 and KO229/23

89. I note that Articles 22 [Direct Applicability of International Agreements and Instruments] and 53 [Interpretation of Human Rights Provisions] of the Constitution establish that the ECHR is directly applicable and has precedence over the domestic laws of the Republic of Kosovo and that fundamental human rights and freedoms must be interpreted in accordance with the court decisions of the ECtHR.

F) Constitutional review of paragraph 2 of Article 4 (Ne Bis In Idem) in the context of the dismissal of the indictment, namely the modification of final decision ending the criminal proceedings in -joint cases KO192/23 and KO229/23

90. I note that the relevant court requires a constitutional review of paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law, which establishes: *"2. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code"*.

91. I further recall that Article 4 of Protocol 7 provides

> *"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
> *3. No derogation from this article shall be made under Article 15 of the Convention."*

92. I note that paragraph 2 of Article 4 of Protocol 7 of the ECHR provides for exceptions which *„shall not prevent the reopening of the case in accordance with the law and*

penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."

93. I note that paragraph 2 of Article 4 of Protocol 7 of the ECHR does not prevent, *"a final decision of a court may be reversed through extraordinary legal remedies" ,* if it is provided for by the law of the respective state.

94. Based on the above, I conclude that paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law, which established: *"2. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code"* is not contrary to article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights.

G) Constitutional review of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) in the context of the dismissal of the indictment, namely the modification of final decision ending the criminal proceedings in -joint cases KO192/23 and KO229/23

95. Returning to the present case, I recall that the Relevant court in case KO192/23 considers that the Constitutional Court should clarify three (3) important things, namely: (i) first, what is meant by the term used by the legislation "*manifestly inappropriate or based on a serious error*", since this may cause ambiguities in interpretation; (ii) secondly, how should the court proceed after establishing that it is a "*manifestly inappropriate or based on a serious error*" since this is not clarified by this legal provision or (iii) third, this way of deciding to the detriment of the defendant, upon request for protection of the legality of the Chief State Prosecutor, by an extraordinary legal remedy, whether it is in accordance with the constitutional principles and provisions, as well as with the decisions of the European Court of Human Rights.

96. The Relevant Court further in referral KO229/23 points out that "*in the present case, in addition to the defendants' defense, the state prosecutor also filed a request for protection of legality against the final decision, taking into account that in the request he proposed that on the grounds of serious errors the case should be remanded for retrial, the question that is posed is whether the final decision can be changed with the request for protection of legality as an extraordinary legal remedy to the detriment of defendants and are the provisions of article 4 par. 2, article 432 par. 4 and 438 par. 2 of the CPC in compliance with articles 30, 31, 34 and 53 of the Constitution of the Republic of Kosovo.*"

97. Returning to general principles, the court recalls that Article 4 consists of three paragraphs. The first paragraph establishes three key components of the principle of ne bis in idem (Mihalache v. Romania [VV], 2019, § 49):
    a. whether both proceedings were "criminal" in nature",
    b. whether the offence was the same in both proceedings and
    c. whether there was a duplication of proceedings.

The third component in turn consists of three separate sub-issues:
    i. whether there were new proceedings;
    ii. if so, whether the first set of proceedings was concluded by a final decision; and
    iii. whether the exception in the second paragraph is applicable

98. Further applying the general principles to present joint cases KO192/23 and KO229/23, I note that the first key component is not in dispute, that is, the proceedings are „criminal“ in nature.

99. Furthermore, I note that the other key component, that the same part is being dealt with in both proceedings, is not in dispute before the applicants, namely, the referring courts.

100. The third key component is disputed before the applicants, that is, whether accepting the request for protection of legality in accordance with paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) would lead to a duplication of the proceedings. I further recall that the third key component consists of three separate sub-questions that the court must answer.

101. In the context of the dismissal of the indictment, that is, the modification of the final decision ending the criminal proceedings in the joint cases KO192/23 and KO229/23, it must be determined whether by applying paragraph 2 of Article 438 Judgment on Request for Protection of Legality), which reads „2. *If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*“, there has been a violation of the principle “*Ne Bis In Idem*“ which is established by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights.

102. In order to reach this answer, the court must carry out the test for the third component, namely, answer whether by wording, “*unless if the final decision is manifestly inappropriate or based on serious error*“ comes to

i. reopening of new proceedings;
ii. if so, whether the first set of proceedings was concluded by a final decision; and
iii. whether the exception from the second paragraph is applicable.

103. I note that as regards the first sub-question i) will there be the opening of new proceedings, namely is it possible to open new proceedings based on the wording *“unless if the final decision is manifestly inappropriate or based on serious error“* based on paragraph 2 of article 438 (Judgment on Request for Protection of Legality).

104. The answer to this question of the test is YES, because the possibility of modifying the final decision is foreseen even to the detriment of the defendant if the final decision is “*manifestly inappropriate or based on serious error.*“

105. The next question before the court is ii) whether the first set of proceedings was concluded by a final decision, namely whether before the application of the request for the protection of legality as an extraordinary legal remedy, the decision of the lower courts became final.

106. Regarding the dismissal of the indictment, the court recalls the general principles established in the *Mihalache* case (§§ 99-101), the Court referred to the fact that under domestic law the public prosecutor’s office was called upon to participate in the administration of criminal justice. The prosecutor had jurisdiction to investigate the applicant’s alleged actions, questioning a witness and the suspect to that end. Subsequently, he applied the relevant substantive rules laid down in domestic law; he had to assess whether the requirements were fulfilled for characterising the applicant’s alleged acts as a criminal offence. On the basis of the evidence produced, the

prosecutor carried out his own assessment of all the circumstances of the case, relating both to the applicant individually and to the specific factual situation. After carrying out that assessment, again in accordance with the powers conferred on him under domestic law, the prosecutor decided to discontinue the prosecution, while imposing a penalty on the applicant that had a punitive and deterrent purpose. The penalty imposed became enforceable on the expiry of the time-limit for an appeal by the applicant under domestic law. In these circumstances, the Court found that, irrespective of any judicial involvement, the prosecutor's decision amounted to a "conviction" within the meaning of Article 2 of Protocol No. 7.

107. Regarding the modification of the final decision ending the criminal proceedings, I recall the general principles that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings (ne bis in idem principle) that have been concluded by a "final" decision. According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a decision is final if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them (Sergey Zolotukhin v. Russia [GC], 2009, § 107). Decisions against which an ordinary appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired (§ 108). On the other hand, extraordinary remedies such as a request for the reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the "final" nature of the decision does not depend on their being used (§ 108).

108. The answer to this question of the test is also YES because it foresees the possibility of changing the final decision even to the detriment of the defendant if the final decision is „*manifestly inappropriate or based on a serious error*."

109. Finally, the third sub-question of the third key component must be answered, namely iii) is the applicable exception from paragraph 2 of Article 4 of Protocol 7, which reads "*2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*"

110. In order to arrive at this answer, the Court had to look at Code No. 08/L-032 on Criminal Procedure of the Republic of Kosovo as a whole.

111. First of all, I note that in accordance with Code No. 08/L-032 on Criminal Procedure of the Republic of Kosovo, there are two extraordinary legal remedies as provided for in Article 419 of the Law.

Article 419
Extraordinary Legal Remedies

"1. Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code. The request for the reopening of the criminal proceedings is filed with the Basic Court that rendered the decision.

2. A party may request the extraordinary mitigation of punishment at any time during the period being served in imprisonment. The party files the request with the Basic Court where the first instance judgement was issued, which transmits all case files to the Supreme Court.

3. A party may request protection of legality within three (3) months from the day of filing the final judgment or final ruling against which protection of legality is sought. The party files the request with the Basic Court where the first instance decision was issued which transmits all case files to the Supreme Court.

4. Articles 375, 376, 377, 378 and 379 of the present Code applies to all requests made under this Article".

112. cI further note that on the basis of Article 422 it is possible to "reopen *Criminal proceedings which were dismissed in a final form"*, while on the basis of Article 423 it is possible to "*reopen a criminal proceedings terminated by a final judgment"*, which read

Article 422
Reopening of Criminal Proceedings Dismissed by a Final Ruling

"1. Criminal proceedings which were dismissed in a final form before the main trial can be reopened if the state prosecutor withdrew the indictment and it is proven that this withdrawal was a result of the criminal offense committed by the state prosecutor. While proving this criminal offense, provisions of Article 423, paragraph 3 of the present Code apply.

2. If the indictment was dismissed based on insufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offense as described in the indictment and if new facts and evidence are discovered and obtained, a new indictment can be filed if the review panel determines that new evidence and facts justify this".

Article 423
Reopening Criminal Proceedings Terminated by Final Judgment

"1. Criminal proceedings terminated by a final judgment may only be reopened if:

1.1. it is proven that the judgment rests on a forged document or a false statement of a witness, expert witness or interpreter;

1.2. it is proven that the judgment ensued from a criminal offense committed by a judge or a person who undertook investigative actions;

1.3. new facts are discovered or new evidence is produced which, alone or in connection with previous evidence, appears likely to justify the acquittal of the convicted person or his conviction under a less severe criminal provision;

1.4. a person was tried more than once for the same offense or several persons were convicted of the same offense which could have been committed only by a single person or only by some of them; or;

1.5. in the case of conviction for a continuous criminal offense, or some other criminal offenses which under the law include several acts of the same kind or different kinds, new facts are discovered or new evidence is produced which indicates that the

convicted person did not commit an act included in the criminal offense, of which he was convicted and the existence of these facts would have critically influenced the determination of punishment.

2. Criminal proceedings terminated by a final judgment may be reopened only in favour of the defendant, except that if it is proven that the circumstances under paragraph 1 sub-paragraphs 1.1 and 1.2 of the present Article have been a result of a criminal offense committed by the defendant or a person acting on his behalf against a witness, expert witness, interpreter, state prosecutor, judge or those close to such persons, criminal proceedings terminated by a final judgment may be reopened against the defendant. The reopening of criminal proceedings to the detriment of the defendant is only permissible within five (5) years of the time the final judgment was rendered.

3. In cases under paragraph 1 sub-paragraphs 1.1 and 1.2 or paragraph 2 of the present Article, it must be proven by a final judgment that the persons concerned have been found guilty of criminal offenses in question. If proceedings against these persons cannot be conducted because they are dead or because other circumstances exist which preclude criminal prosecution, the facts under paragraph 1 sub-paragraphs 1.1. and 1.2. or paragraph 2 of the present Article may be proven by using other evidence".

113. Then I note that Article 424 of the Law regulates "*Persons authorized to submit a request reopening of criminal proceedings*", further Article 425 regulates "*Content of the Request for Reopening Criminal Proceedings and the Court Deciding Thereupon*", while Article 426 regulates "Basis and Procedure for Dismissing the Request to Reopen Criminal Proceedings," further by Article 427 "*Decisions of the Panel on the Request for Reopening Proceedings*" and finally by Article 428 "*Rules on New Reopening Proceedings".*

Article 424
Persons Authorized to Request Reopening of Criminal Proceedings

"1. The reopening of criminal proceedings may be requested by the parties and defense counsel. After the death of the convicted person, the reopening may be requested by the state prosecutor or by the spouse, the extramarital spouse, a blood relation person in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person.

2. The reopening of criminal proceedings may be requested even after the convicted person has served his sentence and irrespective of the period of statutory limitation, an amnesty or a pardon.

3. The court which is competent to decide on the reopening of criminal proceedings, upon learning of the existence of grounds to reopen criminal proceedings, notifies thereof the convicted person or another person authorized to file the request".

Article 425
Content of the Request for Reopening Criminal Proceedings and the Court Deciding Thereupon

"1. A request for reopening criminal proceedings is decided by the review panel of the Basic Court which adjudicated the previous proceedings.

2. The request shall specify the legal ground on which the reopening is requested and the evidence supporting the facts on which the request rests. If the request does not

contain this information, the court asks the requesting party to supplement the request within a specified time.

3. A judge who participated in rendering the judgment in previous proceedings may not take part in the deliberations of the panel on the request for reopening".

Article 426
Basis and Procedure for Dismissing the Request to Reopen Criminal Proceedings

"1. The court dismisses the request by a ruling on the basis of the request itself and the files of previous proceedings if it finds that:

1.1. the request has been filed by an unauthorized person;

1.2. there are no legal grounds for reopening of proceedings;

.3. the facts and evidence on which the request rests were presented in an earlier request for reopening of proceedings which was rejected by a final ruling;

1.4. the facts and evidence obviously do not provide grounds to grant the reopening of proceedings; or

1.5. the person who requests the reopening of proceedings did not abide by the provisions under Article 425 paragraph 2 of the present Code.

2. If the request is not dismissed, the court serves a copy of the request on the state prosecutor or the other party who are entitled to reply within eight (8) days. After the court has received the reply to the request, or after the time limit for the reply has expired, the presiding judge of the review panel orders that the facts and evidence indicated in the request and the reply thereto be produced and examined".

Article 427
Decisions of the Panel on the Request for Reopening Proceedings

"1. On the basis of the results of the examination of the facts and evidence indicated in the request and the reply, the court either grants the request and allows the reopening of criminal proceedings or rejects the request.

2. If the court finds that the grounds on which it has allowed the reopening of proceedings also benefit a co-accused who has not requested the reopening of proceedings, it proceeds ex officio as if such request had also been filed by that person.

3. In the ruling by which the reopening of criminal proceedings is allowed the court orders that a new main trial be scheduled immediately or that the case be returned to the stage of investigation or that an investigation be opened if none was conducted before.
4. The court orders that the execution of the judgment is postponed or interrupted if, having regard to the evidence filed, the court considers that:

4.1. the convicted person may be given a sentence in the retrial as a result of which, allowing for the part of the sentence already served, he would have to be released;

4.2. he may be acquitted of the charge; or

4.3. the charge against him may be rejected.

5. When a ruling granting the reopening of criminal proceedings becomes final, the enforcement of punishment is stayed. However, if grounds provided for in Article 184 paragraph 1 of the present Code exist, the court orders detention on remand".

Article 428
Rules on New Reopening Proceedings

"1. New proceedings, held on the basis of a ruling which grants the reopening of criminal proceedings, is conducted in accordance with the provisions applying to the original proceedings. In the new proceedings, the court is not bound by the rulings rendered in the original proceedings.

2. If new proceedings are terminated prior to the opening of the main trial, the earlier judgment is annulled by a ruling on termination.

3. In rendering a new judgment, the court either annuls the earlier judgment or a part thereof or affirms the earlier judgment. In the punishment imposed by the new judgment, the court gives credit for a sentence already served and if reopening was granted only for some of the acts of which the accused was convicted or acquitted, the court imposes a new aggregate punishment in accordance with the provisions of criminal law.

4. In new proceedings, the prohibition under Article 395 of the present Code is binding on the court".

114. On the basis of the abovementioned norms, it is concluded that these legal solutions fully cover the exceptions listed in the general principles and provide an accurate and precise possibility to allow, as an exception, the reopening of already completed criminal proceedings in accordance with paragraph 2 of Article 4 of Protocol 7 of the ECHR.

115. Therefore, I conclude that the abovementioned articles concerning the extraordinary legal remedy of the request for reopening of criminal proceedings are in accordance with the exceptions provided for in paragraph 2 of Article 4 of Protocol 7 of the ECHR and the answer to this to the third sub-question of the third key component is YES, as regards this extraordinary legal remedy.

116. I further note that the Criminal Procedure Code No. 08/L-032 of the Republic of Kosovo provided the possibility of another extraordinary legal remedy, namely a request for protection of legality, by which it is also possible to modify the "final decision" of the lower courts by an extraordinary legal remedy.

117. The law foresees this possibility in Article 432, which provides "*Grounds for Filing a Request for Protection of Legality" while in the contested Article 438 it provides what the Judgment on Request for Protection of Legality can be, which read;*

Article 432
Grounds for Filing a Request for Protection of Legality

"1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:

1.1. on the ground of a violation of the criminal law;

1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384 paragraph 1 of the present Code; or

1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.

2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

3. Notwithstanding the provisions under paragraph 1 of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law.

4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand".

Article 438
Judgment on Request for Protection of Legality

"1. If the Supreme Court of Kosovo determines that a request for protection of legality is well founded it renders a judgment by which, depending on the nature of the violation, it shall:

1.1. modify the final decision;

1.2. annul in whole or in part the decision of both the Basic Court and the higher court or the decision of the higher court only, and return the case for a new decision on the merits or retrial to the Basic Court or the higher court; or

1.3. confine itself only to establishing the existence of a violation of law.

2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error.

3. If the Court of Appeals was not entitled under the present Code to annul a violation of law committed in a decision at first instance or in judicial proceedings which preceded it and the Supreme Court of Kosovo finds that the request filed in favour of the accused is well-founded and that the annulment of the committed violation requires that the decision at first instance be annulled or altered, the Supreme Court of Kosovo annuls or alters the decision of the Court of Appeals as well, even though the law has not thereby been violated".

118. First of all, I note that in accordance with paragraph 2 of Article 432 "*2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.*"

119. Based on this, I conclude that this legal remedy does not fall under the exception required by paragraph 2 of Article 4 of Protocol 7 of the ECHR because it requires the finding of new evidence or new facts.

120. I recall that paragraph 2 of Article 4 of Protocol 7 reads "*2 The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."*

121. Therefore, I conclude that the abovementioned articles concerning the extraordinary legal remedy of the request for protection of legality are not in accordance with the exceptions provided for in paragraph 2 of Article 4 of Protocol 7 of the ECHR and the answer to the third sub-question of the third key component is NO, as regards this extraordinary legal remedy.

122. I assess that in the circumstances of the present case, the subject of the constitutional review is the question of whether the relevant court can render a decision that affects the fundamental rights and freedoms of the defendant regarding the request for protection of legality. The Court assesses that from the very nature of the request for the protection of legality, it follows that it is a continuation - even though it is an extraordinary legal remedy - of the same criminal procedure that was concluded by a final decision. The request for protection of legality is limited only to the reasons for procedural violations of the law and does not refer to the discovery of new facts that were previously unknown or to any significant violations of previous criminal proceedings, and as such does not fall under the exceptions provided for in paragraph 2 of Article 4 of the Protocol 7 of the ECHR.

123. I recall that the concept of "essential violations" in the sense of Article 4 (2) of Protocol no. 7 suggests that only serious violations of procedural rights that severely impair the integrity of the previous procedure can serve as a basis for reopening the procedure to the detriment of the accused, when he has been acquitted or convicted for a criminal offense that is milder than the one for which he should have been convicted on the basis of the relevant law. In this regard, in such cases, a reassessment of the evidence on file by a public prosecutor or a higher court will not by itself satisfy that requirement.

124. Furthermore, I note that Article 4 of Protocol no. 7 does not prevent the reopening of the proceedings in favour of the convicted person and any other modifications of the judgment to the benefit of the convicted person. In such situations, therefore, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice. Also, in all cases, the reasons justifying the reopening of the proceedings must, according to Article 4 (2) of Protocol no. 7, be such that they „*affect the outcome of the case*" either in favor or to the detriment of the defendant (see the ECtHR case of *Mihalache v. Romania*, cited above, paragraph 129).

125. In this context, I consider that regular courts can reopen the criminal proceedings based on paragraph 2 of Article 4 of Protocol no. 7 and the case law of the ECtHR. In addition, the regular courts can reopen criminal proceedings on the basis of the conditions that are exhaustively stated in Article 423 (Reopening of Criminal Proceedings Dismissed by a Final Ruling) of the contested law, which, among other things, establishes that criminal proceedings may be reopened due to falsification of judgment, false statements, if the judgment was reached as a result of a criminal offense committed by a judge or a person who undertook investigative actions, if new facts are presented or new evidence is submitted that relates to the innocence of a convicted person and cases in which a person has been tried more than once for the same criminal offense.

126. Considering the features of extraordinary legal remedies, requests for protection of legality and reopening of criminal proceedings by a final judgment, the Court assesses:

(i) extraordinary legal remedy - a request for protection of legality is submitted only in cases where it is claimed that the criminal proceedings are characterized by procedural violations; (ii) extraordinary remedy – reopening of criminal proceedings that have been concluded by a final judgment in cases where it is claimed that the criminal proceedings are characterized by "fundamental defects". Accordingly, I consider that the request for protection of legality cannot be used to reopen a closed criminal case. A criminal proceeding concluded by a final decision can be reopened only in cases where there are "fundamental errors" that are provided for by an extraordinary legal remedy - a reopening of a criminal proceeding concluded by a final judgment.

127. Furthermore, I also recall the obligations from Article 440 Protection of rights according to the Constitution of the Republic of Kosovo, the European Convention on Human Rights and the European Court of Human Rights, which oblige the Republic of Kosovo to; *"A request for an extraordinary legal remedy under the present Chapter may be filed on the basis of rights available under this Code which are protected under the Constitution of the Republic of Kosovo or the European Convention on Human Rights and its Protocols, as well as any decision of the European Court of Human Rights".*

128. Bearing in mind all this and the possibility of direct application of paragraph 2 of article 4 of Protocol 7 of the European Convention on Human Rights, I again point to the content of paragraph 2 of article 4 (Ne Bis In Idem) of the contested law, which states: *„2. A final decision of a court may be reversed through extraordinary legal remedies only in favor of the convicted person, except when otherwise provided by the present Code*". Therefore, since there is a possibility of direct application of paragraph 2 of article 4 of protocol 7 of the European Convention on Human Rights, I do not see a reason for the existence of the wording „*unless if the final decision is manifestly inappropriate or based on serious error*" of paragraph 2 of article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 on Criminal Procedure, because regular courts can directly apply the exceptions provided for in paragraph 2 of article 4 of Protocol 7 of the European Convention on Human Rights.

129. I assess with additional emphasis that paragraph 2 of Article 4 (Ne Bis In Idem) of the contested law cannot be used in the context of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality), that is, it cannot be used in the context of an extraordinary legal remedy - a request for the protection of legality, but only in the context of an extraordinary legal remedy - a reopening of the criminal proceedings by a final judgment. I consider that for the purpose of legal certainty, Kosovo must not be the only country in Europe that has two extraordinary legal remedies that can be used to reopen a final judgment to the detriment of the defendant.

130. Based on all of the above, I consider that the wording „*unless if the final decision is manifestly inappropriate or based on serious error*" of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 on Criminal Procedure, is not in accordance with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) Protocol no. 7 of the European Convention on Human Rights;

131. I will not go further into the constitutional review of whether the wording „*unless if the final decision is manifestly inappropriate or based on serious error*" of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the Code no. 08/L-032 on Criminal Procedure, is in accordance with Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights, considering that I have already reasoned that the latter is not in compliance with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights.

H) Conclusion regarding alleged violations of the Constitution

132. Based on the above, and taking into account the consideration of the applicant's allegations in his referral:

I. **I AGREE** that the Court **DECLARES** the referral admissible;

II. **I AGREE** that the Court **HOLDS**, that the wording "*or terminating"* of paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the Code no. 08/L-032 of the Criminal Procedure, is not contrary to item 2 of paragraph 1 of Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights;

III. **I AGREE** that the Court **HOLDS**, that paragraph 2 of article 4 (Ne Bis In Idem) of Code no. 08/L-032 of Criminal Procedure is not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

IV. **I CONSIDER** that the Court should have **HELD** that the wording *"unless if the final decision is manifestly inappropriate or based on serious error"* of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 of Criminal Procedure, is not in compliance with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

V. **I CONSIDER** that the Court should have **HELD** that, in accordance with paragraph 3 of Article 116 [Legal Effect of Decisions] of the Constitution, paragraph 5 of Article 20 (Decisions) of the Law and paragraph 4 of rule 60 (Enforcement of Decisions) of the Rule of Procedures, the wording *"unless if the final decision is manifestly inappropriate or based on serious error"* of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 of Criminal Procedure, is repealed on the day of publication of the Judgment in the Official Gazette of Kosovo.

Concurring and Dissenting Opinion submitted by the Judge;

Radomir Laban, Judge

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On 20 June 2024 in Prishtina

This translation is unofficial and serves for informational purposes only.