



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

Prishtina, on 18 July 2017  
Ref. No.:AGJ 1107/17

## JUDGMENT

in

**Case No. KO142/16**

Applicant

**The Appellate Panel of the Special Chamber of the Supreme Court of  
Kosovo on Privatization Agency of Kosovo Related Matters**

**Constitutional review of Articles 10 and 40.1.5 of the Annex to Law No.  
04/L-034 on Privatization Agency of Kosovo**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of

Arta Rama-Hajrizi, President  
Ivan Čukalović, Deputy President  
Altay Suroy, Judge  
Almiro Rodrigues, Judge  
Snezhana Botusharova, Judge  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge and  
Gresa Caka-Nimani, Judge

### **Applicant**

1. The Referral was submitted by the Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (hereinafter: the referring court).

2. The Referral was signed by Sahit Sylejmani, Presiding, Vladimir Kanev, Judge, Werner Kannenberg, Judge, Sabri Halili, Judge, and Ilmi Bajrami, Judge.
3. The Referral submitted by the referring court is related to the trial conducted in that court in the case number AC-II-12-0086.

### **Challenged law**

4. The referring court challenges the constitutionality of Articles 10 and 40.1.5 of the Annex to Law No. 04/L-034 on Privatization Agency of Kosovo (hereinafter: the Law on PAK), adopted by the Assembly of the Republic of Kosovo on 31 August 2011.

### **Subject matter**

5. The referring court requests the Constitutional Court of the Republic of Kosovo to assess the constitutionality of Articles 10 and 40.1.5 of the Annex to the PAK Law, which allegedly are in contravention with Article 46 [Protection of Property] of the Constitution of the Republic (hereinafter: the Constitution), in conjunction with Article 1 of Protocol no. 1 of the European Convention on Human Rights (hereinafter: the Convention).

### **Legal basis**

6. The Referral is based on Article 113.8 of the Constitution, Articles 51, 52 and 53 of the Law on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 75 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

### **Proceedings before the Constitutional Court**

7. On 6 December 2016, the referring court submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
8. On 7 December 2016, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Snezhana Botusharova (Presiding), Ivan Čukalović and Selvete Gërxhaliu-Krasniqi (judges).
9. On 15 December 2016, the Court notified the referring court and PAK about the registration of the Referral.
10. On 18 January 2017, the Court requested the PAK to reply to some specific questions related to the substance of the Referral under consideration.
11. On 2 February 2017, the PAK replied to the questions raised regarding the Referral under consideration.
12. On 15 February 2017, the Court sent to the members of the Venice Commission Forum a request with several questions for comparative analysis regarding the Referral in review.

13. On 20 February 2017, the PAK responses were sent to the referring court for any eventual comment.
14. On 27 February 2017, the referring court submitted additional comments.
15. Between 28 February 2017 and 6 March 2017, the following members of the Venice Commission's Forum replied: the Constitutional Court of South Africa, the Constitutional Court of the Czech Republic, the Constitutional Court of Bulgaria, the Constitutional Court of Slovakia, the Constitutional Court of Slovenia and the Constitutional Court of Croatia.
16. On 30 March 2017, the Special Chamber of the Supreme Court notified the Court about the claim filed with the Special Chamber by the third parties (in a capacity of creditors) for the imposition of a security measure against "AC Agrokosova", requesting to ban the sale of the cadastral parcels in the liquidation procedure. The Special Chamber notified the third parties that it cannot impose a security measure until the Constitutional Court renders a final decision on the constitutional review of Articles 10 and 40.1.5 of the Annex to the PAK Law.
17. On 12 April 2017, the third parties requested the Court to impose interim measure because the Liquidation Authority would start selling the respective cadastral parcels by 28 April the latest.
18. On 14 April, the legal representatives of the third parties submitted to the Court a notice, which they addressed earlier to the PAK, emphasizing that: "[...] *The Constitutional Court of Kosovo has not yet given its opinion on your request and did not render a decision on the imposition of the security measure, so please exclude from the privatization and sale the cadastral parcels with number 1715 in a surface area of 0.65, 17 ha, 1516 in a surface area of 04437 ha, registered in the name of Horticulture-former Mladost in Gjilan, until the proceedings in the Constitutional Court of Kosovo and in the Special Chamber of the Supreme Court of Kosovo are completed.*"
19. On 9 May 2017, the Court unanimously approved the admissibility of the Referral.
20. On the same date, the Court with a majority of votes found that Articles 10 and 40.1.5 of the Annex to the PAK Law are in compliance with the Constitution.

### **Summary of facts**

21. From the case file it transpires that the Referral under review follows from a claim by the third parties, I.M. and H.M., regarding the confirmation of their property rights over two parcels of land in the Gjilani region. It is alleged that the third parties had acquired the property right over the parcels in question through a 1972 sale-purchase contract concluded between them and AIC "Agrokultura" Gjilan.

22. On 29 December 2009, the Municipal Court in Gjilan, by Judgment C. No. 5/08, when conducting the contested procedure between the third parties, in a capacity of claimants, and AIC "Agrokultura" in a capacity of the respondent, decided that the contested parcels were the property of the claiming parties, who purchased them in 1972.
23. On 5 February 2010, the PAK filed an appeal with the Special Chamber of the Supreme Court against the aforementioned Judgment of the Municipal Court in Gjilan, claiming the existence of violations of the procedural provisions, erroneous and incorrect determination of the factual situation and the erroneous application of the of substantive law.
24. Accordingly, the challenged procedure was transferred to the Special Chamber of the Supreme Court.
25. On 5 December 2013, the Special Chamber of the Supreme Court received a letter from the Liquidation Authority where it was requested to suspend all the court proceedings, in accordance with Article 10 of the Law on PAK, because the AIC "Agrokultura" had entered the liquidation.
26. On 6 December 2016, the referring court filed a Referral with the Court requesting the constitutional review of Articles 10 and 40.1.5 of the Annex to the Law on PAK.

#### **The allegations of the referring court**

27. The referring court alleges the existence of violation of Article 46 [Protection of Property] of the Constitution, in conjunction with Article 1 of Protocol no. 1 (Protection of property) of the Convention.
28. The crux of the Referral of the referring court consists in the allegation that the challenged articles infringe upon the property rights of the interested parties, namely the creditors, because any court action and procedure involving a socially-owned enterprise or its assets that is subject to the liquidation decision, is suspended after the notification about the liquidation decision to the relevant court by the Liquidation Authority.
29. The referring court states that *"suspending or dismissing an ownership claim against a SOE in liquidation pursuant to Section 9.3 of UNMIK Reg 2005/18 would not conform with the protection of the property rights according to Art 1, Protocol 1, of the ECHR and the established case law of the European Court of Human Rights, as it would deprive the claimants of their right to have their property rights adjudicated by an independent court. To suspend the adjudication of the property claim of the claimants would constitute a violation of Art 1, Protocol 1 of the ECHR."*
30. The referring court further reasons that *"This line of reasoning is based on the assessment that the suspension of the court case refers the claim first and foremost to Liquidation Authority which is not a court. While any decision of that Liquidation Authority can be challenged in the court, the procedure, given the powers of the Liquidation Authority to use and dispose of assets of*

*the SOE under liquidation, practically creates a risk for the claimants to lose their property in the procedure because the provisions to effectively protect owners of real property potentially are not effective and/or the rank of the property claim in the liquidation proceedings is too low, given the fundamental and human right to property. Namely the affected owners would run the risk of being subject to a de facto expropriation without adequate compensation.”*

31. The referring court further adds that “[...] there is a remaining and serious doubt about whether or not the provisions on suspension of judicial proceedings regarding possession or property are constitutional. If they are not, they would need to be nullified by the Constitutional Court, which would also be relevant for the decision in the pending case.”
32. The referring court also states that “the question whether the Constitutional Court can review also the compliance of Kosovo legislative acts with Article 1, Protocol 1 of the European Convention on Human Rights, which is an international legal instrument binding in Kosovo based on Article 22 of the Constitution, is not material in this case. Because the fundamental right to protection of property as enshrined in Article 46 of the Constitution is protected...”.
33. Regarding the aim of liquidation, the referring court states that “The aim of the liquidation is to wrap up all assets of the entity under liquidation to satisfy the creditors as far as possible and in line with the priority class of their claims. The priority classes of claims are defined in Article 40. Claims based on possession and on property are in the fifth class, which is namely ranking below costs of the proceedings and secured claims, but prevails over preferential claims of employees, unsecured claims and claims of owners/shareholders of the entity under liquidation.”
34. Finally, the referring court addresses the Court: “As it is the exclusive prerogative of the Constitutional Court to formally nullify legislation adopted by the assembly, the court in accordance with Article 113 paragraph 8 of the Constitution and Rule 75 of the Rules of Procedure of the Constitutional Court submits the question of the constitutionality of Articles 10 and 40.1.5 of the Annex Law No. 04jL -034 on the Privatization Agency of Kosovo by way of this Referral to the Constitutional Court.”

### **Comments submitted by PAK**

35. In its comments, PAK initially explains:

*“Socially Owned Enterprise “AIC Agrokultura” continues to be under the liquidation procedure which is being conducted and which has not been completed yet. As approximately 500 other socially owned enterprises the “AIC Agrokultura” is also under this process due to the decision of the Board of PAK, by applying the legal responsibilities stipulated clearly by the Law on PAK. The process of liquidation, as a process of transformation of socially owned property to private ownership, by enabling the transfer of money and revitalization of assets that have been*



*blocked for some time now and which are depreciated, composes the final stage of the mandate of PAK for administering this property. Of course, this process goes through numerous steps and consists of some important activities, among which the most important are the sale or the transformation of ownership over assets of the SOE, the assessment of creditor and property claims by the Liquidation Authority, by including here also the legal assessment based on appealing this assessment and the share of credit funds. At this moment, the Liquidation Authority completed the assessment of all credit and property requests but numerous decision of the Liquidation Authority have been appealed and we are waiting the decisions of the Special Chamber. [...].”*

36. PAK further points out:

*“The ownership rights of parties that have claims against “AIC Agrokultura” are guaranteed through the review of these claims by the Liquidation Authority [...].The review of allegations by the Liquidation Authority is of course the first stage of assessing these allegations, since Article 5.7 of the Law and Article 37.7 of the Annex to the Law on PAK, gives the right to any alleged owner, who is not satisfied with the assessment of the Liquidation Authority, to appeal the decision of the Liquidation Authority on his allegations within a time limit of 30 days to the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo. In the Court procedure, the party has all the procedural rights stipulated in the Law 04/L-033, by including here also the right to request a preliminary injunction for suspension of transfer of the asset (sale under liquidation) based on Article 55 of the Annex to the Law 04/L-033 on Special Chamber [...].The party that is dissatisfied with the Judgment or the Decision of the Specialized Panel, based on the complaint against the Decision of Liquidation Authority on property claims, can address the Appellate Panel [...].Therefore, the review of the property claim of the party goes through numerous filters by ensuring not just in entirety but also in every special instance, the application of the rights of a party to a regular legal process.”*

37. PAK further explains:

*“Based on Article 10 of the Annex to the Law on PAK, when the enterprise enters the liquidation procedure, every court or arbitration procedure that is being conducted before a Court or Tribunal Arbitration, including the proceedings before the Special Chamber of the Supreme Court of Kosovo, is suspended. This legal stipulation has been decided by the legislator with the purpose of focusing on reviewing credit or property claims at a single authority only for eliminating the parallel decisions on the same claims, while the enterprise goes through liquidation proceedings. Without this stipulation, we would have a confusing situation for protecting the rights of alleged owners or creditors who could be subject of assessment before any basic court or Special Chamber besides the review by the Liquidation Authority. However, such legal stipulation does not constitute any violations of the rights of the alleged creditor or owner.”*

38. Finally, PAK reiterates:

*“The categorization at the level of priorities of distribution of proceeds according to property requests/interests is a substantial characteristic of legislation on liquidation/bankruptcy in any democratic country of the world that respects the trade economy. Article 40 of the Annex to the Law on PAK serves especially to this purpose. However, it leaves the impression that its subject matter was the provision of Article 40.1.5 and not the one of Article 40.1.8 that places exactly in another category of property rights lower in the payment row. Finally, we want to emphasize that the initiation of the process of liquidation of an enterprise does not mean in any way immediate alienation of its assets. The alienation of the assets of the enterprise under liquidation is conducted by PAK through a tender process that is open and transparent where all the rights of parties are completely respected. Moreover, there is no intention to put in sale any asset against which there is a pending property claim.”*

#### **Additional comments of the referring court**

39. In the additional comments, the referring court, among others, stated:

- a) *The purpose of liquidation is to close all assets (irrespective of their legal nature and value, thus affecting the property, claims, rights of any kind) and use them to satisfy all claims against the entity which is usually referred as a “waterfall” mechanism: Money is used to cover the categories of claimants from top to bottom by following the legal system of priorities (Article 40 of the Annex to the PAK Law) and only after a category is fully satisfied, the remainder, if there is any, is used for the other lower category (Article 41 of the Annex to the PAK Law). Within one category, if the remaining funds are insufficient to cover all creditors, each of them receives the same percentage to cover his claim. After the liquidation closure, the entity legally cease to exist (Article 45 of the Annex to the PAK Law). Creditors who have low priority class claims, for which there are no resources left to be distributed, receive nothing, in other words, suffer a complete loss. Third party claims do not present any exceptions to this system. It is not an exception that the liquidation procedures continue for years. In order to finalize and close a liquidation of a SOE, the liquidation authority must obtain the consent of the SCSC (Article 44 of the Annex to the PAK Law), therefore the SCSC has an overview of the completed liquidation proceedings.*
- b) *The PAK rightly pointed out that the lawfulness of the liquidation authority's actions may be subject to judicial review. Except that it is worth mentioning that the property-based claims are attributed to a particular category of priority by law (Article 40 paragraph 1.5 of the Annex to the PAK Law). It should also be noted that the proceeds of the privatization of assets of a SOE are maintained by the PAK in custody or trust, separated from the agency funds. Neither the SOE is responsible for the obligations of PAK nor does the PAK have access to funds belonging to a particular SOE (Article 18 of the PAK Law). In this way, it is ensured that all SOE assets are used only for this SOE and for*

*nothing else. The other aspect of this is clear that there is no obligation of any institution for the claims that cannot be met by SOE funds and assets within the system (priority waterfall distribution), which is mentioned above. In addition to the protection that is inherent in this system, the property claims have not been given any special protection of any kind.*

### **Main comments received by the Venice Commission Forum**

40. The Court notes that from the received responses of the Forum of the Venice Commission, is noted that among the states that submitted responses there are similar legal situations, but that are not identical with the Republic of Kosovo, namely with the present case.
41. The Court also notes that in the majority of the comments received by the Venice Commission Forum is noted that the liquidation and bankruptcy process of enterprises, whether public or private, affects the creditors' position and interests. However, in all the cases in question, the creditors' rights are protected and realized in the court proceedings.
42. In this regard, the Constitutional Court of Bulgaria stated that *"the acts of the authorities conducting the privatization procedure are subject to judicial control. The lawmakers' efforts to release such acts from the administrative judiciary have been declared non-constitutional by the Constitutional Court. Creditors' rights in the liquidation, bankruptcy or privatization proceedings are subject to judicial protection."*
43. The Constitutional Court of Croatia stated that *"the bankruptcy proceedings are conducted in order to satisfy creditors' claims by selling the debtor's assets. The bankruptcy proceeding is conducted exclusively by the competent Commercial Court."*
44. The Constitutional Court of Slovakia clarified that *"a state-owned enterprise may be dissolved with or without liquidation. Liquidation occurs when assets are not transferred to the successor. However, if the enterprise is dissolved according to the rules of the Privatization Law, then the liquidation will not take place. For this reason, the pending court proceedings during the privatization procedure are not suspended and the jurisdiction to decide the property claims remains with the civil courts."*
45. The Constitutional Court of the Czech Republic explained that *"when a decision on liquidation is made, the liquidation is registered in a commercial register and the administrator plays the role of a body established by law. The Administrator takes all necessary actions to decide all claims and obligations so that the enterprise is liquidated as soon as possible. He invites publicly the creditors to file their claims against the enterprise within a certain time limit. The court proceedings initiated prior to the liquidation announcement are further extended with the only difference that in that case the administrator who recently represents the enterprise in the court instead of the body designated by law. Liquidation cannot be closed before the end of*



*the court proceedings because all the claims and obligations filed must be resolved.”*

46. The Constitutional Court of South Africa stated that “*when the legal proceedings are suspended as a result of the liquidation order of an enterprise, the person who initiated the liquidation of the enterprise or has made a special decision on the voluntary liquidation of an enterprise, the person who commenced legal proceedings may, after giving the written notice to the administrator, continue those proceedings at the same court.*”
47. The Constitutional Court of Slovenia submitted a decision (U-I-288/04 of 17 March 2005) on constitutional review of the Law on Transformation of the Successor Fund of the Republic of Slovenia and the Establishment of the Public Agency of the Republic of Slovenia for Succession. The law in question was declared incompatible with the Constitution of the Republic of Slovenia, as it did not specify the continuation of judicial, civil and enforcement proceedings that were suspended based on that law. The Constitutional Court of Slovenia found that the challenged law violated the rights of individuals to judicial protection of rights.

## **Relevant legal and constitutional provisions**

### **Relevant constitutional provisions:**

#### *Article 46 [Protection of Property]*

1. *The right to own property is guaranteed.*
2. *Use of property is regulated by law in accordance with the public interest.*
3. *No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.*
4. *Disputes arising from an act of the Republic of Kosovo or a public authority of the Republic of Kosovo that is alleged to constitute an expropriation shall be settled by a competent court.*

### **Respective provisions of Law No. 04/L-033 on Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters**

#### *Article 9 [Conduct of Proceedings by a Sub-Panel or Single Judge]*

1. *Any specialized panel of the Special Chamber may issue an order delegating to one of its members or to a subpanel consisting of two of its*

*members the responsibility and authority to conduct any or all proceedings for a case within its subject-matter jurisdiction. Judgments and Decisions issued by such a single judge or sub-panel shall be deemed to be issued by the concerned specialized panel.*

***Challenged provisions of Articles 10 and 40.1.5 of the Annex to the PAK Law***

*Article 10  
Suspension of actions*

*1. Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal. Such notice shall refer to this Article 10 and be accompanied by a copy of the Liquidation Decision and a copy of the published Liquidation Notice.*

*2. Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court. Such suspended actions, proceedings and acts shall include, but not be limited to, any action, proceeding or act:*

*2.1. concerning the collection, recovery or enforcement of a Claim for debts, taxes, penalties or obligations of any kind;*

*2.2. concerning the creation, recognition, modification, increase, perfection, registration or enforcement of any Claim or Interest against or to the Enterprise or any Asset of the Enterprise;*

*2.3. any act to realize, seize, or sell any pledged or mortgaged or otherwise encumbered asset or to exercise ownership or control over any Asset of the Enterprise; and*

*2.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of the regulatory provisions, rules or decision, to the extent that these involve monetary Claims against the Enterprise.*

*3. The suspension of actions, proceedings and acts shall not apply to any of the following:*

*3.1. court action by or on behalf of the Enterprise directed against third parties;*

*3.2. criminal proceedings against the Enterprise or one or more members of its Management;*

*3.3. transfers or dispositions of Assets of the Enterprise in the ordinary course of business of the Enterprise, including transactions*

*provided for under the present Law and in this Article 10 in particular;*

*3.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of regulatory provisions, rules or decision, to the extent that these do not involve monetary Claims against the Enterprise; and*

*3.5. inspections and requests for inspection made by holders of registered mortgages, perfected pledges or similar encumbrances relating to Assets of the Enterprise.*

#### *Article 40* *Priorities of Claims and Interests*

*1. In liquidation proceedings all Claims of creditors shall be satisfied according to classes 1.1 – 1.8 hereunder and in the following order:*

*1.1. the costs of selling or otherwise realizing the property or assets of the Enterprise;*

*1.2. post Reorganization Petition secured credit incurred in accordance with Article 13 of UNMIK Regulation 2005/48 or the Law on the Reorganization of Certain Enterprises, whichever is then in force, to the extent that such credit was approved by the Court. This priority relates only to proceeds from the sale or other transfer of assets securing the credit;*

*1.3. priority Claims, in the following order:*

*1.3.1. court expenses;*

*1.3.2. expenses of the Liquidation Authority and any supporting advisors;*

*1.3.3. expenses of the Liquidation Authority required for the maintenance and protection of the property and assets of the Enterprise;*

*1.3.4. expenses for the continued operation of the Enterprise after the decision of the Agency or Court to commence liquidation proceedings; and*

*1.3.5. all Administrative Expense Claims incurred during any reorganization or during the liquidation proceedings;*

*1.4. secured Claims to the extent realized from Assets securing such Claims and in the amount of such Secured Claims and Claims;*

*1.5. claims based on the ownership of specific assets including real assets;  
(...)*

*1.8. claims of owners, shareholders, founders, participants or partners of the Enterprise.*

### **Assessment of the admissibility**

48. The Court will first examine whether the Referral has fulfilled the admissibility requirements laid down in the Constitution, and as further specified in the Law and the Rules of Procedure.

49. In this regard, the Court initially refers to paragraphs 1 and 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, which establish:

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

*(...)*

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

50. The Court refers to Articles 51 [Accuracy of Referral] of the Law, which stipulates:

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

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

51. The Court also recalls Rules 75 and 76 of the Rules of Procedure, which provide:

#### *Rule 75 [Filing of Referral]*

*(1) Any Court of the Republic of Kosovo may submit a Referral to the Court pursuant to Article 113.8 of the Constitution, ex officio, or upon the request of one of the parties to the case.*

*(2) The Referral shall state why a decision of the court depends on the question of the compatibility of the law to the Constitution. The file under consideration by the court shall be attached to the Referral.*

*(3) Any Court of the Republic of Kosovo may file a Referral to initiate the procedure pursuant to Article 113. 8 of the Constitution regardless of*



*whether a party in the case has disputed the constitutionality of the respective legal provision.*

*Rule 76 [Notification]*

*The Court, following filing of the Referral, shall order the court to suspend any ongoing procedures with respect to the case in question until the Court has issued a decision or Judgment in the case.*

52. Referring to the abovementioned provisions, the Court must first assess whether the referring court is an authorized party to file such a Referral.
53. The Court refers to its Resolution in case KO126/16, where the Court found that each composition of a regular court having competence to adjudicate the case is an authorized party to file a referral in accordance with Article 113.8 of the Constitution.
54. In this connection, the Court refers to Article 9 [Conduct of Proceedings by a Sub-Panel or Single Judge] of Law no. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters that establishes:

*“1. Any specialized panel of the Special Chamber may issue an order delegating to one of its members or to a subpanel consisting of two of its members the responsibility and authority to conduct any or all proceedings for a case within its subject-matter jurisdiction. Judgments and Decisions issued by such a single judge or sub-panel shall be deemed to be issued by the concerned specialized panel.”*
55. The Court notes that, in the present case, the Referral was submitted by five judges of the Special Chamber, including its President. This composition of the Court has jurisdiction to adjudicate the case AC-II-12-0086.
56. Therefore, taking into account the above-mentioned explanations, the Court considers that the present Referral was submitted by “the court” within the meaning of Article 113.8 of the Constitution.
57. The Court further refers to its decision in Case KO04/11, where it was established that, *“in order to assess admissibility of the Referral, this Court has first to consider if the contested law is to be directly applied by the Applicant with regard to a pending case and secondly if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the Applicant. Thirdly it is important to see if the Applicant specified what provisions of the challenged law are considered incompatible with the Constitution.”*
58. Based on the above, it results that in order that the Referral submitted under Article 113, paragraph 8 of the Constitution, is admissible, must meet the following criteria: a) the referring court should have the case under review; b) the challenged law is to be directly applied by the referring court with regard to a pending case; c) the lawfulness of the challenged law is a precondition for the

decision regarding the case pending; and ç) the referring court should specify what provisions of the challenged law are considered incompatible with the Constitution (*Constitutional Court of the Republic of Kosovo: Case no. KO126/16, Resolution on Inadmissibility, published on 1 June 2017*).

59. The Court notes that as an essential requirement for the admissibility of a referral for incidental control of constitutionality, explicitly provided in the Law and the Rules of Procedure, is the existence of the so-called “direct connection element” between the provisions of the challenged law and the issue that is to be adjudicated before the regular courts.
60. The Court considers that “the direct application” of the concrete norm means that the outcome of the decision by the referring court depends on the direct implementation or non-implementation of the contested norm.
61. Therefore, in order to have a direct connection, there must be a necessary relation between the decision of the Constitutional Court (resolution of the case of unconstitutionality of the law by this Court) and resolution of the main issue by the referring court, as an initiator subject of the incidental adjudication - in the sense that the adjudication by the regular court cannot be terminated independently from the adjudication in the Constitutional Court” (See *Constitutional Court of the Republic of Albania - Decision V-30/10 of 17 June 2010; Decision No. 13 of 4 May 2009*).
62. The Court notes that this interpretation is also supported by the case law of other countries. Thus, the Federal Constitutional Court of Germany emphasizes the connecting element between the challenged norm and the specific case, reasoning that “[...] if the Court declared unconstitutional the challenged provision, the claim would be rejected, whereas declaring those provisions as constitutional would result in the approval of the claim” (See *Decision of the Federal Constitutional Court of Germany 2 BvL 12, 13, 14, 15/56, 6 November 1957*).
63. In the present case, in order to assess the admissibility of the Referral, the Court must first ascertain whether the challenged law is to be directly applied by the referring court in the case under review (namely the case number AC-II-12-0086); second, whether the lawfulness of the challenged law (namely its compliance with the Constitution) is a prerequisite for taking a decision on the case under the consideration by the referring court; thirdly, it is important to see whether the referring court has specified what provisions of the Law are considered in contradiction with the Constitution.
64. In the light of the facts of the case and of the foregoing considerations: the Court considers that the Referral raises serious doubts regarding the constitutionality of Articles 10 and 40.1.5 of the Annex to the PAK Law. The referring court has also argued that the specific articles of the Law in question should be applied in the case number AC-II-12-0086.
65. Accordingly, after examining the relevant claims and respective arguments submitted by the referring court and analyzing the main elements of the Referral, the Court considers that the Referral raises serious issues which are of

such complexity that their determination should depend on an examination of its merits. The Referral cannot, therefore, be regarded as being manifestly ill-founded, within the meaning of the Rule 36 (1) (d) of the Rules of Procedure and no other ground for declaring it inadmissible has been established (See, for example, Case No. KO73/16, Applicant *the Ombudsperson*, Constitutional Review of Administrative Circular No. 1/2016, issued by the Ministry of Public Administration of the Republic of Kosovo, on 21 January 2016, Judgment of 8 December 2016, paragraph 49 and other references mentioned in that decision).

### **Assessment of the merits**

66. Initially, the Court notes that on 5 December 2013, the Special Chamber of the Supreme Court received a letter from the Liquidation Authority requesting the suspension of all court proceedings pursuant to Article 10 of the PAK Law because KBI "Agrokultura" had entered liquidation. On the other hand, the Referral court submitted the Referral to the Constitutional Court of the Republic of Kosovo on 6 December 2016 (namely after three years).
67. The Court further emphasizes the substance of the allegations of the referring court that the suspension of the proceedings against a SOE against which the liquidation procedure begins - and referring of the case to the Liquidation Authority, deprives the claimants from their right that their property rights are adjudicated by an independent court. In addition, the referring court argues that the provisions to effectively protect the owners of immovable property are potentially ineffective and that the order of property claim in the liquidation proceedings - according to Article 40.1.5 of the Annex to the PAK Law - is very low, bearing in mind the basic human right to property.
68. In this respect, the Court first refers to paragraphs 1 and 2 of Article 10 of the Annex to the Law on PAK, which establish:
  1. *Any judicial, administrative or arbitration action, proceeding or act involving or against an Enterprise (or any of its assets) that is the subject of a Liquidation Decision shall be suspended upon the submission by the Liquidation Authority of a notice of the Liquidation Decision to the concerned court, public authority or arbitral tribunal. Such notice shall refer to this Article 10 and be accompanied by a copy of the Liquidation Decision and a copy of the published Liquidation Notice.*
  2. *Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court. Such suspended actions, proceedings and acts shall include, but not be limited to, any action, proceeding or act:*
    - 2.1. *concerning the collection, recovery or enforcement of a Claim for debts, taxes, penalties or obligations of any kind;*
    - 2.2. *concerning the creation, recognition, modification, increase, perfection, registration or enforcement of any Claim or Interest against or to the Enterprise or any Asset of the Enterprise;*

*2.3. any act to realize, seize, or sell any pledged or mortgaged or otherwise encumbered asset or to exercise ownership or control over any Asset of the Enterprise; and*

*2.4. regulatory proceedings or actions with regard to the prevention of or remedy for any violation of the regulatory provisions, rules or decision, to the extent that these involve monetary Claims against the Enterprise.*

69. The Court notes that paragraph 1 of Article 10 of the Annex to the Law on PAK in fact provides that judicial, administrative or arbitral proceedings are suspended upon notice by the Liquidation Authority.
70. However, the Court also notes that in accordance with paragraph 2 of Article 10 of the Annex to the Law on PAK: *"Any such suspended action, proceeding or act shall only continue or be effective with the permission of the Liquidation Authority or the Court"*. A textual interpretation of this paragraph highlights the fact that it recognizes to the referring court the competence to decide on the conduct of the suspended procedure, to continue or to put into effect the actions, proceedings or suspended acts.
71. The Court notes that, in its Referral, the referring court does not refer to paragraph 2 of Article 10 of the Annex to the Law on PAK. Furthermore, the Court has no knowledge how Article 10 of the Annex to the PAK Law, in particular paragraph 2, applies. Moreover, the referring court did not state whether it is hindered by the Liquidation Authority, in respect of implementation of paragraph 2 of Article 10 of the Annex to the Law on PAK.
72. However, the Court does not note that there is any obstacle for the referring court to take any of the two following actions, as regards the interpretation and application of Article 10 of the Annex to the Law on PAK namely: (i) to allow the suspension of the court proceedings pursuant to paragraph (1) of Article 10, of the Annex to the Law on PAK, or (ii) to continue with actions, proceedings, or such suspended acts, that effectively means to resume the suspended proceedings pursuant to paragraph 2 of Article 10, of the Annex to the PAK Law.
73. Based on the case law of other countries in the cases of incidental control, the referring court has an obligation to: (i) to prove the direct link between the challenged norm and the specific case to be resolved by it; (ii) the necessary relation that the referring court has with the implementation of the specific norm, and (iii) the referring court should ensure that there is no other norm, law that would enable it to resolve the specific case (*see the case law of the Constitutional Court of the Republic of Albania mentioned above*).
74. The Court considers that the referring court has not substantiated that there is an obstacle that in the present case, does not allow it to apply paragraph 2 of Article 10 of the Annex to the PAK Law, as another provision that would enable it to resolve the case.



75. As to the allegations of the referring court raised against Article 40.1.5 of the Annex to the PAK Law, the Court notes that the case under review relates to the privatization process and that the Kosovo legislator has issued laws for the implementation of the relevant economic and social policies, in the public interest.
76. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities (in this case of the legislative), it is bound to review the challenged measures under Article 46 of the Constitution in conjunction with Article 1 of Protocol No. 1 of the Convention, and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted (See case *James and Others v. the United Kingdom*, ECtHR, Application 8793/79, Judgment of 21 February 1986, paragraph 46).
77. Accordingly, the Court must ascertain whether a fair balance has been found between the requirements of the general interest of the society and the requirements for the protection of the fundamental rights of the individual (see Case, *Sporrong and Lonnroth v. Sweden*, ECtHR, Application No 7151/75; 7152/75, Judgment of 23 September 1982, paragraph 69). In particular, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized, (see *James and others*, cited above, paragraphs 34 and 50).
78. In this regard, the Court again emphasizes the essence of the allegation of the referring court with regard to Article 40.1.5 of the Annex to the PAK Law: "*The priority classes of claims are defined in Article 40. Claims based on possession and on property are in the fifth class, which is namely ranking below costs of the proceedings and secured claims, but prevails over preferential claims of employees, unsecured claims and claims of owners/shareholders of the entity under liquidation.*"
79. The Court also refers to the substance of PAK comments with regard to Article 40.1.5 of the Annex to the PAK Law: "*The review of allegations by the Liquidation Authority is of course the first stage of assessing these allegations, as Article 5.7 of the Law and Article 37.7 of the Annex to the Law on PAK, gives the right to any alleged owner, who is not satisfied with the assessment of the Liquidation Authority, to appeal the decision of the Liquidation Authority on his allegations within a time limit of 30 days to the Specialized Panel of the Special Chamber of the Supreme Court of Kosovo.*"
80. In this regard, the Court notes that Article 40.1.5 of the Annex to the Law on PAK constitutes a restriction of the property right of the interested parties, but this restriction is not automatically a violation of property interests, however, as it is seen from the PAK's response, the applicable law in Kosovo stipulates that the decisions of the Liquidation Authority are not final, but that those decisions may be appealed to the Special Chamber of the Supreme Court.

81. The limitation of the rights of access to a court cannot limit or reduce the access to the court of an individual to such an extent that the very essence of the right is impaired. Moreover, the limitation will not be compatible with Article 31 of the Constitution in conjunction with Article 6 (1) of the Convention if the “legitimate aim” is not respected and there is no “reasonable relationship of proportionality between the means employed and the aim sought to be achieved” (see *Ashigdane v. United Kingdom*, ECtHR, Application No. 8225/78, Judgment of 28 May 1986, paragraph 57).
82. The Court notes that, in the present case, the challenged Articles 10 and 40.1.5 of the Annex to the PAK Law do not infringe the essence of the right to judicial protection of rights and protection of creditors' property because: (i) the limitation is foreseen by law adopted by the Assembly of the Republic of Kosovo; (ii) the limitation is objective and reasonable because it prevents the creation of confusion arising from the conduct of parallel proceedings before the referring court and the Liquidation Authority; and (iii) the principle of proportionality is applied because after the initial conduct of proceedings before the Liquidation Authority - in order to avoid parallel proceedings – the procedural safeguards are offered to challenge the decisions of the Liquidation Authority before the Special Chamber of the Supreme Court (in two instances within this Chamber).
83. In addition, the Court refers to paragraph 3, Article 44 [Case closure], of the Annex to the PAK Law which establishes: “*At the request of the Liquidation Authority, where no creditors have submitted claims by the Claims Submission Deadline, the Court shall issue a decision permitting closure of the liquidation case.*”
84. The Court considers that this strengthens the guarantees for judicial protection of the property rights, including the creditors' claims during the liquidation process of the SOEs.
85. In conclusion, the Court considers that the challenged Articles 40.1.5 of the Annex to the PAK Law are compatible with the Constitution.

## **FOR THESE REASONS,**

The Constitutional Court, in accordance with Article 113.8 of the Constitution, based on Articles 51, 52 and 53 of the Law, and pursuant to Rule 75 of the Rules of Procedure, in the session held on 9 May 2017, unanimously

## **DECIDES**

- I. TO DECLARE the Referral admissible;
- II. TO HOLD, by majority of votes, that Articles 10 and 40.1.5 of the Annex to Law No. 04/L-034 on Privatization Agency of Kosovo are compatible with the Constitution of the Republic of Kosovo;
- III. TO NOTIFY this Decision to the Parties;
- IV. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- V. This Decision is effective immediately;

**Judge Rapporteur**

  
Bekim Sejdiu



**President of the Constitutional Court**

  
Arta Rama-Hajrizi