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Commentary

**LCC
Law on the Constitutional Court
of the Republic of Kosovo**

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Acknowledgment

The drafting of a commentary often presents a complex and difficult activity, perhaps as much as the drafting of a law. That is because the definition of purpose, meaning and scope of the legal norm, and its interpretation from the linguistic, spatial and temporal perspective poses a great challenge and responsibility for the authors. The same holds true for the Commentary of the Law on the Constitutional Court, a project implemented through the financial support of the Federal Ministry for Economic Cooperation of the Federal Republic of Germany and the Society for International Cooperation (Deutschen Gesellschaft für Internationale Zusammenarbeit - GIZ).

To this end we wish to express our gratitude for the support of the German Federation for the generous financial support and technical assistance in drafting this Commentary. In particular we wish to thank the project leader implementing the "Legal Reform Project in Kosovo", Mr. Volkmar Theobald, who provided generous support throughout the process of drafting this Commentary. A considerable assistance in implementing this project was provided by Mr. Flakron Sylejmani, senior legal adviser at the Legal Reform Project of GIZ in Kosovo. Mr. Sylejmani has provided considerable assistance in the coordination of activities for the completion of the work and has provided professional advice with regard to the content of the Commentary. Special thanks go to the German reviewers, whose comments and suggestions have been very valuable for the finalization of this Commentary.

Finally, we wish to emphasize that this Commentary came after several years of intense team effort and commitment of the authors. Therefore, we want to express our special thanks to our families for their patience shown in the course of the writing of this Commentary.

We hope that this Commentary will be welcomed by the legal community in Kosovo and beyond, and will contribute to the advancement of legal thought and for the implementation of the Law on the Constitutional Court.

Foreword

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ), as part of its efforts aimed at improving the quality of the legal literature in Kosovo is pleased to provide you with the commentary to the Law on Constitutional Court of Republic of Kosovo.

Given the fact that to date, the process of implementation and enforcement of the Constitution in Kosovo has faced obstacles, in particular in lack of uniform interpretation of the provisions, it was seen as necessary to provide expert interpretation of the law in order to extract its proper and correct meaning.

Commentary provides explanations and clarifications of articles of the Constitution and provides guidance for its correct and adequate implementation, according to domestic and international theory and practice, not leaving aside the legal achievements in this regard. Thus, this commentary will help legal professionals in the institutions of Kosovo, from the Ministries, Courts, Prosecutors, Law Faculties, as well as all professional associates to correctly understand and implement the law in the performance of their duties.

This will further contribute to the creation of legal certainty, protection of interests of the parties to the proceedings and increased confidence of citizens in the institutions of Justice.

Being the first of its kind, we expect for the Commentary to become a valuable tool for the community of legal professionals, and a worthy contribution to justice in Kosovo.

GIZ - Legal Reform Project in Kosovo - would like to thank the authors of this Commentary and academic personnel, legal experts and their associates who contributed to this work, so that this publication and others in the future will be useful for professionals in the field of justice, legal sciences, and also be helpful for the people of Kosovo in general.

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AUTHOR'S SPEECHES

After the entry into force of the Constitution of the Republic of Kosovo on 15 June 2008, Chapter VIII [Constitutional Court] of the Constitution was implemented by the adoption of the Law on the Constitutional Court of the Republic of Kosovo (Law No. 03/L-21), dated 16 December 2008.

It was at the initiative of the Deutsche Gesellschaft fuer Technische Zusammenarbeit (GTZ) (presently, Deutsche Gesellschaft fuer Internationale Zusammenarbeit GIZ), the international cooperation entity of the German Federal Government, to request a number of constitutional law experts in Kosovo to draft a Commentary which would be a useful tool in the hands of legal practitioners, students and other interested parties, when considering the provisions of the Law on the Constitutional Court of the Republic of Kosovo (hereinafter, LCC, the Law on the Constitutional Court, or simply, the Law). It is, however, emphasized that the opinions expressed, in the Commentary do not pretend to be the only ones possible, but solely bind the authors.

Sometimes the authors were of the view that the wording of a specific Article (or part thereof) of the Law or a particular Rule (or part thereof) of the Rules of Procedure seemed to be inaccurate or not fully comprehensible. In such cases, the authors suggested a possible amendment of (parts of) such Articles or Rules.

Together with the information and references mentioned in the text itself and in the footnotes, these opinions are meant to guide the reader in his/her search for a better understanding of the Law. Since a great number of Articles of the Law have been supplemented by corresponding Rules of Procedure, adopted by the Constitutional Court, the authors found it unavoidable, when commenting on a particular Article of the Law, to comment also on the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the Rules) supplementing that Article. Furthermore, relevant case law of the Court is mentioned, whenever the interpretation of an Article or Rule was dealt with by the Court. Also, in order to put a specific Article or Rule in a wider perspective, the authors felt that a reference to similar provisions of a neighboring country or other countries could sometimes be helpful.

A special word needs to be said about the European Convention on Human Rights and Fundamental Freedoms (hereinafter, ECHR) which, pursuant to Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution and together the other international agreements and instruments metioned in the Article, is directly applicable in the Republic of Kosovo and, in case of conflict, has priority over provisions and other acts of public institutions. Moreover, according to Article 53 [Interpretation of Human Rights Provisions] of the Constitution, human rights and fundamental freedoms shall be interpreted consistent with the court decisions of the European Court of Human Rights (hereinafter, ECtHR), established under the ECHR. As a result, throughout the Commentary and where applicable, references are found to relevant articles of the ECHR and the Court Rules and case law of the ECtHR.

It should be emphasized, however, that this edition is only a first attempt to properly comment on the provisions of the Law and the relevant Rules. This means that the text of the Commentary should not be seen as graven in stone, but be considered as a tool that is constantly evolving, depending on the way in which the provisions of the Law and Rules are applied by the Constitutional Court in its daily practice. In this respect, the authors would also very much welcome comments, remarks and suggestions which could lead to an improved second edition of the Commentary and its contents. For that reason the readers of the Commentary are invited to let their voices heard, whenever they think fit through emails or otherwise.

Last, but not least, the authors would like to thank GIZ wholeheartedly for having been chosen to write this Commentary which, it is hoped, will contribute to a better understanding of the functioning of the Constitutional Court within the framework of the Constitution and the Law on the Constitutional Court.

Pristina,
August 2014

AIM OF THE COMMENTARY

As stated in the Preface, the aim of the Commentary is to provide the legal community in Kosovo with a useful tool, able to assist it in an easy and better understanding of the provisions of the Law on the Constitutional Court and the relevant Rules of Procedure of the Court. Furthermore, it contains guidelines regarding the scope and purpose of these provisions. From a structural perspective, the Commentary includes a legal analysis of each provision of the Law, supported by other legal materials, and, where possible, refers to the travaux préparatoires as an important demarcation source as to the meaning of certain provisions.

Since the jurisprudence of the Constitutional Court is yet in an early stage, reference to the experiences of other constitutional courts in neighboring or other countries is made, where appropriate. Moreover, with the aim of providing a comparative overview and analysis of the constitutional provisions which these constitutional courts are held to interpret in their jurisprudential practice, such provisions are mentioned in the text or in footnotes in order to draw the attention of the reader to the often considerable uniformity in the different legislations dealing with constitutional issues.

Furthermore, as mentioned in the Preface, an important role in the Commentary is given to the Strasbourg jurisprudence in order to show the alignment of the Court's decisions with the jurisprudence of the European Court of Human Rights, which, by virtue of Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is mandatory.

Table of Contents

| | |
|--|-----|
| Acknowledgment..... | 3 |
| Foreword..... | 5 |
| Author's speeches..... | 7 |
| Aim of the commentary..... | 9 |
| Table of Contents..... | 11 |
| Bibliography..... | 15 |
| List of abbreviations..... | 35 |
| Guidelines for users of the commentary..... | 37 |
| Introduction..... | 39 |
| I. Background of the Law..... | 39 |
| II. Scope of the Law..... | 41 |
| III. Rules of Procedure of the Constitutional Court..... | 42 |
| IV. Interrelation between the Constitutional Court and the ordinary courts..... | 42 |
| Law (no. 03/L-121) on the Constitutional Court of the Republic of Kosovo..... | 47 |
| CHAPTER I: Organization of the Constitutional Court..... | 47 |
| 1. General provisions..... | 47 |
| Article 1 [Scope of the Law]..... | 47 |
| Article 2 [Organization of the Work of the Constitutional Court]..... | 50 |
| Rule 1 [General Provisions]..... | 52 |
| Rule 14 [Administrative Sessions] of the Rules of Procedure..... | 53 |
| Article 3 [Office and Symbols]..... | 57 |
| Rule 2 [Seat of the Court] of the Rules of Procedure..... | 60 |
| Rule 3 [Symbol and Stamp of the Court] of the Rules of Procedure..... | 61 |
| 2. Judges of the Constitutional Court..... | 62 |
| Article 4 [Additional Conditions for Appointment of Judges]..... | 62 |
| Article 5 [Incompatibility of Function]..... | 68 |
| Article 6 [Procedure for Review of Candidates for Appointment to the Constitutional Court]..... | 72 |
| Article 7 [Appointment and commencement of mandate]..... | 80 |
| Article 8 [Termination of the mandate]..... | 84 |
| Article 9 [Prior termination of the mandate]..... | 86 |
| Rule 5 [Resignation] of the Rules of Procedure..... | 92 |
| Rule 6 [Dismissal Procedures] of the Rules of Procedure..... | 93 |
| Rule 11 [Resignation of President or Deputy President] of the Rules of Procedure..... | 97 |
| Article 10 [Duties of judges]..... | 97 |
| Article 11 [President and Deputy President]..... | 101 |
| Rule 10 [Election of President and Deputy President] of the Rules of Procedure..... | 104 |
| Rule 12 [Functions of the President] of the Rules of Procedure..... | 107 |
| 3. Administration of the Constitutional Court..... | 109 |
| Article 12 [Secretariat]..... | 109 |
| Rule 15 [Secretariat] of the Rules of Procedure..... | 114 |
| Rule 16 [Secretary General and Deputy Secretary General] of the | |

| | |
|--|-----|
| Rules of Procedure..... | 115 |
| Rule 17 [Staffing of the Secretariat] of the Rules of Procedure..... | 119 |
| Article 13 [Legal Advisors] | 121 |
| Rule 18 [Legal Advisors] of the Rules of Procedure | 123 |
| Article 14 [Budget] | 127 |
| Rule 20 [Budget and Fees] of the Rules of Procedure | 130 |
| Article 15 [Remuneration of Judges] | 131 |
| CHAPTER II: Procedure | 134 |
| 1. General procedural provisions..... | 134 |
| Article 16 [General Rule]..... | 134 |
| Article 17 [Principle of Publicity]..... | 136 |
| Rule 22 [Accessibility] of the Rules of Procedure..... | 144 |
| Rule 23 [Access to Files and Documents] of the Rules of Procedure..... | 146 |
| Rule 24 [Information on Status of Proceedings] of the Rules of Procedure | 151 |
| Rule 41 [Participation in Hearings] of the Rules of Procedure..... | 151 |
| Article 18 [Exclusion of a Judge] | 154 |
| Rule 7 [Recusal procedures] of the Rules of Procedure | 158 |
| Article 19 [Taking of the decisions] | 162 |
| Rule 4 [Precedence of Judges] of the Rules of Procedure | 166 |
| Rule 58 [Dissenting Opinions] of the Rules of Procedure | 168 |
| Rule 59 [Concurring Opinions] of the Rules of Procedure..... | 170 |
| Article 20 [Decisions]..... | 172 |
| Rule 39 [Right to Hearing and Waiver] of the Rules of Procedure | 177 |
| Rule 56 [Type of Decisions] of the Rules of Procedure | 178 |
| Rule 57 [Content of Decisions] of the Rules of Procedure | 179 |
| Rule 60 [Final Text of Judgment and Filing] of the Rules of Procedure | 182 |
| Article 21 [Representation]..... | 185 |
| Article 22 [Processing Referrals]..... | 186 |
| Rule 8 [Appointment of Judge Rapporteur] of the Rules of Procedure | 198 |
| Rule 9 [Appointment of Review Panels] of the Rules of Procedure..... | 199 |
| Rule 28 [Initiation of proceedings] of the Rules of Procedure | 200 |
| Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure | 201 |
| Rule 30 [Registration of Referrals and replies] of the Rules of Procedure..... | 211 |
| Rule 33 [Appointment of Judge Rapporteur] of the Rules of Procedure | 213 |
| Rule 34 [Report of Judge Rapporteur] of the Rules of Procedure | 214 |
| Rule 35 [Review Panels] of the Rules of Procedure | 216 |
| Rule 36 [Admissibility Criteria] of the Rules of Procedure..... | 218 |
| Rule 37 [Joinder and Severance of Referrals] of the Rules of Procedure..... | 230 |
| Rule 38 [Pilot Judgments] of the Rules of Procedure | 232 |
| Article 23 [Withdrawal of a party]..... | 233 |
| Rule 32 [Withdrawal of Referrals and Replies] of the Rules of Procedure | 235 |
| Article 24 [Oral Hearing]..... | 235 |
| Rule 40 [Schedule of Hearings] of the Rules of Procedure | 236 |
| Rule 41 [Participation in Hearings] of the Rules of Procedure..... | 237 |
| Rule 42 [Notice of Hearing] of the Rules of Procedure | 239 |
| Rule 43 [Hearing Procedure] of the Rules of Procedure..... | 240 |

| | |
|--|-----|
| Rule 44 [Deliberations and voting] of the Rules of Procedure | 243 |
| Article 25 [Evidence] | 247 |
| Rule 45 [Submission of Evidence by Parties] of the Rules of Procedure | 248 |
| Rule 46 [Summons of Witnesses] of the Rules of Procedure | 250 |
| Rule 47 [Witness Testimony] of the Rules of Procedure | 255 |
| Rule 48 [Experts] of the Rules of Procedure | 257 |
| Rule 49 [Objections against Witnesses or Experts] of the Rules of Procedure | 261 |
| Rule 50 [Reimbursement of Witnesses and Experts] of the Rules of Procedure | 262 |
| Rule 51 [Documents] of the Rules of Procedure | 263 |
| Rule 52 [Site or Object Inspection] of the Rules of Procedure | 266 |
| Rule 53 [Amicus Curiae] of the Rules of Procedure | 267 |
| Article 26 [Cooperation with other Public Authorities] | 269 |
| Rule 57 [Content of decisions], paragraph 5, of the Rules of Procedure | 271 |
| Rule 63 [Enforcement of Decisions] of the Rules of Procedure | 273 |
| Article 27 [Interim Measures] | 283 |
| Rule 54 [Request for Interim Measures] of the Rules of Procedure | 287 |
| Rule 55 [Decision on Interim Measures] of the Rules of Procedure | 287 |
| Article 28 [Procedural Costs] | 294 |
| CHAPTER III: [Special procedures] | 297 |
| 1. Procedure for cases defined under Article 113, paragraph 2 items 1 and 2 of the Constitution | 297 |
| Article 29 [Accuracy of the Referral] | 298 |
| Article 30 [Deadlines] | 301 |
| 2. Procedure for cases defined under Article 113, paragraph 3 item 1 of the Constitution | 302 |
| Article 31 [Accuracy of referral] | 302 |
| Rule 67 [Referral] of the Rules of Procedure | 304 |
| Article 32 [Deadline] | 305 |
| 3. Procedure for cases arising under Article 113, paragraph 3 item 2 of the Constitution | 307 |
| Article 33 [Accuracy of referral] | 308 |
| Article 34 [Deadline] | 309 |
| 4. Procedure for cases defined in Article 113, paragraph 3 item 3 of the Constitution | 310 |
| Article 35 [Deadline] | 312 |
| 5. Procedure for cases defined under Article 113, paragraph 3 item 4 of the Constitution | 313 |
| Article 36 [Suspension Effect] | 314 |
| Rule 70 [Judgment] of the Rules of Procedure | 315 |
| Article 37 [Deadline] | 316 |
| 6. Procedure in cases defined in Article 113, paragraph 3 item 5 of the Constitution | 317 |
| Article 38 [Accuracy of the Referral] | 317 |
| Article 39 [Deadlines] | 318 |

| | |
|---|-----|
| 7. Procedure in cases defined in Article 113, Paragraph 4 of the Constitution | 319 |
| Article 40 [Accuracy of the Referral] | 319 |
| Article 41 [Deadlines] | 320 |
| 8. Procedure for cases defined under Article 113, Paragraph 5 of the Constitution | 320 |
| Article 42 [Accuracy of the Referral] | 322 |
| Article 43 [Deadline] | 323 |
| 9. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 6 of the Constitution | 328 |
| Article 44 [Accuracy of the Referral] | 329 |
| Article 45 [Deadlines] | 330 |
| Rule 71 [Notification] of the Rules of Procedure | 331 |
| Rule 72 [Cancellation of Proceedings] | 332 |
| Rule 73 [Withdrawal] of the Rules of Procedure | 333 |
| 10. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 7 of the Constitution | 334 |
| Article 46 [Admissibility] | 335 |
| Article 47 [Individual Requests] | 336 |
| Article 48 [Accuracy of the Referral] | 349 |
| Article 49 [Deadlines] | 353 |
| Rule 27 [Calculation of Time Periods] of the Rules of Procedure | 358 |
| Article 50 [Return to the Previous Situation] | 358 |
| Rule 74 [Judgment] of the Rules of Procedure | 361 |
| 11. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 8 of the Constitution of the Republic of Kosovo | 368 |
| Article 51 [Accuracy of Referral] | 370 |
| Rule 75 [Filing of Referral] of the Rules of Procedure | 373 |
| Article 52 [Procedure before a court] | 376 |
| Rule 76 [Notification] of the Rules of Procedure | 377 |
| Article 53 [Decision] | 377 |
| Rule 77 [Judgment] of the Rules of Procedure | 379 |
| Rule 64 [Interim Measures] of the Rules of Procedure | 380 |
| Rule 65 [Judgment] of the Rules of Procedure | 380 |
| 12. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 9 of the Constitution of the Republic of Kosovo | 383 |
| Article 54 [Deadline] | 385 |
| Rule 78 [Acceptance for Review] of the Rules of Procedure | 389 |
| Rule 79 [Review by the Court] of the Rules of Procedure | 390 |
| CHAPTER IV: Final and Transitional Provisions | 392 |
| Article 56 [Earlier Cases] | 395 |
| Article 57 [Interim Secretariat of the Constitutional Court] | 397 |
| Article 58 [Entry into force] | 398 |
| Anex 1: Law on Constitutional Court of the Republic of Kosovo | 399 |
| Annex II: Rules of Procedure of the Constitutional Court of the Republic of Kosovo, no. 126-3/ 2013, of 17 June 2013 | 416 |
| INDEX/LIST OF KEYWORDS | 449 |

Bibliography

- Arnold, Prof. Rainer University of Regensburg, Report “The decisions of the German Federal Constitutional Court and the binding force for ordinary courts”, Conference on “Interrelations between the Constitutional Court and Ordinary Courts”, Baku, Azerbaijan, 9-10 November 2006, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2006)047 (available for downloading at:
<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282006%29047-e>).
- Barnstedt, Elke Luise Director at the Federal Constitutional Court, Germany, Report “The Constitutional Court Budget as one of the Guarantees of the Independence of Constitutional Justice”, Seminar on “The Budget of the Constitutional Court: a determining factor of its independence”, Sarajevo, 14-15 October 2004, organized by the Venice Commission in cooperation with the Constitutional Court of Bosnia and Herzegovina, CDL-JU(2004)059 (available for downloading at:
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282004%29059-e>).
- Barnstedt, Elke Luise 2004. Director at the Federal Constitutional Court of Germany, Report “The Constitutional Court budget as one of the guarantees of the independence of constitutional justice”, Venice Commission/Seminar on “The budget of the Constitutional Court: a determining factor of its independence, Sarajevo, 14-15 October (available for downloading at:
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282004%29056-e>
- Borrajó Iniesta, Ignacio Constitutional Tribunal, Spain, Report “Limits of Fact, Law and Remedies: Myths and Realities of Constitutional Review of Judicial Decisions, Constitutional Court of Spain Experience”, Conference “The Limits of Constitutional Review of the Ordinary Court’s Decisions in Constitutional Complaint Proceedings”, Brno, Czech Republic, 14-15 November 2005, organized by the Venice Commission in cooperation with the Constitutional

Court of the Czech Republic, CDL-JU(2005)068 (available for downloading at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282005%29068-e>).

Bross, Siegfried

Judge of the German Federal Constitutional Court, Report “Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany”, Conference on “Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice”, on the occasion of the 10th Anniversary of the Constitutional Court of Azerbaijan, Baku, Azerbaijan, 14-15 July 2008, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2009)001 (available for downloading: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282009%29001-e>

Buyse, Antoine

The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges, Utrecht University School of Law (the Netherlands); Netherlands Institute of Human Rights (SIM) ; Utrecht University - Faculty of Law, November 27, 2009; Nomiko Vima (The Greek Law Journal), Vol. 57, pp. 1890-1902, 2009 (available at SSRN: <http://ssrn.com/abstract=1514441>)

Conference of European Constitutional Courts

The Themes of the Conferences of European Constitutional Courts since 1972: www.vfgh.gv.at/cms/vfgh-kongress/en/downloads/en/themes.pdf.

Constitutional Court of Albania

Constitutional Justice: Functions and Relationship with the Other Public Authorities, Conference of European Constitutional Courts, National report prepared for the XVth Congress of the Conference of European Constitutional Courts by the Constitutional Court of Albania. <http://www.confconstco.org/en/common.home.html> (Click on XVth Congress)

Constitutional Court of
Bosnia and Herzegovina

Conference of European Constitutional Courts,
National Report “Constitutional Justice: Functions
and Relationship with the Other Public Authorities”,
prepared for the XVth Congress of the Conference of
European Constitutional Courts. See also the
National Reports prepared by other European
Constitutional Courts for the XVth Congress on the
website of the Conference:
<http://www.confeuconstco.org/en/common.home.html>
(Click on XVth Congress).

Constitutional Court of Croatia

Conference of European Constitutional Courts,
National Report “The Constitutional Court, the Other
Courts and the Constitutionality Review, prepared for
the XIIth Congress of the Conference of European
Constitutional Courts. See also the National Reports
prepared by other European Constitutional Courts for
the XIIth Congress on the website of the Conference:
<http://www.confeuconstco.org/en/common.home.html>
(Click on XIIth Congress).

Constitutional Court of Slovenia

Constitutional Justice: Functions and Relationship
with the Other Public Authorities, Conference of
European Constitutional Courts, National report
prepared for the XVth Congress of the Conference of
European Constitutional Courts by the Constitutional
Court of Slovenia.
<http://www.confeuconstco.org/en/common.home.html>
(Click on XVth Congress)

Consultative Council of
European Judges (CCJE),

Opinion No. 1 (2001), for the Attention of the
Council of Ministers of the Council of Europe on
“Standards concerning the Independence of the
Judiciary and the Irremovability of Judges”,
(Recommendation No. R(94) on the Independence,
Efficiency, and Role of Judges and the Relevance of
its Standards and any other International Standards to
Current Problems in these Fields), Council of Europe,
CCJE(2001)OP No.1 (Available at:
<http://wcd.coe.int/ViewDoc.jsp?id=1046405&Site=COE>).

Consultative Council of
European Judges (CCJE)

Opinion No. 3 (2002) to the attention of the
Committee of Ministers of the Council of Europe on
the principles and rules governing judges’ profes-
sional conduct, in particular ethics, incompatible

- behaviour and impartiality. 19 November 2002
(Available at:
http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203_EN.pdf).
- Doli, Dren Kosovar Constitutional Court's Jurisdiction: Searching for Strength and Weaknesses, German Law Journal, Vol. 11 No. 08, 1 Augustus 2010.
- European Commission for Democracy through Law (Venice Commission) Council of Europe Democracy through Law Collection Science and technique of Democracy, No. 10, The role of the constitution in the consolidation of the rule of law, Bucarest, 8-10 June 1994, Proceedings.
- European Court of Human Rights Department for the Execution of Judgments of the European Court of Human Rights, Publication "Execution of Judgments of the European Court of Human Rights – Introduction", Council of Europe, H/Exec(2004)2, Update: 2006 (http://www.coe.int/Human_rights/execution/)
- European Court of Human Rights Key case-law issues "The Concept of Possessions", European Court of Human Rights, Updated: 23/01/2007 (document is available for downloading at www.echr.coe.int (Case-Law - Case-Law Analysis))
- European Court of Human Rights Key case-law issues, "Individual Petition", European Court of Human Rights, Updated: 31/12/2007 (document is available for downloading at www.echr.coe.int (Case-Law - Case-Law Analysis))
- European Court of Human Rights Key case-law issues, "Exhaustion of Domestic Remedies", European Court of Human Rights, Updated: 28/04/2006 (document is available for downloading at www.echr.coe.int (Case-Law - Case-Law Analysis)).
- European Court of Human Rights Key case-law issues, "Six-Month-Rule", European Court of Human Rights, Updated: 13/03/2006 (document is available for downloading at www.echr.coe.int (Case-Law - Case-Law Analysis)).

- European Court of Human Rights Key case-law issues, “Compatibility Ratione Temporis”, European Court of Human Rights, Updated: 31/12/2006 (document is available for downloading at www.echr.coe.int (Case-Law - Case-Law Analysis)).
- European Court of Human Rights Practical Guide on Admissibility Criteria, European Court of Human Rights, Council of Europe, 2009 and updated to 31 March 2011. This Guide is available for downloading at www.echr.coe.int (Case-Law-Case-Law Analysis–Admissibility).
- European Court of Human Rights Pilot-judgment procedure, Rule 61 of the Rules of Court, European Court of Human Rights, Publication of the ECtHR of 18/03/2011 (available for downloading at www.echr.coe.int)
- European Court of Human Rights Rules of Court, European Court of Human Rights, Registry of the Court, Strasbourg, 6 May 2013 (The Rules are available for downloading at www.echr.coe.int).
- Eynde, Laura Van den An Empirical Look at the Amicus Curiae Practice of Human Rights NGO’s before the European Court of Human Rights,” Dissertation at Stanford Law School. www.globalgovernancewatch.org/docLib/20140115_on_Amicus_Curiae_Practice_of_NGOs_at_ECHR.pdf. Netherlands Quarterly of Human Rights, Vol.31/3, 271-313, 2013.
- Ford, Christian et. al. “Neotrustship or Mistrustship? The “Authority Creep Dilemma in United Nations Transitional Administration. Vanderbilt Journal of Transnational Law, 2008.
- Stahn, Carsten. “Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government”, 14 Leiden Journal of International Law, (2001).
- Stahn, Carsten “The United Nations Transitional Administrations in Kosovo and East Timor: A first Analysis”, 5 Max Planck Yearbook of United Nations Law (2001).
- Marshall, David & Inglis, Shelley “The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo”, 16 Harvard Human Rights Journal (2003), 96-145.

- Yannis, Alexandros "The UN as Government in Kosovo", 10 Global Governance, (2004).
- Tunheim, John. "Rule of law and the Kosovo constitution." Minn. J. Int'l L. 18 (2009):
- Schwartz, Herman. "The New East European Constitutional Courts" Mich. J. Int'l L. 13 (1991)
- Ferejohn, John, & Pasquale Pasquino. "Constitutional adjudication: lessons from Europe." Tex. L. Rev. 82 (2003): 1671
- Report of the Czech Const. Court. "The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts ' (<http://www.confconstco.org>)
- Van Alstyne, et. al. "A Critical Guide to Marbury v. Madison." Duke Law Journal (1969): 1-47; Marshall, Chief Justice John. "Marbury v. Madison." 2013-6-19]. <http://laws.flndlaw.corn/US/5/137.html> (1803).
- Weller, Marc. "The Vienna negotiations on the final status for Kosovo." International Affairs 84.4 (2008): 659-681.
- Kelsen, Hans. Pure Theory of Law. The Law Book Exchange, 2003
- Stone Sweet, Alec. "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)." West European Politics 25 (2002): 77-100
- Miller, Mark Judicial independence and judicial accountability: searching for the right balance: when congress attacks the federal courts. 56 Case Western Reserve Law Review, 1015 (2006);
- Jackson, Vicki C Fair and Independent Courts: A Conference on the State of the Judiciary: Packages of Judicial Independence: The Selection and Tenure of Article III Judges 95 Georgetown Law Journal. 965 (2007)
- Jackson, Vicki & Mark Tushnet Comparative constitutional law. New York: Foundation Press, 1999
- Kommers, Donald & Russell Miller. The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded. Duke University Press, 2012

- Kommers, Donald "The federal constitutional court in the German political system." *Comparative Political Studies* 26.4 (1994): 470-491
- Morrison, Fred L. "Constitution of Bosnia-Herzegovina, The." *Const. Comment.* 13 (1996): 145; Yee, Sienho. "New Constitution of Bosnia and Herzegovina, The." *Eur. J. Int'l L.* 7 (1996): 176
- Szasz, Paul C. "The protection of human rights through the Dayton/Paris peace agreement on Bosnia." *American Journal of International Law* (1996): 301-316.
- Epstein, Lee, & Jeffrey A. Segal. *Advice and consent: The politics of judicial appointments.* Oxford University Press, 2005
- Lively, Donald E. "Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities, The." *S. Cal. L. Rev.* 59 (1985): 551.
- Kane Jr, John L. "Public Perceptions of Justice: Judicial Independence and Accountability." *Journal of the National Association of Administrative Law Judiciary* 17.2 (2013)
- Geyh, Charles Gardner. "Judicial Selection Reconsidered: A Plea for Radical Moderation." *Harv. JL & Pub. Pol'y* 35 (2012): 623
- Kelemen, R. Daniel. "The political foundations of judicial independence in the European Union." *Journal of European Public Policy* 19.1 (2012): 43-58
- Seibert-Fohr, Anja. *Judicial Independence in Transition.* Vol. 233. Springer, 2012
- Kelemen, Katalin. "Appointment of constitutional judges in a comparative perspective—with a proposal for a new model for Hungary." *Acta Juridica Hungarica* 54.1 (2013): 5-23.
- Zurn, Michael, et al. *Rule of Law Dynamics: In an Era of International and Transnational Governance.* Cambridge University Press: 2012.

- Tadros, Victor. "The Ideal of the Presumption of Innocence." *Criminal Law and Philosophy* (2013): 1-19.
- Duff, R. A. "Pre-trial detention and the presumption of innocence." *Oxford University Press, Forthcoming* (2012): 12-31.
- Weiß, Wolfgang. "Human rights in the EU: rethinking the role of the European convention on human rights after Lisbon." *European Constitutional Law Review* 7.1 (2011): 64-95.
- Thomas, Clarence. "Judging." *U. Kan. L. Rev.* 45 (1996): 1
- Kaufman, Irving R. "The Essence of Judicial Independence." *Columbia Law Review* (1980): 671-701.
- Fuchs, Claudia/Lachmayer, Konrad The Right to a Fair Trial in the Case-Law of the Austrian Constitutional Court, www.icl-journal.com, Vol 3, 1/2009, 2.
- Gentili, Gianluca Comparison of European Systems of Direct Access to Constitutional Judges: Exploring Advantages for the Italian Constitutional Court, 1 June 2012, 2012 Italian Journal of Public Law, Issue 1, p.159 (2012).
- Graber, Mark A. *Dred Scott and the Problem of Constitutional Evil*. New York, Cambridge University Press (2006).
- Guettler, Vojen Judge, Constitutional Court of the Czech Republic, Report "Executions of judgments of the Constitutional Court of the Czech Republic", Seminar on "The Efficiency of Constitutional Justice in a Society in Transition", Yerevan, Armenia, 6-7 October 2000, organized by the Venice Commission in cooperation with the Constitutional Court of Armenia, CDL-JU(2000)040 (available for downloading at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CJL-JU%282000%29040-e>).
- Harutyunyan, Gagik Hoffmann-Riem, Wolfgang (German Member), Omejec, Jasna (Croatian Substitute Member), on whose comments was based the "Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia", adopted by the Venice Commission at its

80th Plenary Session (Venice, 9-10 October 2009),
CDL-AD(2009)042.
[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)042](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042)

- Hasani, Enver and Cukalovic, Ivan Commentary to the Constitution of the Republic of Kosovo, GIZ, 2013.
- Hasani, Enver Constitutional Protection of the Head of State: The case of Kosovo, ICL Journal | Vol 7 | 2/2013 | 128
- Hasani, Enver,/ Doli, Dren/ Individual Complaint Mechanism as a Means to Protecting
- Korenica, Fisnik Fundamental Human Rights and Freedoms: The Case of the Constitutional Court of Kosovo, European Yearbook on Human Rights 2012, Edited by Wolfgang Benedek, Wolfram Karl and Manfred Novak, pages 383 – 400.
- Jackson, Vicky & Tushnet, Mark Comparative Constitutional Law, 461(1999)
Comparative Constitutional Law, 2nd Ed. (University Casebooks)
- Klein, Oliver Research Assistant, Federal Constitutional Court, Germany, Report “The Federal Constitutional Court’s relation to the German ordinary courts, Conference on “Interrelations between the Constitutional Court and Ordinary Courts”, Baku, Azerbaijan, 9-10 November 2006, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2006)045 (available for downloading at:
<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282006%29045-e>)
- Korenica, Fisnik Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-law of the European Court of Human Rights in Kosovo’s Domestic Legal System, Liverpool Law Review, Published online 20 December 2011
<http://link.springer.com/article/10.1007/s10991-011-9098-9>
- Kuijer, Martin University of Amsterdam, Report “Applicability of Article 6 ECHR”, Bulgarian National Institute of

- Justice, included in the current data base within the framework of the project “Promoting Efficiency of the Bulgarian Judiciary in the Area of Human Rights Protection”, accomplished by BLHR Foundation from November 2005 to August 2006, Chapter 4.6, Constitutional courts, Pages 23 to 25.
- Kuijer, Martin The Blindfold of Lady Justice, Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR, Wolf Legal Publishers 2004.
- Kutris, Gunars President of the Constitutional Court of Latvia, Report “Authority of the Constitutional Court as the Precondition of Execution of the Decisions”, Conference on “Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice”, Baku, Azerbaijan, 14-15 July 2008, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2008)028.
[www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-JU\(2008\)028-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-JU(2008)028-e)
- Lopez Guerra, Luis The Role and Competences of the Constitutional Court, Report by Luis Lopez Guerra, Collection Science and technique of democracy, No. 10, The role of the constitutional court in the consolidation of the rule of law, Bucharest, 8-10 June 1994, Proceedings, European Commission for Democracy through Law, Council of Europe (CDL-STD(1994)010,
<http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-STD%281994%29010-e>
- Marko, Joseph The New Kosovo Constitution in a Regional Comparative Perspective, Review of Central and East European Law, 33(2008), p. 437-450.
- Maurer, Andreas The Federal Constitutional Court’s Emergency Powers to Intervene: Provisional Measures pursuant to Article 32 of the Federal Constitutional Court Act. German Law Journal (2001),
<http://www.germanlawjournal.com/index.php?pageID=11&artID=70>

- Mavcic, Arne The budget of the constitutional court, control and management with respect to the independence and autonomy of the court, a paper that describes the structure and the forms of regulation of the financial basis of the activity of constitutional courts in comparative perspective”, a paper presented at the seminar organized by the Venice Commission in cooperation with the Constitutional Court of Bosnia and Hercegovina, Sarajevo, 14-15 October 2004, available at [http://www.venice.coe.int/docs/2004/CDL-JU\(2004\)066prog](http://www.venice.coe.int/docs/2004/CDL-JU(2004)066prog).
- Mavcic, Arne Constitutional Court, Slovenia, Written Contribution for the “Mini-Conference”, “Constitutional Court Decisions – Slovenia”, 8th Meeting of the Joint Council on Constitutional Justice, “Mini-Conference” on Effects and execution of constitutional review decisions, Tallinn, 19 June 2009, organized by the Venice Commission, CDL-JU(2009)010 (to be found on website)
- Mavcic, Arne Constitutional Court of the Republic of Slovenia, Report “The Constitutional Court budget as one of the guarantees of the independence of constitutional justice”, Seminar on “The budget of the Constitutional Court: a determining factor of its independence”, Sarajevo, 14-15 October 2004, organized by the Venice Commission in cooperation with the Constitutional Court of Bosnia and Herzegovina, CDL-JU(2004)056, <http://venice.coe.int/webforms/documents/?pdf=CDL-JU%282004%29056-e#>
- Mazak, Jan President of the Constitutional Court of Slovakia, Slovakian Member of the Venice Commission, Report “The European Model of Constitutional Review of Legislation”, Exchange of Views between the Southern African Judges Commission and the Venice Commission, 17 March 2006, CDL-JU(2006)016, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282006%29016-e>
- Mole, Nuala/Harby, Catharina Article 6 of the European Convention on Human Rights, Human rights handbooks, No. 3, Directorate

- General of Human Rights, Council of Europe, 2001, 2006 (1st edition, 2001; 2nd edition, August 2006).
- Myjer, Egbert The European Court of Human Rights, Standard case-law on the hearing of witnesses, 2005, presented at the 10th Annual Conference of the International Association of Prosecutors on Domestic Violence, Copenhagen, 28 August –1 September 2005 (available for downloading at: www.iap-association.org).
- Paczolay, Peter President of the Constitutional Court of Hungary, Report “Experience of the Execution of Constitutional Court’s Decisions declaring Legislative Omission in Hungary”, Conference on “Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice”, on the Occasion of the 10th Anniversary of the Constitutional Court of Azerbaijan, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2008) 029, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282008%29029-e>
- Pinelli, Cesare University of Macerata, Rome, Italy, Report “Concept and Practice of Judicial Activism in the Experience of some Western Constitutional Democracies”, International Conference dedicated to the 15th Anniversary of the Constitution of the Republic of Estonia, “Political Questions in Constitutional Review: What is the Dividing Line between Interference with Policy-Making and Routine Constitutional Review?”, Tallinn, Estonia, 6-7 September 2007, organized by the Venice Commission in cooperation with the Supreme Court of Estonia, CDL-JU(2007)029, <http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-JU%282007%29029-e>.
- Puskas, Valentin Zoltan Enforcement of the Constitutional Court Decisions, Constitutional Law Review, www.constcourt.ge/files/Journal_2012_eng.pdf
- Rawls, John Political Liberalism, New York: Columbia University Press, 1993.

| | |
|----------------------------------|---|
| Report | Report from the Venice Commission (Council of Europe) for the composition of constitutional courts, dated 17 February 1997. http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx . |
| Ribicic, Ciril | Strengthening Constitutional Democracy, World Conference on Constitutional Justice, Cape Town, 23-24 January 2009, Theme “Influential Constitutional Justice: its influence on society and on developing a global human rights jurisprudence”, organized by the Constitutional Court of South Africa and the Venice Commission, www.venice.coe.int/WCCJ/WCCJ_papers_E.asp . |
| Role of the constitutional court | Proceedings, UniDem Seminar, Bucharest 8-10 June 1994, in the consolidation of the rule of Venice Commission, Science and technique of democracy, law. No.10. www.nbpublish.com |
| Rozakis, Christos | The Right to a Fair Trial in Civil Cases, Judicial Studies Institute Journal, pages 96 – 106, 2004. |
| Sabareanu, Ruxandra | Secretary General, Constitutional Court of Romania, Report “Communicating the Decisions of the Constitutional Court to the Public (How Communication Theory Could be used for Publicity of the Constitutional Court Decisions)”, CDL-JU(2006)056, http://www.venice.coe.int/webforms/events/default.aspx?id=616 |
| Saiz Arnaiz, Prof. Alejandro | University of Basque Country, Spain, Report “Techniques of constitutional interpretation by the European Constitutional Courts”. Workshop on “Principles of Constitutional Control, Techniques of Constitutional and Statutory Interpretation”, Kyiv, 5-6 June 1998, organized by the Constitutional Court of Ukraine, ARD/CHECCHI and the Venice Commission, CDL-JU(1998)024, http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%281998%29024rev-e |
| Shala, Arberesha Raca | The Ombudsperson in the Constitutional Jurisprudence of Kosovo, Kosova Anayasa Hukukunda |

- Ombudsman, Anadolu University, Journal of Social Sciences.
www.anadolu.edu.tr/sites/default/files/files/19.pdf
- Sievecking, Rosanna Wissenschaftliche Mitarbeiterin, Federal Constitutional Court, Karlsruhe, Germany, Report on “Case-law on constitutional protection of economic rights of citizens in Germany”, Seminar on “Economic transition: property rights, restitution, pensions and other issues concerning the constitutional protection of economic rights of citizens”, Bishkek, 27-28 April 2001, CDL-JU(2001)25,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282001%29025-e>
- Hirschl, Ran. Constitutional theocracy. Harvard University Press, 2011.
- Solyom, Laszlo, Eotvos The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary, International Sociology, March 2003, Vol. 18(1): 133-161, SAGE.
- Sovdat, Jadranka Secretary General of the Constitutional Court of Slovenia, Report “The Organisation of the Work of Legal Advisors in Support of the Decision-Making of the Constitutional Court, Presentation and Experience of the Constitutional Court of Slovenia”, Third Conference of Secretaries General of Constitutional Courts and Equivalent Bodies, Bled, Slovenia, 29-30 September 2005, organized by the Venice Commission in cooperation with the Constitutional Court of Slovenia, CDL-JU(2005)041,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282005%29041-e>
- Spirovski, Igor Judge, Constitutional Court of the Republic of Macedonia, Former Substitute Member of the Venice Commission, Report on “The competence of the Constitutional Court to Control the conformity of Laws with International Treaties: New Trends in Constitutional Justice”, Seminar on “The Competence of the Constitutional Court to Control the Conformity of Laws with International Treaties“, Podgorica,

- Montenegro, 3 November 2009, organized by the Venice Commission in cooperation with the Constitutional Court of Montenegro and the OSCE, CDL-JU(2009)036,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282009%29036-e>
- Spirovski, Igor Judge of the Constitutional Court of the Republic of Macedonia, Report on the Independence of the Constitutional Court of the Republic of Macedonia: Guarantees and Challenges, 2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, 16-17 January 2011 “Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies”, organized by the Federal Supreme Court of Brazil and the Venice Commission, Papers.
- Stack, Kevin M. The Practice of Dissent in the Supreme Court. The Yale Law Journal. 105:8, 2235-2259, (1996).
- Steinberger, Helmut Models of Constitutional Jurisdiction, Science and Techniques of Democracy, No. 2, Strasbourg (1993), European Commission for Democracy through Law, Council of Europe. CDL-STD(1993)002 (to be found on website).
- Suumann, Gea Analyst, Supreme Court, Estonia, Report “Execution and Effect of Constitutional Review Judgments, the Supreme Court Practice in 2004 – 2008”, 8th Meeting of the Joint Council on Constitutional Justice, “Mini-Conference” on Effects and execution of constitutional review decisions, Tallinn, 19 June 2009, organized by the Venice Commission, CDL-JU(2009)012,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282009%29012-e>
- Theunis, Jan Law Clerk at the Belgian Constitutional Court, Report “The interrelations between the Constitutional Court and ordinary courts, Conference “Interrelations between the Constitutional Court and Ordinary Courts, Baku, Azerbaijan, 9-10 November 2006, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2006)046,

<http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-JU%282006%29046-e>

Tuori, Kaarlo

Prof. of Jurisprudence, University of Helsinki, Finland, Member of the Venice Commission, Report “Combining Abstract Ex Ante and Concrete Ex Post Review: the Finnish Model, Unidem Seminar “Definition and Development of Human Rights and Popular Sovereignty in Europe”, organized by the Venice Commission in cooperation with the Faculty of Law of the Goethe University, Frankfurt am Main, Germany, and the Helsinki University, Finland, 15-16 May 2009, CDL-UD(2010)011, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-UD%282010%29011-e>

Tuori, Kaarlo

University of Helsinki, Vice-President of the Venice Commission, Report “Rights, Democracy and Local Self-Governance Social Rights, International Conference dedicated to the 15th Anniversary of the Constitution of the Republic of Estonia, “Political Questions in Constitutional Review: What is the Dividing Line between Interference with Policy-Making and Routine Constitutional Review?”, Tallinn, Estonia, 6-7 September 2007, organized by the Venice Commission in cooperation with the Supreme Court of Estonia, CDL-JU(2007)031, <http://solrtest.bsz-bw.de/vufind/Record/DE-208275097641/Description>

Ugur Erdal/Hasan Bakirci/

Article 3 of the European Convention on Human Rights, A

Boris Wijkstrom

Practitioner’s Handbook (OMCT (World Organisation against Torture) Handbook Series Vol. 1, 20 July 2006).

Varvarovsky, Pavel

The Budget of the Constitutional Court: Control and Management. Presentation of the Venice Commission Workshop held in Kyiv, Ukraine, 19-21 January 1998, CDL-JU (1998)009, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%281998%29006-f>

Venice Commission

Main reference documents:
www.venice.coe.int/WebForms/pages/default.aspx?01_main_reference_documents&lang=en

| | |
|-------------------|---|
| Venice Commission | Referendums in Europe – an Analysis of the Legal Rules in European States, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session, CDL-AD(2005)034 (available for downloading at: http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD%282005%29034-e). |
| Venice Commission | Techniques of constitutional interpretation by the European Constitutional Courts, Report by Prof. Alejandro Saiz Arnaiz, University of the Basque Country, Spain, Workshop on “Principles of Constitutional Control, Techniques of Constitutional and Statutory Interpretation”, Kyiv, 5-6 June 1998, organized by the Constitutional Court of Ukraine, ARD/CHECCHI and the Venice Commission, CDL-JU(1998)024 (available for downloading at: http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD%282005%29034-e). |
| Venice Commission | STUDY on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary session (Venice, 17-18 December 2010) on the basis of comments by Harutyunyan, Gagik, Armenian Member of the Venice Commission, Nussberger, Angelika, German Substitute Member, Paczolay, Peter, Hungarian Member, CDL-AD(2010)039rev, http://www.venice.coe.int/webforms/documents/default.aspx?pdfid=CDL-AD%282010%29039rev-e |
| Venice Commission | Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd session, Venice, 18-19 October 2002, CDL-AD(2002)23 rev, http://www.venice.coe.int/webforms/documents/?pdfid=CDL-AD%282002%29023rev-e |
| Venice Commission | Code of Good Practice of Referendums, adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007) on the basis of contributions by Pieter van Dijk (member, The Netherlands), Francois Luchaire (member, Andorra) and Giorgio Malinverni |

- (member, Switzerland), CDL-AD(2007)008rev,
<http://www.venice.coe.int/webforms/documents/CDL-AD%282007%29008rev.aspx>
- Venice Commission Report on Composition of constitutional courts, dated 17 February 1997
[www.venice.coe.int/webforms/documents/CDL-STD\(1997\)020.aspx?pdf=](http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx?pdf=).
- Wagner, Britta Secretary General, Constitutional Court, Austria, Report “Effects and Execution of Constitutional Court Judgments”, 8th Meeting of the Joint Council on Constitutional Justice, “Mini-Conference” on “Effects and execution of constitutional review decisions”, Tallinn, 19 June 2009, organized by the Venice Commission, CDL-JU(2009)013, CDL-JU(2009)013,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282009%29013-e>
- Wagnerova, Eliska, Vice-President of the Constitutional Court of the Czech Republic, Report “Types of Judgments as a Contribution to the Efficiency of Decision-Making at the Constitutional Court”, Conference on “Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice,” on the occasion of the 10th Anniversary of the Constitutional Court of Azerbaijan, organized by the Venice Commission in cooperation with the Constitutional Court of Azerbaijan, CDL-JU(2008)030,
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU%282008%29030-e>
- Wedam Lukic Dragica Judge, Constitutional Court, Slovenia, Report “The Limits of the Review of Decisions of Ordinary Courts in Constitutional Complaint Proceedings before the Constitutional Court of the Republic of Slovenia”, Conference on the Limits of Constitutional Review of Ordinary Court’s Decisions in Constitutional Complaint Proceedings, Brno, Czech Republic, 14-15 November 2005, organized by the Venice Commission in cooperation with the Constitutional Court of the Czech Republic, CDL-JU(2005)060,

<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282005%29060-e>

Wildhaber, Luzius

Judicial Impartiality Under the European Convention on Human Rights, a working paper available at <http://www.concourt.am/hr/ccl/vestnik/2.12-2001/wildhaber-eng.htm>.

LIST OF ABBREVIATIONS

| | |
|----------------|--|
| BVerfGG | Bundesverfassungsgerichtsgezet (Constitutional Court Act, as amended Date of issuance 12.03.1951. |
| DIFID | UK Department for International Development |
| EComHR | European Commission of Human Rights, abolished by Protocol 11 to the ECHR in 1998.1 ECHR European Convention on Human Rights and Fundamental Freedoms of 3 September 1953, as amended. |
| ECtHR | European Court of Human Rights |
| ESDP | European Security and Defence Policy |
| EWMI | East West Management Institute |
| FYROM | Former Yougoslav Republic of Macedonia |
| ICO | International Civilian Office |
| ICR | International Civilian Representative |
| IRZ Foundation | German Foundation for International Legal Cooperation |
| KFOR | Kosovo Force |
| LCC | Law No. 03/L-121 on Constitutional Court of 16 December 2008, as amended. |
| LCP | Law No. 3/L006 on Contested Procedure of 30 June 2008, as amended |
| OMCT | World Organisation against Torture |
| UN | United Nations |
| UNMIK | United Nations Mission in Kosovo, established under Security Council Resolution 1244 of 10 June 1999. |
| USAID | United States Agency for International Development |
| KJC | Kosovo Judicial Council |
| ECHR | European Convention on Human Rights |

GUIDELINES FOR USERS OF THE COMMENTARY

The Commentary has a clear and simple structure. The text of each Article of the Law and of each Rule of the Rules of Procedure is followed by comments. The comments on the different paragraphs of an Article and on the relevant paragraphs of the Rules are distinguished as follows: for the comments on a paragraph of an Article of the Law, the particular comments are preceded in the margin by the corresponding numbers of the paragraph in ordinary numbers (1, 2, etc.), while for the paragraphs of a Rule, the particular comments are preceded in the margin by the corresponding numbers of the Rule in roman numbers (I, II, etc.).

Attached to this Commentary are the Law on the Constitutional Court of 16 December 2008, as amended, and the Court's Rules of Procedure of 23 November 2010, as amended for the last time on 17 June 2013. Furthermore, at the end of the commentary the reader will find an index of keywords, referring to the more important legal terms.

Introduction

I. Background of the Law

The adoption, on 16 December 2008, of Law No. 03/L-21 on the Constitutional Court of the Republic of Kosovo (hereinafter referred to as “the Law”), under which the Constitutional Court was established, marks an important turning point in the process of consolidation of the constitutional democracy and the rule of law in an independent Kosovo. It also represents the rebirth of the Constitutional Court in Kosovo, which was abolished in early 1990 after the abolition of the constitutional autonomy of Kosovo on 28 March 1989, when the Serbian Parliament introduced constitutional amendments that significantly limited Kosovo's autonomy determined by the SFRY Constitution of 1974 and the Constitution of Kosovo from 1974.¹ Since then, numerous efforts have been made to restore the system of constitutional control. In 1999, the Interim Agreement for Peace and Self-Government in Kosovo (the “Rambouillet” Agreement) provided for the establishment of a nine-member Constitutional Court with an international presence of five international judges to ensure the conformity of laws with the constitution and the protection of fundamental rights and freedoms guaranteed by it.² The Rambouillet Agreement was not implemented and the institutions provided by it were never established.

The need to introduce a system of constitutional protection and the setting up of a Constitutional Court, was echoed by local representatives during the drafting of the Constitutional Framework for the Provisional Self-Government in Kosovo (hereinafter: “Constitutional Framework”). In April 2001 local and international experts under the leadership of the United Nations Mission in Kosovo (UNMIK)³ were mandated to draft a constitutional document, which would enable the establishment of the Provisional Institutions of Self-Government and would allow a gradual transfer of authority from UNMIK to these Provisional Institutions of Self-Government.⁴

But the proposal to establish a constitutional court was rejected by UNMIK for the reason that such a step would go beyond the spirit and the limits set forth by UN Security Council Resolution 1244 and would represent an attribute of statehood and,

¹ For a detailed overview of the constitutional history of Kosovo see Joseph Marko in Jochen Abr Frowein and Christiane E. Philipp, *Max Planck Yearbook of United Nations Law* [Volume 5 of *Max Planck Yearbook of United Nations Law*] (Martinus Nijhoff Publishers, 2001) p. 116.

² See article V (6) of the Interim Agreement for Peace and Self-Government in Kosovo. The full text of the Agreement is available at http://peacemaker.un.org/sites/peacemaker.un.org/files/990123_Rambouillet_Accord.pdf.

³ The Joint Working Group established by UNMIK to draft the Constitutional Framework was chaired by Mr. Johan van Lamoen, one of the drafters of the present Commentary.

⁴ U.N. Security Council Resolution 1244 was passed in June 1999. The resolution authorized an international military and civilian presence in Kosovo for an undefined length. The NATO-led peacekeeping force KFOR was charged with maintaining peace and order, while UNMIK was given the role of administering Kosovo on a provisional basis with the aim of gradually transferring its administrative responsibilities to elected, autonomous governmental institutions.

thus, prejudice the final status of Kosovo.⁵ Article 9.4.11 of the Constitutional Framework only provided for the establishment of a Special Constitutional Chamber of the Supreme Court on Constitutional Framework Matters, competent to decide, inter alia, whether any law adopted by the Assembly would be incompatible with the Constitutional Framework as well as with international legal instruments on human rights. However, the Special Chamber never became operational; thus, the Article never gained any constitutional significance.⁶

The concept for the establishment of a constitutional court as the fundamental component of the forthcoming constitutional architecture of Kosovo triumphed in the "Vienna Talks", which determined the future status process of Kosovo prepared by the UN Special Envoy, Mr. Martti Ahtisaari who, in the Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2007 (hereinafter: "Comprehensive Proposal"), provided for the establishment of a nine-member Constitutional Court to safeguard the constitutional order in Kosovo.⁷

Subsequently, a draft Constitution of the Republic of Kosovo, based on the principles developed in the Comprehensive Proposal, was drafted by a Working Group of 21 members and, on 2 April 2008, certified by the International Civilian Representative mandated, under Article 1 [Objectives] of Annex IX [International Civilian Representative] of the Comprehensive Proposal, to supervise the implementation of the Settlement and to support the relevant efforts of Kosovo's authorities.⁸

On 9 April 2008, the Assembly of Kosovo adopted the Constitution of the Republic of Kosovo, which entered into force and effect on 15 June 2008, laying down the foundations of the Constitutional Court of the Republic of Kosovo (hereinafter: "Constitutional Court"). Until the time of the writing of this Commentary, the Constitution has been modified with 23 constitutional amendments. Except the constitutional amendment that empowered the Assembly of Kosovo to grant amnesty, the rest of the constitutional amendments were enacted to bring the country's

⁵ For more on the UN administration in Kosovo, see Christian E. Ford and Ben A. Oppenheim, "Neotrusteeship or Mistrusteeship? the "Authority Creep" Dilemma in United Nations Transitional Administration", 41 *Vanderbilt Journal of Transnational Law*, (2008), 55 - 105; Alexandros Yannis, "The UN as Government in Kosovo", 10 *Global Governance*, (2004), 67-81; Carsten Stahn, "Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government", 14 *Leiden Journal of International Law*, (2001), 531-561; Carsten Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A first Analysis", 5 *Max Planck Yearbook of United Nations Law* (2001), 105-183; David Marshall and Shelley Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo", 16 *Harvard Human Rights Journal* (2003), 96-145.

⁶ The Constitutional Framework for the Provisional Self-Government in Kosovo, Art. 9.4.11. This Act is available at http://assembly-osova.org/common/docs/FrameworkPocket_ENG_Dec2002.pdf.

⁷ The Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007, addressed the following issues: Constitutional provisions; rights of Communities and their Members; decentralization of local government; justice system; religious and cultural heritage; international debt; property and archives; Kosovo security sector; International Civilian Representative; European Security and Defense Policy (ESDP) Rule of Law Mission; International Military Presence (e.g., continuation of KFOR) and the legislative agenda. The full text of the Comprehensive Proposal can be found at http://unosek.org/docref/Comprehensive_proposal-english.pdf.

⁸ See the Comprehensive Proposal (supra note 7).

supervised independence to an end. Part of these foundation are for instance in Article 112 [General Principles] of its Chapter VIII [Constitutional Court], the Constitution provides that the Constitutional Court is “the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution”,⁹ but also Article 113 [Authorized Parties] of the Constitution which enumerates the authorized parties which have legal standing before the Court and defines the matters which can be referred to it. By introducing the constitutional complaint procedure in Article 113.7, individuals (as well as legal persons under Article 21 [General Principles], paragraph 4, of the Constitution)¹⁰ obtained a powerful instrument for the protection of their human rights and fundamental freedoms guaranteed by the Constitution.

The provisions of the Constitution relating to the Constitutional Court were implemented by the adoption of Law no. 03/I-121 on the Constitutional Court of the Republic of Kosovo, dated 16 December 2008, which further regulates the Court’s organization and functioning; conditions and procedures for appointment and dismissal of its judges; and procedures for filing and reviewing constitutional complaints. The process of drafting the Law on the Constitutional Court commenced in May 2008, when a Joint Working Group, composed of representatives of Kosovo institutions and international organizations, including Kosovar and international legal experts, was established.¹¹

Two of the authors of the Commentary, namely Ms. Gjylieta Muskolaj and Mr. Visar Morina have had the honor to be members of this Working Group.

II. Scope of the Law

The Law on the Constitutional Court implements Articles 112 [General Principles], 113 [Jurisdiction and Authorized Parties], 114 [Composition and Mandate of the Constitutional Court], 115 [Organization of the Constitutional Court], 116 [Legal Effect of Decisions], 117 [Immunity], and 118 [Dismissal] of Chapter VIII [Constitutional Court] of the Constitution.

In particular, Article 1 [Scope] of Chapter I [Organisation of the Constitutional Court], Sub-Chapter 1 [General Provisions] of the Law, provides that: *“This Law further regulates the organization and functioning of the Constitutional Court of the Republic of Kosovo, procedures for submitting and reviewing referrals to the Constitutional*

⁹ For more information about the particularities of the process, see Marko, Joseph. “The new Kosovo constitution in a regional comparative perspective.” *Review of Central and East European Law* 33, no. 4 (2008): 437-450.; See also Tunheim, John. “Rule of law and the Kosovo constitution.” *Minn. J. Int’l L.* 18 (2009): 371.

¹⁰ Article 21.4 of the Constitution provides: “Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable “

¹¹ The Joint Working Group was chaired by Prof.Dr.Arsim Bajrami, former Minister of Public Administration of the Government of Kosovo and lecturer of constitutional law at the University of Prishtina in Kosovo and Ms.Vjosa Osmani, member of the Assembly of the Republic of Kosovo and lecturer of international law at the University of Prishtina in Kosovo.

Court, terms and procedures for appointment and dismissal of the Constitutional Court judges, basic procedural principles and rules and other organizational issues.”

The scope of the Law will be commented in detail under the relevant Article(s) of the Law hereafter.

III. Rules of Procedure of the Constitutional Court

Pursuant to Article 2 [Organization of the Work of the Constitutional Court], providing that: “2. *The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law,*” the Court, after its establishment in September 2009, prepared a set of rules which were adopted by the Judges on 23 November 2010. According to Article 1 [General Provisions] of Chapter I [Organization of the Constitutional Court], “*The Rules of Procedure shall supplement the relevant provisions of the Constitution of the Republic of Kosovo and the Law on the Constitutional Court of the Republic of Kosovo in governing the organization of the Constitutional Court of the Republic of Kosovo (“Court”), procedures before the Court and other matters related to the functioning of the Court.*”

These Rules of Procedure have been amended several times, the last time in 2013. In order for the reader to better understand the interaction of the Law and the Rules of Procedure, only the most recent amendments to the text of the Rules appear in the Commentary.

IV. Interrelation between the Constitutional Court and the ordinary courts

Although the Constitutional Court is a court of justice, it is not an ordinary court, since it is one of the constitutional bodies of the Republic of Kosovo alongside the President, the Assembly, the Government, the Ombudsperson and the Judiciary. As mentioned above, the Constitutional Court has the mandate to serve as the final interpreter of the Constitution of the Republic of Kosovo and its decisions are binding on the judiciary and all persons and institutions of the Republic of Kosovo, by virtue of Article 116 [Legal Effect of Decisions] of the Constitution. In the constitutional doctrine, constitutional courts are often portrayed as constitutional bodies standing outside the classical system of judiciary. There are several reasons why constitutional courts are treated outside the narrowly defined concept of ordinary judiciary. First, in some European constitutions, “the constitutional provisions for the constitutional courts do not usually appear in the judiciary section...but in a separate section”.¹² For example the Constitution of Italy (Art. 134), the Constitution of Austria (art. 137) or the Constitutional Council in France (Art. 56) have structurally discussed the protection of constitution and its protective mechanisms on separate constitutional sections. But there are of course exceptions to this standard. For example, the German Basic Law,

¹² Schwartz, Herman. “The New East European Constitutional Courts” *Mich. J. Int’l L.* 13 (1991): 741.

under the section called administration of justice, provides for a more unified and cohesive approach of the judiciary, which also includes the Constitutional Court within this narrowly defined concept of judiciary. Article 92 provides that “the judicial authority is vested in the judges; it is exercised by the Federal Constitutional Court, by the Supreme Federal Court, by the Federal courts provided for in this Basic Law and by the courts of the Laender”.

The second distinctive element is that the profile and the background of the judges of the constitutional court. In this sense, judges of the constitutional courts do not necessarily come from the judiciary but from “a wider population including lawyers and prominent legal scholars”.¹³ Some countries can even allow for non-lawyers to become members of the Constitutional Court such as the case of France and Turkey although in practice “these courts are generally made up of lawyers”.¹⁴ Thirdly, judges of constitutional court are appointed based on a constitutional formula which is often different from the system of the appointment of ordinary judges. In Kosovo, for example, judges of the Constitutional Court are appointed in the manner that is rather different from that of ordinary judges. Also the length of service of the constitutional judges is different compared with that of the ordinary judges, which makes their constitutional status slightly different compared to ordinary judges.

In performing its task as a final authority for the interpretation of the Constitution and the compliance of laws with the Constitution, the Constitutional Court reviews also the decisions (actions) of the ordinary courts (besides the legislature and the executive), pursuant to Article 113.7 of the Constitution, by adjudicating referrals of complainants (individuals and legal persons) alleging that an act of an ordinary court has breached their human rights or fundamental freedoms, guaranteed by the Constitution. However, the complaint must first have been brought before the competent appeals court(s), including the Supreme Court, before it is submitted to the Court. This means that all available remedies must have been exhausted, before the Court can review whether the ordinary court has violated constitutional rights as claimed by the complainant.

A few words regarding the constitutional interpretation of the Constitution are useful here. As the President of the Kosovo Constitutional Court Mr. Enver Hasani has rightfully indicated on the commentary of the 2008 Kosovo Constitution “the Constitutional Court is not the exclusive interpreter of the Constitution. Constitutional interpretation occurs in every second of the institutional life as long as institutions discharge their constitutional duties that derive from this Constitution”.¹⁵ But the Constitutional Court remains the final interpreter of the meaning of constitutional norms when state institutions are not certain or have opposing views regarding the meaning of constitutional norms or principles. This kind of interpretative decision of

¹³ Ferejohn, John, and Pasquale Pasquino. "Constitutional adjudication: lessons from Europe." *Tex. L. Rev.* 82 (2003): 1671.

¹⁴ Report from the Venice Commission (Council of Europe) for the composition of constitutional courts, dated 17 February 1997. The report is available at [http://venice.coe.int/webforms/documents/CDL-STD\(1997\)020.aspx](http://venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx).

¹⁵ See Hasani, Enver and Cukalovic, Ivan. *Commentary of the Kosovo Constitution*. GIZ, 2013. p. 566.

the Constitutional Court are generally considered as sources of constitutional law and are legally binding to state institutions.

When the Court finds that the challenged decision (action) of the ordinary court has violated the Constitution, the Court will only set aside the decision, but not replace it by its own judgment. Instead, it will refer the case back to the ordinary court, which must re-consider the case in view of the Court's decision and its reasoning. There have been a few cases where the Constitutional Court reviewed the constitutionality of the judgments of the Supreme Court. In the case *Ibrahimi et.al vs. the Supreme Court of Kosovo*, the Constitutional Court underlined that it's not the task of the Constitutional Court "to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts, including the Supreme Court".¹⁶ The Constitutional Court's duty in these type of constitutional review proceedings is to verify and assess whether any of the constitutional rights guaranteed by the Constitution have been violated in the course of the judicial proceedings, and whether constitutional guarantees with regard to the manner in which those judicial proceedings have been observed by the competent courts. It should be noted that in terms of procedural links, "ordinary courts do not have a special status in comparison to other persons or bodies interested in cases before the Constitutional Court. The ordinary court gains the status of a party to the proceeding: in the case of a reference it is the proposing party (the petitioner), and in the case of a constitutional complaint, it is the defending party".¹⁷

The current legislation does not provide a clear picture with regard to the extent to which the constitutional review of the courts judgments can be made by the Constitutional Court. However, the judgments of the Constitutional Court which declare the judgments of the Supreme Court as unconstitutional should be respected and executed by the Supreme Court. The decisions of the Constitutional Court are legally binding to physical persons and public authorities, including the courts. This provision can also be interpreted as "meaning Constitutional Court decisions are binding precedents. Originally, the restrictive interpretation of this provision prevailed, but, gradually, a broader interpretation and precedential effects of Constitutional Court's decisions are being recognized more and more".¹⁸

A further relation between the Court and the ordinary courts is laid down in Article 113.8 of the Constitution, according to which: "*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 law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.*" "The Constitution uses the term all courts, which means that each court regardless of its

¹⁶ *Imer Ibrahimi vs. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo*. Constitutional Court of Kosovo. 23 June 2010. [Http://gjk-ks.org/](http://gjk-ks.org/). Accessed on Web. 02 Dec. 2011.

¹⁷ Report of the Constitutional Court of Czech Republic, "The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts ' (<http://www.confueconstco.org>) <<http://confueconstco.org/reports/rep-xii/Tsjechie-EN.pdf>> accessed 15 May 2014.

¹⁸ *Ibid*

hierarchy in the justice system in Kosovo is entitled to ask the Constitutional Court for the compatibility of the law with the Constitution, if resolution of the concrete case depends on the compatibility of the referred law with the constitution. This is called in the theory of constitutional review as incidental referral. The ordinary judges are of course not permitted to decide themselves on the constitutionality of a law which is necessary for their decision. The referring court can only interrupt the judicial proceedings and forward the case to the Constitutional Court, which would then decide whether or not the contested law is constitutional. The German Federal Constitutional Court has similar competencies as enumerated in the German Basic Law and the Federal Constitutional Court Act.¹⁹

The concrete judicial review of constitutionality will be commented further under Article 51 [Accuracy of Referral] of the Law.

¹⁹ See for details the Basic Law for the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May 1949, as amended. The Law can be accessed at <https://btg-bestellservice.de/pdf/80201000.pdf>.

Law (no. 03/L-121) on the Constitutional Court of the Republic of Kosovo

Chapter I: Organization of the Constitutional Court

1. General provisions

Article 1 [Scope of the Law]

This Law further regulates the organization and functioning of the Constitutional Court of the Republic of Kosovo, procedures for submitting and reviewing referrals to the Constitutional Court, terms and procedures for appointment and dismissal of the Constitutional Court judges, basic procedural principles and rules and other organizational issues.

The legal architecture is generally premised upon the principle of the supremacy of the constitution, which means that the constitution is the *lex fundamentalis* in the constitutional state. It implies that any law or act inconsistent with constitutional provisions is considered null and void. It also “entails not only that all consistencies and political institutions must abide by it, but also that all other sources of law or legal authority are placed lower than the constitution in a given country’s legal hierarchy”.²⁰ The constitutional supremacy over the laws has long been echoed by Justice Marshall in the U.S. jurisprudence case called *Marbury v. Madison* (1810) in which he stated that the constitution is the supreme law of the land and when ordinary laws conflict with the constitution, they must be struck down or made null and void.²¹ The primacy of the constitution over other normative acts including but not limited to parliamentary enacted laws, constitutes the axis of the doctrine of the hierarchy of legal acts. The principle is also entrenched in the Kosovo Constitution which in its Article 16 provides that “the Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution”. The other feature of the constitutional norms besides their supremacy is their exclusivity and broadness of the language that is accommodated in the constitutional texts. This has two implications: first, that some of the constitutional norms may be applied directly in the operation of constitutional bodies and can be also directly invoked by the individuals, and second, some of the constitutional norms may require further elaboration in the law in order to be subject of implementation. The same also goes for selected provisions of the Kosovo Constitution regarding the Constitutional Court which called for further regulation in the form of a law enacted by the Assembly. An elaboration of the constitutional basis of the Law on the Constitutional Court is therefore relevant to be discussed.

²⁰ Hirschl, Ran. *Constitutional theocracy*. Harvard University Press, 2011. p. 72.

²¹ See Van Alstyne, William W., and John Marshall. "A Critical Guide to *Marbury v. Madison*." *Duke Law Journal* (1969): 1-47; Marshall, Chief Justice John. "*Marbury v. Madison*." 2013-6-19]. <http://laws.fndlaw.corn/US/5/137.html> (1803).

The legal basis of the Law is laid down in Chapter VIII of the Constitution, defining the basic principles of the organization and functioning of the Constitutional Court. The Assembly of the Republic of Kosovo (hereinafter: the "Assembly") adopted Law No. 03/L-121 in order to further regulate these basic principles.²² This technique of legal drafting was also followed with regard to the regulation of the organization and functioning of the main constitutional bodies. For example, in December 2008 the Assembly adopted Law No. 03/L-094 on the President of the Republic of Kosovo. This Law provides a detailed regulative framework related, *inter alia*, to the election, competencies and dismissal of the President, which are derived from the basic principles of the institution of President of the Republic of Kosovo (hereinafter: "President"), laid down in Chapter V [President of the Republic of Kosovo].

The regulation by law of further details of the organization and functioning of the Kosovo constitutional bodies creates, thus, a body of laws which, through their similarity, provides legal certainty and stability and ensures their harmonious functioning. Two striking fundamental features need to be mentioned in this regard. First, the Law received its validity from the Constitution (Arts. 113, 114 and 115), which authorizes the Assembly to regulate further selected categories of the Constitutional Court namely the issue of the additional competencies of the Constitutional Court, determination of other relevant qualifications of the candidates for judges of the Constitutional Court and determination of the organizational structure and rules of procedure of the Court. Using Kelsen's words on his reflections about the law and state, the constitutionally conferred powers of the Assembly imply that the constitutional norm as a higher norm determines not only the organ and the procedure for the adoption of the Law regulating the above-mentioned categories of the Constitutional Court, but they also determine the content of those legislative norms.²³ Second is that the Law not only receives its validity from the Constitution but must remain within constitutional parameters set out by the Constitution by regulating only those Court's matters for which express constitutional authorizations are provided. From the Kelsenian perspective of the hierarchy of legal norms this means that "a norm belongs to a certain legal order only because and so far as it is in accord with a higher legal norm that determines its creation".²⁴

²² See Article 113 of the Constitution. The Constitution was adopted on 9 April 2008 and can be loaded down from site: <http://gazetazrytare.rks-gov.net/Default.aspx>. For more on the 2008 Kosovo Constitution see Tunheim, John. "Rule of law and the Kosovo constitution." *Minn. J. Int'l L.* 18 (2009): 371; Marko, Joseph. "The new Kosovo constitution in a regional comparative perspective." *Review of Central and East European Law* 33.4 (2008): 437-450. Weller, Marc. "The Vienna negotiations on the final status for Kosovo." *International Affairs* 84.4 (2008): 659-681.

²³ Kelsen, Hans. *Pure Theory of Law*. The Law Book Exchange, 2003, p. 267

²⁴ Ibid. p. 267. For more on Hans Kelsen works and his theory for the protection of constitutionality see Kelsen, Hans. *General theory of law and state*. Vol. 1. The Lawbook Exchange, Ltd., 1945; Ferejohn, John E. "Constitutional review in the global context." *NYUJ Legis. & Pub. Pol'y* 6 (2002): 49. Stone Sweet, Alec. "Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation)." *West European Politics* 25 (2002): 77-100. Jabloner, Clemens. "Kelsen and his circle: The Viennese years." *European Journal of International Law* 9.2 (1998): 368-385. Pasquino, Pasquale. "Constitutional adjudication and democracy. Comparative perspectives: USA, France, Italy." *Ratio Juris* 11.1 (1998): 38-50.

As to the Constitutional Court, the Rules of Procedure²⁵ adopted by its judges, supplement the relevant provisions of the Law and further regulate the organization of the Court, the proceedings and other matters related to its functioning. As mentioned above, the Constitution only defines the basic principles of the organization and functioning of the Court on issues relating to: (a) jurisdiction and authorized parties; (b) the composition and mandate of the Court; (c) the organization of the Court; (d) the legal effect of decisions of the Court; and (e) the immunity and dismissal of the judges of the Constitutional Court.

In fact, the determination of the border line between what should remain in the Constitution and what should be further regulated in primary or secondary legislation related to the organization and functioning of the Constitutional Court, cannot be clearly determined. Indeed this was one of the dilemmas of the members of the Working Group for drafting the Law on the Constitutional Court (hereinafter "the Working Group") which came up during the process of drafting the Law. The Working Group decided not to repeat constitutional provisions in the text of the Law and agreed that the Law should only deal with such issues, which would call for further legal regulation or when a constitutional provision, due to its general terms, would trigger further regulation based upon primary legislation. This is evident from the text of Article 1.1 of the Law and from the structure of the Law itself, by which only those issues are regulated, for which an expressive constitutional authorization is provided by the Constitution.²⁶

Among the questions, with which members of the Working Group were confronted during the legal drafting, was the question about the scope of the Law. In other words, seen from a legal regulatory perspective, there did not seem to be any clear standard or parameter to measure whether the Law should be a minimalist law or an extensive and comprehensive one. This was due to the fact that, if the Law would aim at regulating the above-mentioned categories in great detail, this might ensure a higher degree of legal certainty as to the organizational and functional aspects of the Constitutional Court.

But on the other hand, such approach might not be the most pragmatic solution due to the fact that it could prevent the Constitutional Court to adjust the Rules on its organization and functioning to the specific circumstances. The Working Group rejected the idea to equip the Constitutional Court with additional jurisdiction to what is already been provided by Article 113 of the Constitution, guided by the idea to avoid a situation in which the newly established Constitutional Court would be facing an explosive number of cases in the initial period of its operation.

Article 1 of the Law does not expressively set up a substantive rule, but merely addresses the scope of the Law. The language of Article 1 is broad and not limited to the categories that are subject to legal regulation by the Law. This confirms the assumption that the drafters intended not to restrict the scope of the Law by

²⁵ The Rules of Procedure of the Constitutional Court 126-3/2013 have been adopted by the Constitutional Court on 21 June 2013 and can be loaded down from site: <http://www.gjk-ks.org>.

²⁶ The Working Group on Establishment of the Constitutional Court was responsible to prepare legal framework needed for functioning of the Court; budget for the Court for the period 2009-2011; to determine the initial organizational structure of the Constitutional Court. For more on the composition of the Working Group for establishment of the Constitutional Court see <http://www.gjk-ks.org/?cid=2.2>.

enumerating the categories that are further regulated in the Law. However, a more coherent drafting approach would have been to enumerate in Article 1 all categories, which are subject of legal regulation by the Law, for example, the decisions of the Constitutional Court and their legal effects. Such an approach would have ensured more consistency in the application of the Law and would have easily guided the reader through all issues which the Law regulates.

The further regulation of the internal organization and competencies of constitutional tribunals by the law is typical for the European countries and beyond. For example, the Law on the Organization of the Constitutional Court of Albania, in its Article 1, determines that "this Law provides rules on the organization and functioning of the Constitutional Court, status of its members, presentation and review of the applications, principles and regulations of constitutional adjudication, decision taking and their execution".²⁷

Similarly, the Constitutional Act on the Constitutional Court of the Republic of Croatia provides that the "Constitutional Act regulates conditions and procedure for the election of judges of the Constitutional Court of the Republic of Croatia and termination of their office, conditions and terms for instituting proceedings for the review of constitutionality and legality, procedure and legal effects of its decisions, protection of human rights and fundamental freedoms guaranteed by the Constitution and other issues of importance for the performance of duties and functions of the Constitutional Court".²⁸

There are other examples, however, which show that constitutional court laws may not contain a legal provision to demarcate the aim and/or the scope of the law by proceeding directly with the regulation of the subject matter. Such are, for example, the Law on the Constitutional Court of the Federal Republic of Germany²⁹, the Law on the Constitutional Court of Hungary and the Law on the Constitutional Court of Slovenia. It is, therefore, in terms of legal drafting, a matter of choice as to the scope of the law and the extent to which the provisions of the law enumerate the categories that are subject to regulation.

Article 2 [Organization of the Work of the Constitutional Court]

- 2.1 The Constitutional Court shall enjoy organizational, administrative and financial independence in performing duties assigned by the Constitution of the Republic of Kosovo ('Constitution') and the Law.**
- 2.2 The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.**

²⁷ See Law No. 8577, dated 10 February 2000 on the Organization and Functioning of the Constitutional Court of the Republic of Albania.

²⁸ The consolidated text of the Constitutional Act on the Constitutional Court of the Republic of Croatia is published in "Narodne novine", No. 99/99 of 29 September 1999, and the text of the Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court of the Republic of Croatia in "Narodne novine", No. 29/2002 of 22 March 2002.

²⁹ See the Law on the Federal Constitutional Court of Germany of 12 March 1951 (Federal Law Gazette I p. 243), published on 11 August 1993 (Federal Law Gazette I p. 1473), as last amended by the Act of 16 July 1998 (Federal Law Gazette I p. 1823).

- 1 The principle of the organizational independence of the Court is a constitutional principle. Under Article 115 [Organization of the Constitutional Court], paragraph 1, of the Constitution, “the Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law”. Article 2.1 defines two important standards to ensure the constitutional independence of the Constitutional Court: (a) organizational and administrative independence and (b) financial independence. With regard to organizational independence, the Article clearly states that the Constitutional Court shall be autonomous with regard to its internal organization. Details of the organizational and administrative independence of the Court are actually laid down in Article 2.2 of the Law, the wording of which is directly derived from Article 115.1 of the Constitution and Rule 15 [Secretariat], paragraph 2, of the Court’s Rules of Procedure.

Article 2.1 of the Law establishes the standard that the Court should run its administrative services to the fullest extent possible in an independent manner with respect to staffing, obtaining equipment and supplies to maintain the Court building, where constitutional justice is dispensed. The Rules of Procedure, adopted by the Judges,³⁰ go a great deal further, giving concrete effect to the requirements of this principle, which is fundamental for the independence of the Constitutional Court.

As the Constitutional Court of Albania ruled in its decision no. 19, dated 3 May 2007 “...*organizational independence is emphasized through their right [of constitutional bodies] to draft and decide themselves, in accordance with certain criteria, their structure and scope, including the right of appointment of directors and advisors, the number and composition of the subsidiary cabinets, appointment of officials in lower levels, recruitment of personnel at different levels, etc.*”.³¹

- 2 The organizational and administrative independence is strongly connoted at the Constitution and the Law on the Constitutional Court that aims to ensure the independence of the Constitutional Court.³² It means that the Constitutional Court is entirely independent regarding its internal administrative and organizational aspects while respecting the standards set forth by the Constitution and the Law. In view of this, no other state body or institution, is entitled to intervene in addressing issues that constitute the object of the organization and operation of the Court. Organizational independence means the design of the internal structure of the Constitutional Court (organizational chart) in an independent manner. As Steinberger observes commenting on his book about the models of constitutional jurisdiction “the technical and administrative details of the Court’s work should be to the autonomous determination by the Constitutional Court itself, allowing no

³⁰ The Court adopted its Rules of Procedure on 12 December 2012 already amended on 17 June 2013. The Rules of Procedure can be found at <http://gjk-ks.org/?cid=2,37>.

³¹ Decision of the Constitutional Court no. 19/2007. [Http://www.gjk.gov.al](http://www.gjk.gov.al). Constitutional Court of Albania. 03 May 2007.

³² Mark Miller, Judicial independence and judicial accountability: searching for the right balance: when congress attacks the federal courts. 56 Case Western Reserve Law Review, 1015 (2006); Vicki C. Jackson Fair and Independent Courts: A Conference on the State of the Judiciary: Packages of Judicial Independence: The Selection and Tenure of Article III Judges 95 Georgetown Law Journal. 965 (2007).

external directives”.³³ To strengthen the administrative independence at the constitutional courts, Steinberger argues, the administrative staff performing administrative tasks should be under the direct control of the constitutional court, respectively the President of the Court.³⁴

In the Court’s Rules of Procedure, the Judges have laid down the standards of the organizational and administrative independence of the Constitutional Court, which include, but are not limited to: the determination of autonomous administrative structures; budgeting; personnel and other managerial functions that are necessary to ensure the effective and efficient exercise of constitutional adjudication; and the overall administration and management of the Secretariat headed by the Secretary General.

Article 2 of the Law is supplemented by Rules 14 [Administrative Sessions], 15 [Secretariat], paragraph 2, 16 [Secretary General] and 17 [Staffing of the Secretariat] of the Rules of Procedure.

Rule 1 [General Provisions]

The Rules of Procedure shall supplement the relevant provisions of the Constitution of the Republic of Kosovo and the Law on the Constitutional Court of the Republic of Kosovo in governing the organization of the Constitutional Court of the Republic of Kosovo (“Court”), procedures before the Court and other matters related to the functioning of the Court.

The aim of the Rules of Procedure is to supplement the provisions of the Constitution and the Law on the Constitutional Court on organizational matters. It is important to note that the Constitution has provided the constitutional basis for the adoption of the Rules of Procedure pursuant to Article 115 of the Constitution, which states: “The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law”. There are two aspects that deserve comment in this regard. First, the Constitution has authorised the Constitutional Court to determine its internal organization and the rules of procedure in compliance with the Law on the Constitutional Court. Second, Art. 115 of the Constitution, as clearly stated in Rule 1 of the Rules of Procedure implies that the Constitutional Court can regulate its internal functioning and operation of procedures only within the ambit of the issues that have been left to be regulated by the Court and as long as such further regulation is in compliance with norms of the Law on the Constitutional Court. The Law on the Constitutional Court has foreseen implementation of statutory provisions regarding organizational aspects of the Constitutional Court on a number of articles such as for example in Art. 3 (Office and Symbols), Art. 10 (duties of judge), Article 12 para. 3 (Secretariat), Article 13 (Legal Advisors).

³³ Steinberger, Helmut. *Models of constitutional jurisdiction*. No. 2. Council of Europe, 1993. p. 44.

³⁴ Ibid. p.44.

Rule 14 [Administrative Sessions] of the Rules of Procedure

- 14.1 The Judges shall meet in administrative session to discuss and decide on matters of policy related to the administration of the Court. When necessary, at the direction of the President, the Secretariat shall draft policy proposals for review and approval by the Court.**
- 14.2 Administrative sessions of the Court shall be called by the President, who shall chair the meetings. The Court shall meet in administrative session at least twice yearly, or upon the written request of any Judge or the Secretariat.**
- 14.3 Matters of policy related to the administration of the Court shall include, but are not limited to:**
 - (a) the Court's budget;**
 - (b) personnel;**
 - (c) use and maintenance of the building premises;**
 - (d) national and international cooperation;**
 - (e) fines for infractions committed during proceedings;**
 - (f) internal organization and functioning of the Court;**
 - (g) status and contractual matters involving the Secretariat and Legal Advisors;**
 - (h) employment conditions, working schedules, remuneration and code of conduct for the service staff of the Secretariat;**
 - (i) adoption of the Annual Report;**
- 14.4 Decisions at administrative sessions shall be made by majority vote of the judges present and voting, provided that at least five judges are present.**

This Rule enables the Judges to address and decide on matters of policy related to the administration of the Court at an administrative session, where, unlike in judicial sessions, the Judges decide on purely administrative issues, examples of which are mentioned in Rules 14.3, 15 [Secretariat], 16 [Secretary General], 17 [Staffing of the Secretariat], 18 [Legal Advisors] and 20 [Budget and fees] which will be commented on hereafter. Also ordinary courts hold administrative sessions on similar issues as mentioned in the above Rules. The Law on the KJC provides the establishment of management committees at each Basic Court (consisting of the President Judge of the Basic Court and the Supervising Judge of each of its Branches changed under new Law on Courts, No. 03/L-199) at which the work of the court is assessed with the aim of improving the administrative services and operations of the Court.³⁵ The Court Administrator of the Basic Court assumes the role of the secretary in the Management Committee meetings.

Neither Rule 14.1, nor any other Rule stipulates in which manner discussions and decisions of the Judges at administrative sessions will be recorded, summarized or otherwise reported. Therefore, in the absence of any specific provision to that effect, no doubt, relevant rules followed by ordinary courts may be followed by the Secretariat. The Regulation further specifies that the Secretariat is also competent to provide administrative, technical and other related support services to the Court, which may

³⁵ Law No.03/L-223 on Kosovo Judicial Council, art. 32. The Law is available at <http://gzk.rks-gov.net/>.

also include services related to recording the minutes of the meeting. The administrative meetings are formal, therefore, written details of the discussions that have taken place at the meeting must be carefully kept. The minutes of the administrative meetings are not only an effective tool to record the discussions or decisions taken at the meeting but also to review the recorded minutes in the forthcoming administrative meeting for its accuracy and to follow up on administrative items and issues. Minutes of the meetings can be signed by the President of the Court and the Secretary of the Court within a reasonable time and they may be kept in written and electronic format.

According to the Rule, at the administrative sessions, the judges discuss policy matters relating to the administration of the Court and decide whether or not to task the Secretariat with the drafting of certain policy proposals. When deemed necessary by the judges, the Secretariat shall do so “at the direction of the President” in order to ensure that the Secretariat prepares a draft proposal which reflects the decision of the judges. Subsequently, the draft will be reviewed and approved by the judges. Paragraph 3 of the present Rule, commented on hereafter, contains a certain number of policy matters which must be addressed by the judges, although the list is not exhaustive.

It does not come as a surprise that, since the establishment of the Court in September 2009, the President of the Court has called administrative sessions at regular intervals, at his initiative, at the initiative of a judge or of the Secretariat. Many policy matters regarding the administration of the Court needed to be discussed and developed, in particular, because the Court and its Secretariat had to be built from scratch. Only an Interim Secretariat had been functioning before the Court and its Secretariat became operational, only to register referrals and oversee the refurbishment of the Court’s future premises.³⁶

Since the establishment of the Constitutional Court, the Secretariat has drafted policy proposals ranging from the Court’s yearly budget to its proper functioning and internal organization. A Code of Conduct for the staff of the Court has been adopted³⁷, while proposals for the development of national and international cooperation have led to an excellent cooperation with the Supreme Court of Kosovo as well as the Constitutional Courts and high judicial institutions of, *inter alia*, Albania, Austria, Bulgaria, Estonia, France, Germany, Hungary, Ireland, Israel, Italy, Macedonia, Montenegro, The Netherlands, Portugal, Slovenia, Sweden and Turkey.

Moreover, the Court adopted a regulation on its Legal Unit in order to ensure a better cooperation between judges and legal advisers on the one hand and between the Department of Case Registration, Statistics and Archive (DCRSA) and the legal advisers on the other hand. As to the Court’s budget and premises, it is interesting to note that in 2010 the Court used part of its budget for the construction of an elevator enabling persons with a physical handicap to have easy access to the court room in case of public hearings.³⁸

³⁶ See Article 57 of the Law [Interim Secretariat of the Constitutional Court], discussed hereafter.

³⁷ The Code of Conduct and other matters of policy related to the administration of the Court can be found on the Court’s website <http://gjk-ks.org>.

³⁸ The court room’s furniture and equipment is a gift from the Constitutional Court of Turkey.

Starting with the first Annual Report for the year 2009, Annual Reports have now also been published for the years 2010, 2011 and 2012.³⁹ These Reports are published in the three languages used in the Court (Albanian, Serbian and English) and mention not only the Court's vision and mission, but also dwell upon the activities and achievements during the year concerned as well as the help and support given to the Court by different international organizations and donors.⁴⁰ The aim of the annual reports is to reflect the transparency and openness of the Court to the general public regarding the organization, functioning and spendings of the Court.

With a quorum of seven judges, the votes of four judges can determine whether a policy proposal is adopted or rejected. What the decision-making process will be in the case that there is a tie, when eight judges are present and voting, is not clear. At least, the Rule does not provide for a solution.

The requirement of the Court's organizational and administrative independence is strengthened by Rule 15.2, which elaborates the right of the judges under the above Rule 14.3(f) to determine the organizational structure of the Secretariat by approving, in an administrative session, a written proposal by the Secretary General to that effect.⁴¹ The Rule further provides that the Secretary General may, with the approval of the Judges, "*establish or eliminate departments, sections or units as necessary for the effective and efficient discharge of the functions and responsibilities of the Secretariat*".⁴² It is logical that the approval of the judges needs to be sought once more, if the Secretary General wishes to alter the organizational structure of the Secretariat previously endorsed by the judges. The proposed changes may concern the establishment or elimination of administrative departments, sections or units, in particular, when such changes are important for improving the efficient and effective discharge of the Secretariat's functions. It is assumed that, when the Secretariat of the Court drafts policy proposals at the direction of the President, the latter may first consult the judges about the directions to be given. Furthermore, judges may draft policy proposals themselves, if they think fit and have them reviewed and approved by all judges at an administrative session, chaired by the President.

As stipulated by the Rule, the list of policy matters mentioned is not exhaustive. Generally speaking, besides the matters listed, every issue concerning the Court without exception could be discussed by the judges at an administrative session, when included in the agenda at the request of one or more judges, the Secretary General or at the direction of the President. In order to facilitate the discussion on any policy matter, as directed by the President, the Secretariat, or, possibly, one or more judges will prepare a policy proposal for the session concerned.

The legal requirement for the organizational and administrative independence of the Constitutional Court has also been taken into account by the Law on State Administration, which defines, *inter alia*, that the rules concerning organization,

³⁹ Annual Reports can also be found on the Court's website or be obtained at the Court's premises.

⁴⁰ East-West Management Institute (EWMI), the United Kingdom Department for International Development (DFID), the United States Agency for International Development (USAID), the International Civilian Office (ICO), the Legal Reform Project of the Deutsche Gesellschaft fuer internationale Zusammenarbeit (GIZ) and the Government of the Federal Republic of Germany and the German Foundation for International Legal Cooperation (IRZ Foundation).

⁴¹ Rule 15.2. Rules of Procedure.

⁴² Rule 15.2. Rules of Procedure.

cooperation and management of state bodies [which exercise executive powers] are not applicable to the administration of the Constitutional Court.⁴³ The Law on State Administration illustrates clearly that the internal management of the Constitutional Court's administration is a matter for the Court to decide, a legal standard that cannot be compromised.

Any form of administrative dependence on the executive or legislature in the Court's operation may have a detrimental impact on the ability of the Court to provide a high standard of constitutional justice. The horizontal legislation gives also particular attention to the management of human resources in the Constitutional Court. The Law on Civil Service in Kosovo provides, in its Article 3.7, that "the implementation of this Law shall respect the independence of the independent constitutional institutions from the executive branch".⁴⁴

The constitutional method by which the budget of the Constitutional Court is approved is an important barometer to measure the extent of the independence of the Constitutional Court. As a Report of the Venice Commission⁴⁵ [on the Budget of the Constitutional Court: Control and Management] highlights, "if...the European Convention, for example, assures everyone the right to judicial protection within a reasonable time, then without sufficiently qualified and numerous administrative personnel no judge can meet these requirements".⁴⁶

The more ownership the Constitutional Court has in the determination of the budget and its management, the more independent this mechanism will be in the process of constitutional protection. The financial independence of the Constitutional Court is a European recognized standard which enables the Court to exercise the function of the protection of constitutionality in an independent manner and is, therefore, laid down in national laws regarding the organization of constitutional courts. As Steinberger has indicated in its study about models of constitutional jurisdiction "the Constitutional Court itself should set up its budget plan, with the parliament formally deciding on it but under a general duty to comply with the Court's estimate of expenditure". The Constitutional Court should also be entitled to administer its own budget independently from the legislature.⁴⁷

For example, under Article 1 of the German Constitutional Court Act, dated 12 March 1951, the Constitutional Court has a more independent and autonomous position in comparison with other constitutional bodies. The Constitutional Court is not financially subordinated to any Ministry, but it is an autonomously operating and budgetary independent body. The Court's budget may only be adopted as a particular autonomous financial package to be included into the State budget as a whole. The Court is allowed to manage the allocated budgetary funds independently. The budget is discussed and adopted at the plenary session of the Court (Article 1.2 of the Rules of Procedure of the German

⁴³ See, Law No. 03/L-189 on State Administration of the Republic of Kosovo. The Law is published in the Official Gazette of Kosovo at <http://gzk.rks-gov.net/>.

⁴⁴ Law No. 03/L-149 on the Civil Service. The Law is published in the Official Gazette of Kosovo at <http://gzk.rks-gov.net/>.

⁴⁵ European Commission for Democracy through Law of the Council of Europe.

⁴⁶ Varvarovsky, Pavel, *The Budget of the Constitutional Court: Control and Management*. Presentation of the Venice Commission Workshop held in Kyiv, Ukraine. 19-21 January 1998.

⁴⁷ Steinberger, Helmut. *Models of constitutional jurisdiction*. No. 2. Council of Europe, 1993. p.44.

Constitutional Court of 2 September 1975, as amended), with the involvement of a special Budgetary Council (Article 3.1.c of its Rules of Procedure).

In Croatia, the Constitutional Court Act provides that the Constitutional Court has its own budget which shall be adopted as a special part of the State budget by the Chamber of Representatives of the Parliament on the proposal of the Constitutional Court.⁴⁸

Thus, the manner in which the budget of a constitutional court is approved has a clear impact on its independence. As Professor Steinberger argues “there should be as little influence on the court as possible by the parliament’s budgetary power and even less by the Executive” in order for the Constitutional Court to be able to adjudicate independently.⁴⁹ Not only the constitutional courts should be entitled to design the budget plans and have it submitted directly to the parliament, but they should also be entitled to administer the parliamentary allocated budget independently from the legislative or executive. The administration of the Court’s budget should be governed independently by the Court in compliance with the Law on Budget and subject to auditing proceedings when necessary. This aspect was taken into account by the drafters of the Law to ensure that the Venice Commission’s standards on judicial independence would be duly observed. This is a necessary factor not only for the preservation of the strength of the Constitutional Court in the new state structures of Kosovo, but also in order to ensure that state organs at every level are governed by the rule of law. Under the current legal framework, the Constitutional Court of Kosovo enjoys large ownership in the budgetary drafting process and the approval of its budget by the Assembly. The Law on the Constitutional Court of Kosovo provides that, notwithstanding the provisions of other laws, the Constitutional Court prepares the proposal for its annual budget and submits it for approval to the Assembly. Neither the Government nor any other budget organization has the right to change or in any other way modify or affect the budget proposal prepared by the Court. The budget proposed by the Court in its entirety is included in the proposal for the Consolidated Budget of the Republic of Kosovo that is presented by the Government to the Assembly for approval.⁵⁰ A broader view of the importance of considering the independent budget of the Constitutional Court as a separate part of the state budget will be provided in the comments on Article 14 of the Law.

Article 3 [Office and Symbols]

- 3.1 The Office of the Constitutional Court shall be in Pristina.**
- 3.2 The Constitutional Court shall hold its meetings in its Office, but exceptionally, on its decision may hold meetings in other places of the Republic of Kosovo.**
- 3.3 The Constitutional Court shall have its symbol and stamp which shall be determined in the Rules of Procedure.**

⁴⁸ Narodne novine, No. 13/1991, with amendments.

⁴⁹ Helmut. *Models of constitutional jurisdiction*. No. 2. Council of Europe, 1993, p. 44.

⁵⁰ See Mavcic, Arne. *The budget of the constitutional court, control and management with respect to the independence and autonomy of the court*. A paper presented at the seminar organized by the Venice Commission in cooperation with the Constitutional Court of Bosnia and Hercegovina, Sarajevo, 14-15 October 2004, available at [http://www.venice.coe.int/docs/2004/CDL-JU\(2004\)066prog-e.asp](http://www.venice.coe.int/docs/2004/CDL-JU(2004)066prog-e.asp).

- 1 The Law determines that the seat of the Constitutional Court is in Pristina which by virtue of Article 13 of the Constitution is the capital city of the Republic of Kosovo. It may be added that in many European countries seats of constitutional courts remain in the capitals, with few exceptions such as the seat of the Federal Constitutional Court of Germany which is situated in the German city of Karlsruhe.⁵¹ It should also be noted that Pristina is also the official seat of the Supreme Court of Kosovo as the last instance within the ordinary judicial system of Kosovo.⁵²
- 2 The exception of holding constitutional court sessions outside the official seat is clearly provided in Article 3(2) of the Law, which reflects the intention of the legislature to enable the Constitutional Court to hold a court session out of the Court's premises in special circumstances. However, neither the Law nor the Rules of Procedure specify the situations in which a departure from the general rule can be made, except for the fact that the holding of hearings outside the Court's seat can only take place for exceptional reasons, as decided by the judges of the Court. Since the Law does not include definitions of some of the key words, invariably there will be instances and words such as "exceptional reasons" that require legal interpretation. In this context, the judges of the Court will certainly follow the general rules of interpretation, such as that the interpretation will be provided in "good faith" in accordance with the ordinary meaning to be given to the terms of the Law in their context and in the light of its object and purpose. The Constitutional Court may also follow supplementary means of interpretation such as the *travaux préparatoires* of a Law, including the minutes of formal sessions and prior drafts of a text.

The holding of Court hearings in the students' courtroom in the Faculty of Law of the University of Pristina in 2009 is such an example. The holding of court hearings outside the official seat of the court is also provided in other laws and regulations on constitutional courts in Europe. For example, the Rules of Procedure of the Constitutional Court of Croatia provide that "*even though the Office of the Constitutional Court shall be in Zagreb [...] the Constitutional Court may hold its sessions in other places of the Republic of Croatia if this is decided by the majority of judges of the Constitutional Court*".⁵³ According to the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, "*Sessions of the Constitutional Court shall, as a rule, be held at the seat of the Constitutional Court. However, the Constitutional Court may decide to hold its sessions outside the seat*".⁵⁴

⁵¹ For more on the Constitutional Court of Germany see Kommers, Donald P., and Russell A. Miller. *The Constitutional Jurisprudence of the Federal Republic of Germany: Revised and Expanded*. Duke University Press, 2012; Landfried, Christine. "Judicial policy-making in Germany: The federal constitutional court." *West European Politics* 15.3 (1992): 50-67; Kommers, Donald P. "The federal constitutional court in the German political system." *Comparative Political Studies* 26.4 (1994): 470-491.

⁵² See the Law on Courts. Nr. 03/L-199, Art. 21. The Law is available at <http://gzk.rks-gov.net/>.

⁵³ See Rules of Procedure of the Constitutional Court of the Republic of Croatia, available at http://www.usud.hr/default.aspx?Show=poslovnik_ustavnog_suda&m1=27&m2=53&Lang=en

⁵⁴ See Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Article 50. The Rules of Procedure are available at <http://www.ustavnisud.ba>.

- 3 The Constitutional Court determined its symbol on 10 October 2010. The symbol of the Court is composed of Lady Justice (Latin: *Justitia*), the Roman goddess of Justice, as a personification of the moral force of a judicial system in combination with the colors white, blue and gold. Furthermore, Lady Justice is blindfolded, meaning that her judgment and impartiality cannot be influenced, and also wears a sword, which, in the Roman tradition, is the symbol of power and authority.⁵⁵

But other examples of Constitutional Court symbols are also worth mentioning. In every situation the court's symbol conveys a strong message about the importance of maintaining the supremacy of the Constitution and the necessity to ensure the principle of the "rule of law" as essential attributes of constitutional democracy.

For instance, the symbol of the Constitutional Court of South Africa is interesting to mention. When the Court was established in 1994 after the adoption of a democratic Constitution, its symbol was chosen by the judges of the Constitutional Court and bears some very powerful constitutional messages, namely, the tree situated in the middle of the symbol represents the justice system which, historically in African tradition, was performed/practised in the open air under a tree. Moreover, it symbolizes the transparency and underscores the fact that everyone passing by could join and take part in the proceedings, thus symbolically marking the principle of access to justice for all. The constitutional message continues with the part located between the tree and fragments of the South African flag, which symbolizes civic ownership of the constitution protected by the Constitutional Court.⁵⁶

Practices in other countries may also differ as to the legal determination of the symbol of the constitutional court. For example, in Croatia it is the Constitutional Court which decides on the symbol "whose form, content and manner of use" is determined in the Session of the Constitutional Court.⁵⁷ But in Albania the symbols used by the Constitutional Court have been determined by the Assembly when it adopted the Law on the Organization and Functioning of the Constitutional Court, which, in its Article 5, provides that the "logo of the Republic, the national flag and a view of the cover of the Constitution of Albania are placed in the courtroom of the Constitutional Court." It should be noted however that if parliaments decide on the content and form of the logo of the Constitutional Court, the organizational independence of the Constitutional Court might be affected. It therefore results that the decision as to the logo of the Constitutional Court should be entirely left to be taken by the judges themselves as it truly reflects the Court's autonomy as to what message the Court wants to convey to citizens and the public in general.

The symbol of the Court should reflect the ownership of the Kosovo citizens of the Constitution and access of all communities living in Kosovo to the Constitutional Court. The Constitutional Court has already set a constitutional standard for symbols of certain public entities in Kosovo. Deciding on a complaint in relation to

⁵⁵ For more on the definition of *Justitia* see <http://www.lexexakt.de/glossar/justitia.php>.

⁵⁶ For more information about the creation of the South African Constitutional Court logo see <http://www.constitutionalcourt.org.za/site/thecourt/thelogo.htm>.

⁵⁷ Art. 3. Rules of Procedure of the Constitutional Court of Croatia.

the emblem of the Municipality of Prizren, the Constitutional Court, in its Judgment of 18 March 2010, held that “symbols are closely related to the fostering and preservation of tradition, culture, distinctive characteristics of every people and they have an influence on assembling and joining in one idea and one belief”.⁵⁸ The Court further stated that “It is beyond any doubt that symbols convey certain emotions and meanings which are experienced in a specific way by those who recognize their history, tradition and culture in those symbols. The symbols are, therefore, not pure images and decorations, but each of them carries deeper and hidden significations. The emblem represents in many ways the achievements, hope and ideals of all citizens of a country or of a region of a country. As such the emblem ought to have respect for all citizens, that is, in the instant case, for the citizens of the Municipality of Prizren as “a basic territorial unit of local self-governance in the Republic of Kosovo. In order to make it possible for them to see it and feel it in that way, the emblem of the Municipality ought to be a symbol of all the citizens”.⁵⁹

Article 3.3 of the Law is supplemented by Rule 3 [Symbol and Stamp of the Court] of the Rules of Procedures (see below).

The holding of hearings outside the official seat of the Constitutional Court of Kosovo is further detailed in Rule 2 [Seat of the Court] of the Rules of Procedure.

Rule 2 [Seat of the Court] of the Rules of Procedure

- 2.1 The Seat of the Court is in Pristina where the Court shall conduct its meetings and hearings; the Court may conduct meetings and hearings in other suitable locations within the Republic of Kosovo.**
- 2.2 At the request of the Court, the Secretariat shall prepare and submit to the President of the Constitutional Court (“President”) a list of locations which are suitable for conducting meetings and hearings for the Court.**
- 2.3 The decision to conduct meetings outside of the Seat of the Court shall be made by majority vote of all Judges of the Court (“Judges”) present and voting.**

Such suitable locations should provide adequate premises containing appropriate technical and physical infrastructure to enable the proper holding of a court hearing in conformity with standards of fair trial, including access for the media, by reserving a sufficient number of seats for journalists, through whose reporting court hearings would be accessible to members of the public who are unable to be present.

These conditions are also emphasized by Rule 22 [Accessibility] of the Rules of Procedure, which requires the work of the Court to be “*transparent, open and accessible to the public to the greatest extent possible, consistent with the Constitution, the law and confidentiality requirements of the Court*”, including informing the public about the date and time of hearings and providing information on the proceedings concerned.

⁵⁸ Qemal Kurtisi vs The Municipal Assembly of Prizren KO 01/09. Constitutional Court of Kosovo. 18 Mar. 2010. [Http://gjk-ks.org/](http://gjk-ks.org/). Visited on 6 June 2014. Para. 44.

⁵⁹ Ibid. para. 45.

Such a list of locations should contain relevant information about the premises envisaged and a description on their suitability for conducting meetings and hearings of the Court. The list should certainly also contain details about the logistics necessary to properly accommodate the Court in these premises, including the taking of appropriate security measures to be taken by the competent local authorities. An important aspect of the suitability of the locations should be the assurance that the Court's impartiality and judicial independence will not be affected and that the right to a fair hearing before the Constitutional Court of the parties to the proceedings will not be diminished.

The term "parties" certainly means parties to the proceedings before the Constitutional Court. At the same time, they should be given the assurance that neither their rights to a fair hearing, nor the Court's impartiality and judicial independence will be affected by the decision of the Judges to hold the proceedings elsewhere. In case, one party or both parties have serious objections against the Court's intention to conduct the meeting or hearing outside its seat, it is assumed that the Judges will take such objections into due consideration when voting on the proposal.

Rule 3 [Symbol and Stamp of the Court] of the Rules of Procedure

- 3.1 The symbol of the Court shall be decided by 2/3 majority vote of all Judges.**
- 3.2 The stamp of the Court shall contain the coat-of-arms of the Republic of Kosovo encircled by the inscription "Gjykata Kushtetuese e Republikës së Kosovës -- Ustavni Sud Republike Kosova."**

According to the Rule, the symbol of the Court shall be determined by a decision of a 2/3 majority vote of all judges. Whereas during the drafting of Article 3(3) of the Law of the Constitutional Court the right to design its symbol never was in dispute, it was not clear by what majority a decision of the Constitutional Court on the Court's symbol should be taken. Even though a proposal was made that the Court should decide by consensus based upon the idea that the Court's symbol must be reflective of the broad agreement between constitutional judges, the solution provided by the Rules of Procedure reflects the agreement among the members of the Constitutional Court to foster a positive dialogue between them in designing the Court's symbol.

The Court's stamp signifies the authority of the Court and it is, therefore, the duty of the Secretariat to ensure that the stamp of the Court is kept safely when not in use. The Rule does not give further details as to the format of the stamp or the manner in which the stamp should be used. However, the procedure regarding the manner in which a stamp of a public institution is made, used and kept is regulated by the Law on Stamps of the Institutions of the Republic of Kosovo.⁶⁰ Therefore, it must be assumed that the stamp of the Court will be used in accordance with the provisions of that Law, that is to say, to authenticate or certify official acts and other documents issued by the Court.

⁶⁰ See Law on Stamps of the Republic of Kosovo Institutions No. 03/L-054, which is available in the Official Gazette of Kosovo.

2. Judges of the Constitutional Court

Article 4 [Additional Conditions for Appointment of Judges]

4.1 Judges of the Constitutional Court shall be:

- 1.1. citizens of the Republic of Kosovo;**
- 1.2. distinguished jurists with an excellent professional reputation with no less than ten (10) years of professional work experience, particularly in the field of public and constitutional law, which, inter alia, is proved through professional work as judges, prosecutors, lawyers, civil servants or university professors and other relevant working experience in the legal field;**
- 1.3. individuals with excellent moral reputations who can act in full capacity and who have not been convicted of any criminal offence.**

It should be mentioned that it would have been sufficient, in the absence of a second paragraph, to mention the Article as Article 4 and not as Article 4.1.

Article 114.1 of the Constitution determines the qualifications of the judges of the Constitutional Court, stipulating that they have to fulfill three conditions in order to become candidates for the position of members of the Constitutional Court. First, candidates must be citizens of Kosovo. Second, they must be distinguished jurists and persons with the highest moral character. And third, the candidates must have at least ten (10) years of relevant legal experience. By virtue of Article 114.1 of the Constitution, other relevant qualifications for judges of the Court shall be provided by law. Such additional qualifications for the appointment of judges are laid down by the Assembly in Article 4 of the Law on the Constitutional Court.

The “citizenship” criterion enunciated in Article 4.1 constitutes an important legal requirement for the appointment of judges of the Constitutional Court.⁶¹ The importance attached to this requirement is a reflection of the status of the Constitutional Court in the constitutional architecture. Therefore, certain legal responsibilities are attributable to the “citizenship” requirement, being a legal relationship between a citizen of a particular state which carries with it both rights and responsibilities. “Citizenship” is also a legal requirement for the election of President of the Republic of Kosovo, for instance. Article 85 [Qualification for the Election of President] of the Constitution provides that “every citizen of the Republic of Kosovo who is thirty five (35) years old or older may be elected President of the Republic of Kosovo”. The same goes in the case of the election of the Ombudsperson, whereby Article 134 [Qualification, Election and Dismissal of the Ombudsperson], paragraph 2, of the Constitution provides that “Any citizen of the Republic of Kosovo [...] is eligible to be elected as Ombudsperson.”

As far as the selection of the first judges of the Constitutional Court is concerned, the drafters of the Constitution dealt again with the issue of citizenship in Article 152 [Temporary Composition of the Constitutional Court] of the Constitution, which provides for the provisional composition of the Court (this article has been deleted by

⁶¹ See the Law No. 03/L-034 on Citizenship of Kosovo, adopted by the Assembly of Kosovo on 20 February 2008.

the constitutional amendment no 13 in 2012).⁶² Pursuant to Article 152.4, "Three (3) international judges shall be appointed by the International Civilian Representative [...].The three (3) judges shall not be citizens of Kosovo or any neighboring country". In conformity with this provision, the three selected judges are of American, Bulgarian and Portuguese nationality, respectively.⁶³

It should be noted that the citizenship requirement for the appointment of judges of a constitutional court is reflected in the law of many European states.⁶⁴ For instance, according to Article 5 of the Croatian Law on the Constitutional Court, judges of the Constitutional Court shall be elected from among Croatian citizens. Moreover, Article 9 of the Slovenian Law on the Constitutional Court provides that "any citizen of the Republic of Slovenia who is a legal expert and has reached at least 40 years of age may be elected judge in the Constitutional Court".

But there are also examples where citizenship for the selection of constitutional judges is not mandatory. Such is the case with Andorra and Liechtenstein, where judges may also be appointed from neighbouring countries. For example in the constitutional monarchy of Liechtenstein, "the practice is that one judge comes from Austria and one from Switzerland".⁶⁵ Countries with a special post-conflict constitutional situation such as in Bosnia and Herzegovina, have opted for a similar system as in Kosovo, by selecting three international judges for a limited period of time.⁶⁶ In Bosnia and Herzegovina four members of the Constitutional Court are selected by the House of Representatives of the Federation, two members by the Assembly of the Republika Srpska while the remaining three members of the Constitutional Court are selected by the President of the European Court of Human Rights after consultation with the Presidency of the Federation.⁶⁷

Regarding the qualification of candidates for the position of constitutional judges as "distinguished jurists", it should be noted that, from a comparative perspective, substantial legal experience is an absolute requirement for being eligible as a judge of the constitutional court in most of the Europe countries (e.g. Albania, Bulgaria, Former Yugoslav Republic of Macedonia, Germany, Latvia, Lithuania, Portugal, Romania, Russia and Slovakia).⁶⁸ There are a few constitutional courts, which do not expressly require their members to have the qualification of jurist and "expressly allow for non-

⁶² See amendments on the Constitution of the Republic of Kosovo regarding the ending of international supervision of independence of Kosovo, No.04/436, dated 07 September 2012, Official Gazette 25/2012.

⁶³ Note that the transitional provisions of the Constitution has been amended and are no longer applicable, see <http://gzk.rks-gov.net/ActDetail.aspx?ActID=3293>.

⁶⁴ See the Constitutional Act on the Constitutional Court of the Republic of Croatia published in "Narodne novine", No. 99/99 of September 29, 1999, and the text of the Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court of the Republic of Croatia published in "Narodne novine", No. 29/2002 of March 22, 2002 available at <http://www.usud.hr/default.aspx>.

⁶⁵ See report from the Venice Commission (Council of Europe) for the composition of constitutional courts, dated 17 February 1997. [http://www.venice.coe.int/webforms/documents/CDL-STD\(1997\)020.aspx](http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx).

⁶⁶ See Morrison, Fred L. "Constitution of Bosnia-Herzegovina, The." *Const. Comment.* 13 (1996): 145; Yee, Sienho. "New Constitution of Bosnia and Herzegovina, The." *Eur. J. Int'l L.* 7 (1996): 176; Szasz, Paul C. "The protection of human rights through the Dayton/Paris peace agreement on Bosnia." *American Journal of International Law* (1996): 301-316.

⁶⁷ See Article VI of the Constitution of Bosnia and Herzegovina. This Constitution can be accessed electronically at <http://www.ccbh.ba/eng/article.php?pid=835&kat=518&pkat=500>.

⁶⁸ See report from the Venice Commission (Council of Europe) for the composition of constitutional courts, dated 17 February 1997. [http://www.venice.coe.int/webforms/documents/CDL-STD\(1997\)020.aspx](http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx).

lawyers to become members of the court in order to bring together the widest possible span of human experiences and to avoid an excessive specialisation of the court” such as the ones in e.g. Armenia, Austria, France, Liechtenstein and Turkey, even though “the practice has, however, shown that these courts are mostly composed of jurists”.⁶⁹

It may be interesting to note that, in the above mentioned Working Group for drafting the Law, there was agreement amongst the members that the “legal profile” requirement for entering the Constitutional Court provided by the Constitution should be further specified in the Law. They also agreed that the appointing authorities should choose candidates who had demonstrated to possess extensive legal experience, in particular in constitutional law, meaning legal experience in the field of constitutional justice or academic and scholarly proven experience in the field of constitutional law.

In the opinion of the members of the Working Group, the Constitutional Court should, therefore, be composed of distinguished jurists and legal specialists to adjudicate constitutional disputes, candidates with proven background in the area of public law, constitutional law and proven professional work as judges, prosecutors, lawyers, civil servants or university teachers. The framers of the Law sought to establish some sort of filter for the applicants by applying high criteria for the selection of candidates seeking to enter the Constitutional Court.

The eligibility requirement that members of the Constitutional Court must be jurists with no less than ten (10) years of proven professional experience⁷⁰, especially in the field of public and constitutional law (like, inter alia, judges, prosecutors, lawyers, civil servants and university teachers or persons exercising another job of a legal nature) is based upon the premise of selecting the most distinguished jurists to serve in the Constitutional Court. However, the question may be raised whether ten (10) years of experience is sufficient for a person to earn the label “distinguished jurist”. But of course is not only the length of experience to qualify as “distinguished jurist”. There are other factors such as the level of legal or judicial experience, the number of quality of academic publications that are important to assess the quality of the legal experience. Although some countries, like Slovenia have a minimum age limit of 40 years⁷¹, other countries like Albania⁷² and Croatia⁷³ put the level of experience at a higher level by requiring the candidates to have at least 15 years of experience as a highly qualified and experienced jurist.

Equally important to note is the familiarity with the important category of constitutional rights and freedoms guaranteed by the Constitution. The extent to which limitations on the fundamental rights and freedoms are constitutionally permissible, requires a thorough constitutional analysis, in particular by virtue of Articles 55 [Limitations on Fundamental Rights and Freedoms] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

Article 53 provides that “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European

⁶⁹ Ibid.

⁷⁰ Article 7 [Composition of the Constitutional Court], paragraph 2, of the Law on the Constitutional Court of Croatia provides: “*The judges are appointed for nine (9) years without the right to be re-elected, among jurists with high qualifications and work experience of not less than 15 years.*”

⁷¹ Article 9 of the Constitutional Court Act.

⁷² Article 7.2 of the Law on the Organization and Operation of the Constitutional Court of Albania.

⁷³ Article 5 of the Constitutional Act on the Constitutional Court of Croatia.

Court of Human Rights". This requirement means not only familiarization with the framework of the European Convention on Human Rights and Fundamental Freedoms (ECHR), but, in particular, with the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR) in Strasbourg in order to maximize the adherence to the rulings of that court. It should be noted that, over the last few decades, the jurisprudence of the ECtHR has become very extensive and, therefore, an excellent understanding of this jurisprudence would be very useful for the resolution of constitutional cases involving human rights and fundamental freedoms guaranteed by the ECHR and the Constitution.

It is interesting to note that the proposing and appointing authorities in Kosovo, the Assembly and the President of Kosovo respectively, are under a constitutional duty to ensure that the process of the selection of judges of the Constitutional Court reflects formal and substantial regularity. In other words, the authorities responsible for proposing and appointing the judges should make certain that all the formal and material requirements for the judicial appointments are duly met. The duty to ensure the regularity of the judicial appointment process derives from the Constitution, which has provided for a shared and reciprocal checks in the appointment of constitutional judges.⁷⁴

Doubts about the regularity of the appointment of a judge by the authorities concerned drew the attention to the Constitutional Court in Albania, when, in 2005, the President of the Republic of Albania requested an opinion from the Constitutional Court on the interpretation of Articles 125.1 and 136.1 of the Constitution of the Republic of Albania⁷⁵ regarding the procedure which had been followed by the Assembly of the Republic of Albania, when reviewing the Presidential decrees on the appointment of members of the Constitutional Court and members of the Supreme Court, and whether the Assembly had the right not to give its consent to these appointments beyond the criteria determined in the Constitution and other relevant laws.⁷⁶

In its interpretative decision, Albania's Constitutional Court determined that "... the power of the Assembly of Albania to review the choices submitted by the President of the Republic is consistent with the form of the political regime established in the Constitution (Article 1) which is that of a parliamentary republic. In this regard, the participation of the Assembly of Albania in the process of the appointment of judges, going beyond the legal control of the process, is in full harmony with the political nature of this body". According to the Constitutional Court, "the involvement of the Assembly of Albania in this process is related not only to the review of the *legal regularity*, but also of the *merit* of the selection made by the President of the Republic

⁷⁴ For more on checks and balances in the course of the appointment of judges see Epstein, Lee, and Jeffrey A. Segal. *Advice and consent: The politics of judicial appointments*. Oxford University Press, 2005; Gauch, James E. "Intended Role of the Senate in Supreme Court Appointments, The." *U. Chi. L. Rev.* 56 (1989): 337. Lively, Donald E. "Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities, The." *S. Cal. L. Rev.* 59 (1985): 551.

⁷⁵ Article 125 of the Constitution of Albania determines that "The Constitutional Court is composed of 9 members, who are appointed by the President of the Republic with the consent of the Assembly".

⁷⁶ *President of the Republic vs Parliament of Albania No. 02/2005*. Constitutional Court of Albania. 19 Jan. 2005. Accessed on 12 July 2012. This decision is available at <http://www.gjk.gov.al/>.

in order to ensure a composition of the courts which is appropriate and of high quality".⁷⁷

According to this provision, judges of the Court shall also be individuals with excellent moral reputation. It is obvious that this moral requirement is relatively abstract and difficult to measure through interviews or other methods such as tests or assessments made on the basis of opinions of persons who have had official relations with the candidate all along his/her professional career.⁷⁸ Although, therefore, difficult to determine in abstract terms, it may mean that judges of the Court should be highly respected, honest, dignified and ethically motivated in resolving constitutional disputes.

In general, being able to act in full capacity means that a person has the mental ability to understand the nature and effects of one's acts. Furthermore, it also embraces the legal capacity of a natural person or a juridical person to enter into binding contracts and to sue and be sued in one's own name. In the world of justice and law, it is the legal presumption that everyone is able to make his/her own decisions, until it is shown that he/she is not able to do so. The lack of capacity could be a severe learning disability, mental health problem, a brain injury, a stroke or unconsciousness due to an anaesthetic or a sudden accident. The removal of the legal capacity to act is based upon a lawful court decision at the request of an authorized party.

The third issue which Article 4.1.3 refers to is not having been convicted of any criminal act, which represents a more complex situation from a legal point of view. Where requirements for a high degree of moral integrity exist, it is very normal that the past of candidates for the position of judges in the Constitutional Court is clean in the criminal sense. In other words, the candidates for the position of judge of the Constitutional Court should not have a criminal background, as defined by the above mentioned provision. This is certainly reasonable, given the nature of the work and the importance of the institution. In the course of the drafting of the Law, the discussions concentrated on the possible effects which the Article may produce, including the ambiguities which may arise, when applying it.

First, a careful reading of the Article does not provide full clarity as to whether it refers to a final court decision. This is very important from a legal point of view and in the context of the submission of the applications for the position of a judge of the Constitutional Court. Under the applicable criminal law in Kosovo, a judicial decision is final, when "it may no longer be contested by an appeal or when no appeal is permitted".⁷⁹ In case of criminal indictment against the candidate for the position of the judge of the Constitutional Court, the principle that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law is applicable. This legal principle is determined by Article 31 [Right to Fair and Impartial Trial], paragraph 5, of the Constitution⁸⁰, which has been taken *ad verbatim* from Article 6 [Fair Trial], paragraph 2, ECHR.

⁷⁷ Ibid.

⁷⁸ For more information, see the European Charter on the Statute for Judges adopted in Strasbourg on 8 - 10 July 1998. The Charter is available at <http://www.coe.int>.

⁷⁹ See Article 485, Kosovo Criminal Procedure Code, No. 04/L-123. The Law is available at <http://gazetazyrtare.rks-gov.net>.

⁸⁰ Article 31.5 of the Constitution provides: *Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.*

The other issue which was brought to the surface during the discussions was the political convictions which were common during the communist era. Members of the Working Group drew the attention to the danger which the formulation "conviction of a criminal offence" could pose in cases involving political convictions for agitation and political propaganda, which in the communist times had been criminally prosecuted. Although a narrow legal interpretation of the term "conviction of a criminal offence" may prevent potential candidates, who have been victims of communist dictatorship and politically motivated trials, from submitting an application, there has been agreement among the members of the Working Group not to include in that term the category of political convictions.

The Working Group has also been confronted with the question as to whether it would be appropriate to reject applications from those candidates who in the past three years have held high political or state positions. The proposed rejection of such applications was claimed to be necessary as a protective measure to preserve the independence of the Constitutional Court and avoid any politicization of the Court in its initial period of operation. This issue deserves some further attention. One of those countries that have introduced such statutory limitations by introducing the cooling-off period for those candidates that have previously held government or political positions prior to joining the Constitutional Court is Hungary. According to Section 6.1 of the Law on the Constitutional Court anyone who has been a member of Government or a leading official in any political party or having held a leading state officials in the four years prior to election is not eligible to become member of the Constitutional Court"⁸¹.

It is true that the drafters of the Constitution, by virtue of its Article 114.1, intended to enable the legislature to require additional qualifications for the position of judge in the Constitutional Court. But a careful reading of the Article does not show that it has been the intent of the drafters of the Constitution not to allow candidates, who have previously been senior high political or public officers, to assume the position of constitutional judge. Secondly, the language of Article 114 that the law can provide other relevant qualifications does not necessarily mean that restrictive clauses should be introduced into the text of the Law.

Finally, a third issue taken into account was the principle of equality of opportunities in the context of Article 7 [Values] of the Constitution which provides that "*The constitutional order of the Republic of Kosovo is based on the principles of [...]*,

⁸¹ The new Law of 2011 on the Constitutional Court of Hungary in its Section 6 (1) provides "any Hungarian citizen who has no criminal record and has the right to stand as a candidate in parliamentary elections shall be eligible to become a Member of the Constitutional Court, if they:

a) have a law degree;

b) have reached 45 years of age; and

c) are theoretical lawyers of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or have at least twenty years of professional work experience in the field of law.

(2) The professional work experience in the field of law referred to in paragraph (1) shall be from a position for which a law degree is required.

(3) The term of office of Members of the Constitutional Court shall be twelve years. Members of the Constitutional Court may not be re-elected.

(4) Having been a member of Government or a leading official in any political party or having held a leading state officials in the four years prior to election shall disqualify persons from becoming Members of the Constitutional Court.

equality, [...], non-discrimination, [...]". Seen in that context, any restriction on the right to run for public office must be based on the principle of non-discrimination and equal opportunities for all citizens. It was for the above reasons that the proposed restriction for such candidates for the Constitutional Court was not included into the text of the Law.

Article 5 [Incompatibility of Function]

- 5.1 During his/her mandate, a judge of the Constitutional Court shall not have the right to be:**
 - 1.1. member of a party, movement or any other political organization;**
 - 1.2. member of a steering board of a publicly owned enterprise, trade association or non-governmental organization;**
 - 1.3. member of a trade union.**
- 5.2 In addition to the prohibitions referred to in Paragraph 1 of this Article, a judge of the Constitutional Court shall not hold any other public or professional office with remuneration, except the performance as lecturer of legal sciences in an accredited university. For the purposes of this Law, public or professional office shall not be considered if the judge without payment engages in scientific activities, or if he/she becomes a member of an institute or jurists association, humanitarian, cultural, sports and other organizations without remuneration, provided that such activities are not related to the work of any political party.**
- 5.3 A judge proposed by the Assembly of Republic of Kosovo shall not be appointed by the President of Republic of Kosovo if he/she does not present the evidence that he/she has resigned from all relevant functions defined in Paragraphs 1 and 2 of this Article.**
- 5.4 Each judge shall be obliged to inform the President of the Constitutional Court in writing about any activity he/she wishes to perform outside the office of judge of the Constitutional Court for which he/she is paid honorariums or any other forms of remuneration. In case the President of the Constitutional Court expresses his/her opposition, the judge is entitled to request that the decision of the President of the Constitutional Court be reconsidered by all judges of the Constitutional Court. The said decision of the President can be overturned by a majority of all judges of the Constitutional Court.**

The provision that constitutional judges cannot hold concurrent occupations while exercising their functions is a fairly common practice of constitutional courts. The purpose of this constitutional limitation is to guarantee and ensure the development of an impartial and independent constitutional process and the protection of judges from possible outside influences on the process of adjudicating constitutional disputes. The Constitution has defined in Article 112.2 that "*the Constitutional Court is fully independent in the performance of its responsibilities*". To ensure full independence of the constitutional judges, the legislature imposed legal restrictions by declaring the

holding of certain offices incompatible with the mandate of a judge of the Constitutional Court.

As to the prohibition of membership of a party, movement or any other political organization, it should be noted that, unlike a political party, a political movement is not organized to elect its members to public office, but aims at convincing citizens to pursue the interests which are the focus of the movement. The prohibition set forth in Article 5.1.1 of the Law also implies that the members of the Constitutional Court are also not permitted to give a speech in support of a political organization or candidate; or to publicly recommend a candidate for public office, or to assume any functions that are likely to be considered as being political in nature.

The reason for the prohibition is easy: ordinary judges/constitutional judges must be able to adjudicate in the manner that it is free from any kind of external influence, political or otherwise. Therefore, any kind of affiliation, participation or involvement of any sort in the political parties, political movements or political organization of the constitutional judge would narrow down the scope of judicial independence and would impair their ability to adjudicate in the independent and impartial manner.⁸²

Examples of the prohibition of membership of political organizations are common in European constitutional practice. For instance, membership of constitutional judges in political parties is not permitted in many countries, like, for example, in Albania, Azerbaijan, Canada, Croatia, Czech Republic, Estonia, Georgia, Hungary, Italy, Latvia, Romania, Russia, Slovakia, Slovenia, Turkey, and Ukraine, while, at least, active participation of constitutional court judges in political parties or public associations is not allowed in, *inter alia*, Argentina, Armenia, Finland, France, Ireland, Japan, and Lithuania.⁸³

The Law prohibits judges from receiving membership at the Board of publicly owned enterprises during their mandate. The Law on Publicly Owned Enterprises provides the legal framework for the ownership of Publicly Owned Enterprises and for their corporate governance in accordance with internationally recognized principles of corporate governance for publicly owned enterprises in Kosovo.⁸⁴ The purpose of the norm is to prevent judges of the Constitutional Court from having any relationship, including without limitation any ownership interest in the of Publicly Owned Enterprises and enable a judge to diligently discharge the judicial responsibilities without bias or prejudice and maintain professional competence in the course of constitutional proceedings. It should be noted that this norm does not prohibit a judge from attending the proceedings in which the judge is a litigant in a personal capacity against the Publicly Owned Enterprise.

The Constitution guarantees the freedom to establish trade unions and to organize with the intent to protect interests of the employees.⁸⁵ Furthermore, the Law on Organizing

⁸² See more on the independence of judges Kane Jr, John L. "Public Perceptions of Justice: Judicial Independence and Accountability." *Journal of the National Association of Administrative Law Judiciary* 17.2 (2013): 2; Geyh, Charles Gardner. "Judicial Selection Reconsidered: A Plea for Radical Moderation." *Harv. JL & Pub. Pol'y* 35 (2012): 623; Kelemen, R. Daniel. "The political foundations of judicial independence in the European Union." *Journal of European Public Policy* 19.1 (2012): 43-58; Seibert-Fohr, Anja. *Judicial Independence in Transition*. Vol. 233. Springer, 2012.

⁸³ See the Venice Commission report on the composition of constitutional courts (*supra* note 14).

⁸⁴ The Law on Publicly Owned Enterprises No 03/L-087 is available at the Official Gazette of Kosovo.

⁸⁵ Constitution of Kosovo, Art. 44.

Trade Union Organizations regulates further the rights and freedom of the employees to establish trade union organizations in the public and private sector, with the aim of the representation and protection of economic interests, social and professional workers from work and work relation. According to the Law, trade unions are independent organizations that are created as a voluntary union of employees whose aim is the representation and protection of the legal rights and interests of economic, social and professional to their members.⁸⁶ However the Kosovo Constitution provides that the exercise of this constitutional freedom as contemplated by Article 44 of the Constitution may be limited for certain categories of employees. The Law on the Constitutional Court has introduced such limitations for the judges of the Constitutional Court prohibiting judges to receive membership of trade union organizations. This prohibiting measure may have been imposed for purposes of ensuring a higher bar of independence at the Constitutional Court. Trade unionist members may often submit constitutional referrals to the Constitutional Court e.g. alleged violations of constitutional rights or freedoms. Any membership of the judges of the Constitutional Court or affiliation with trade union organizations could compromise the independence of Constitutional Court in the course of the resolution of constitutional disputes which involve trade unions, and the Constitutional Court whose decision-making process depends on the quorum, would not be able to act and decide on the respective matters. Moreover, in some countries the constitutionality of the activity of the trade union organizations may also be contested before the constitutional court, which is yet another reason that might have triggered the law-makers to ban membership of judges of the Constitutional Court in trade union organizations.

However, the Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality gives some flexibility as far as the right of ordinary judges to participate at the trade union organizations by providing that "under their freedom of expression and opinion, judges may exercise the right to join trade unions (freedom of association), although restrictions may be placed on the right to strike".⁸⁷

The same standard applies with regard to prohibition of the membership of the judges of the Constitutional Court in the steering committees or boards of the NGOs. The Law on Freedom of Association in Non-Governmental Organizations sets out the establishment, registration, internal management, activity, dissolution and removal from register of legal persons organized as NGOs in Kosovo. According to the Law, the highest governing body of a foundation is the Board of Directors, which has full responsibility for the policies and financial affairs of the organization, reviews and approves the assets, liabilities, incomes, expenditures, and programs of the organization.⁸⁸ Given the amount of responsibilities of a NGO board or a steering

⁸⁶ Law For Organizing Trade Union In Kosovo No. 04/L-011.

⁸⁷ Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. 19 November 2002. The document is available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%203_EN.pdf.

⁸⁸ Law no.04/l –057 on Freedom of Association in Non-Governmental Organisations is available at the Official Gazette of Kosovo at <http://gazetazrytare.rks-gov.net>.

committee, the objectives of Article 5 para. 1 of the Law on the Constitutional Court are self-understandable.

The second category of prohibitions, which are laid down in paragraph 2 of Article 5, extends to the exercise of public or professional duties for which compensation is provided, with the exception of being a lecturer of legal sciences in an accredited university. A careful reading of this paragraph indicates that the legislature only makes reference to the performance as lecturer of legal sciences, which seems to exclude the potential engagement of judges in teaching in accredited universities other subjects that are not necessarily legal. However, it is interesting to note that many countries provide for a more extensive sort of exception by making reference to "teaching" other subjects in accredited institutions with remuneration.⁸⁹ In these circumstances, a constitutional court judge would be allowed to teach political science or economics or other subjects which have no link with his work as a judge in the constitutional court.

The Law also specifies that the engagement of a constitutional court judge, without compensation, in scientific institutes or associations of lawyers, humanitarian organizations, cultural, sport and other organizations, is not to be considered a public or professional duty, as long as these activities do not relate to the work of a political party. Thus, a judge is entitled to be a member of the board of the local football club or unpaid trainer in a diving club.

Moreover, a member of the constitutional court is in the unique position of being able to contribute to the improvement of laws, including the revision of substantive and procedural law, and the legal system in general. Whenever time permits, a judge should be encouraged to do so through giving speeches at bar associations, judicial conferences or other organizations dedicated to the improvement of the law. In any situation a judge should conduct these extra-judicial activities in a manner that does not cast any reasonable doubt upon his/her capacity to act independently and impartially as a judge and to properly perform his/her judicial duties.

The Article places a legal obligation upon judges proposed by the Assembly of Kosovo to provide evidence for their resignation from all functions specified in Articles 5.1 and 5.2 before they are appointed by the President of the Republic and have taken the oath. If proposed candidates are members of the Assembly, the Government or other public organs at the central or local level, they must cease to be members of such organs, before their appointment by the President. It is the duty of the proposed candidate to declare that such legal obstacles exist and immediately resign from the incompatible position. As to the interpretation of the term "evidence", it means any data that stand as proof of the resignation, such as a statement made under oath or a duly signed letter by the proposed candidate.

The provision clearly provides that it is mandatory for the judges who wish to perform as lecturer of legal sciences in an accredited university to inform the President of the Court in writing. Since the President is tasked to ensure the efficient and effective functioning of the Court by virtue of Rule 12 [Functions of the President] of the Rules of Procedure, he/she may find that the paid activity outside the office of the judge would be to the detriment of the proper functioning of the Court, for instance, because of the number of lectures to be given by the judge concerned, and express his

⁸⁹ See, for instance, Article 98 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina and Article 10(2) of the Constitutional Court Act of the Republic of Croatia.

opposition. In that case, the judge could ask his colleagues to reconsider the opposition of the President. A majority of all judges could overturn such opposition or, although not indicated in the provision propose a compromise acceptable to the President and the judge concerned.

Article 5 of the Law is not supplemented by any specific Rule of the Rules of Procedure.

Article 6 [Procedure for Review of Candidates for Appointment to the Constitutional Court]

- 6.1 A Special Committee for the Review of Candidates for Appointment to the Constitutional Court (hereinafter referred to as the “Committee”) is hereby established. The said Committee shall present to the Assembly a shortlist of qualified candidates for Judges of the Constitutional Court in accordance with the procedure set forth in this Article.**
- 6.2 The Committee shall be composed of the following members:**
- 1. The President of the Assembly of the Republic of Kosovo or a member of the Assembly acting as his/her designated representative;**
 - 2. Leaders of each Parliamentary Group of the Assembly of the Republic of Kosovo or members of the Assembly acting as their designated representative;**
 - 3. President of the Kosovo Judicial Council;**
 - 4. Ombudsperson;**
 - 5. A representative of the Consultative Committee for Communities;**
 - 6. A representative of the Constitutional Court.**
- 6.3 The Committee shall be summoned and chaired by the President of the Assembly of the Republic of Kosovo or his/her designated representative. The Committee shall have two vice chairs selected from its members, one of which shall be from the deputies of a Community different from the Community of the Chair.**
- 6.4 The Committee shall decide with simple majority of votes. In case of equal vote, the vote of the President of the Assembly of the Republic of Kosovo or his/her designated representative will be decisive.**
- 6.5 In case that one of the members of the Committee has a conflict of interest in relation to a case, he/she shall not take part or otherwise participate in any aspect of the committee proceedings on that case.**
- 6.6 The procedure for determining the short list of judges of the Constitutional Court shall be instituted by the Committee. The Committee shall publish an invitation/call published in the written and electronic media including those widely read by the Communities not in the majority in the Republic of Kosovo, in the Assembly, in the judicial institutions, law faculties, chamber of attorneys, judges and prosecutors associations, political parties, and other relevant legal persons and individuals to propose candidates for the election of one or more judges of the Constitutional Court (hereinafter: invitation/call). An individual may propose himself as candidate.**

- 6.7 The invitation/call shall define the conditions for electing a judge of the Constitutional Court determined by the Constitution and this Law, the deadline for proposing a candidate to the Committee, which should not be less than fifteen (15) or longer than twenty (20) days, and the enclosures that shall be delivered with the proposal.**
- 6.8 After the deadline provided in the previous paragraph expires, the Committee, within fifteen (15) days, shall investigate whether the candidates comply with the conditions for being elected judge of the Constitutional Court as determined by the Constitution and this Law, and shall reject invalid candidacies. In carrying out this responsibility, the Committee shall adopt practices developed for the selection and appointment of other members of the judiciary in Kosovo.**
- 6.9 The Committee shall conduct an interview with each of the candidates who comply with the conditions for being elected judge of the Constitutional Court and, on the basis of presented data and interview results, shall prepare a short list of qualified candidates for judges of the Constitutional Court.**
- 6.10 The said short list shall include more candidates than the number of judges, who will be appointed, but not more than five (5) candidates for one vacant position.**
- 6.11 The Committee shall submit to the Assembly of the Republic of Kosovo, together with its short list, the list of all the candidates who comply with conditions for being elected judge of the Constitutional Court.**
- 6.12 The proposal of the Committee shall include the reasons showing why the Committee gave a particular candidate priority over the other candidates.**

The reasons which have determined the detailed description of the procedure for the nomination by the Assembly of Kosovo of candidates for the position of judge in the Constitutional Court, have been multiple.

First, the general language, used by the Constitution in this respect, called for a more detailed regulation by the Law in order to provide procedural clarity for the putting into motion of the procedure for the nomination of candidates by the Assembly. The scope of Article 114 [Composition and Mandate of the Constitutional Court] of the Constitution⁹⁰, which refers to the role of the Assembly in proposing the judges of the Court, is quite broad. It gives no details with regard to the procedural measures to be followed by the Assembly for the selection of judges of the Constitutional Court.

Second, with respect to the nomination process, the Law sets a number of deadlines for the completion of the legal obligations arising from it. These legal deadlines shall

⁹⁰ The relevant paragraphs of Article 114 of the Constitution provide; “Article 114.2: Judges shall be appointed by the President of the Republic of Kosovo upon the proposal of the Assembly and shall serve for a non-renewable mandate of nine (9) years.”, Article 114.3: The decision to propose seven (7) judges requires a two thirds (2/3) majority of the deputies of the Assembly present and voting. The decision on the proposals of the other two (2) judges shall require the majority vote of the deputies of the Assembly, present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the Communities not in the majority in Kosovo.”

prevent unreasonable delays and will ensure that the nomination procedure for the appointment of judges is concluded within a legally prescribed timeframe.⁹¹

And the third element, which members of the Working Group found rather difficult to cope with, was how to legally arrange for the compilation of a list of shortlisted candidates which the Assembly of Kosovo would have to vote upon. In other words, there was a dilemma which body within the Assembly of Kosovo would be competent to set in motion the procedure for the nomination of the judges of the Constitutional Court.

Obviously, Article 6 of the Law introduces an arrangement, whereby a Special Committee for the Review of Candidates for Appointment to the Constitutional Court (hereinafter: "Special Committee") is established. The Special Committee manages the process of nomination of candidates, after the invitation for the proposal of candidates for the election of judge of the Constitutional Court has been published. The Special Committee is also competent to review the profile of the candidates and compile a shortlist of candidates, who comply with the conditions for being elected judge of the Constitutional Court. The Committee will send the shortlist to the Assembly for review and voting. This means that the responsibility of the Committee is mainly to administer the procedure for the nomination of suitable candidates, until they are finally voted upon by the Assembly.

It should be noted that the concept of the Special Committee bears striking similarities with the Committee of the Croatian Parliament. According to Article 6.1 of the Law on the Constitutional Court of the Republic of Croatia, *"the procedure for electing a constitutional judge shall be instituted by the Committee of the Croatian Parliament competent for the Constitution, which shall publish an invitation in the Official Gazette to judicial institutions, law faculties, the chamber of attorneys, legal associations, political parties, and other legal persons and individuals to propose candidates for the election of one or more judges of the Constitutional Court. An individual may propose himself as candidate"*.⁹²

After the deadline for proposing a candidate has expired, the Committee investigates whether the candidates comply with the conditions for being elected judge of the Constitutional Court set out in the invitation and rejects invalid candidates (Article 6.2 of the Law). The Committee then performs a public interview with each of the candidates who comply with those conditions and, on the basis of presented data and interview results, composes a short list of candidates for judges of the Constitutional Court. It is for this reason that the Kosovo system for setting in motion the procedure for the appointment of judges of the Constitutional Court bears striking similarities with the Croatian system of appointment of constitutional court judges.

The composition of the Special Committee reflects broad political representation at the Assembly but also involves the key judicial mechanisms in Kosovo such as the Chairman of the Kosovo Judicial Council and the President of the Constitutional Court. That the Committee is headed by the President of the Assembly (Article 6.2.1) also reflects the intention of the drafters of the Law to avoid a situation of excessive ownership of the parliamentary majority in the nomination process. Furthermore, the

⁹¹ See Art. 6 of the Law No. 03/I-121 on the Constitutional Court of Kosovo.

⁹² The Croatian Law on the Constitutional Court No. 49/02 of May 3, 2002. The Law is available at http://www.usud.hr/default.aspx?Show=ustavni_zakon_o_ustavnom_sudu&m1=27&m2=49&Lang=en

drafters felt that the best way to ensure fair parliamentary representation in the Special Committee was to design a mechanism, which would reflect the political representation in the Assembly, including the minority representation. The provision lists the leaders of each parliamentary group in the Assembly or their designated representatives as authorized entities to participate in the Committee (Article 6.2.2). Such composition of the Special Committee is also important given the required qualified parliamentary majority of two-thirds of the members of the Assembly of Kosovo who are present, a process that requires broad political consensus in order to receive the parliamentary approval of the submitted candidacies. It is hard to imagine such parliamentary approval of the candidacies in the absence of wide political unanimity.

In order to ensure adequate representation from the judiciary in the course of the selection of the judges of the Constitutional Court, the Law provides for participation of the Chairman of the Kosovo Judicial Council (KJC), which, under Article 108 [Kosovo Judicial Council] of the Constitution, is tasked to ensure the independence and impartiality of the judicial system,. The KJC as an independent constitutional institution plays a key role in recruiting and proposing candidates for appointment to judicial office and that such experience in the field of appointment of judges is useful for the work of the Committee and also ensures an open and merit based process, when considering candidates for the position of constitutional court judge.⁹³ The importance of having the Chairman of the KJC at the Special Committee is also explained by the fact that the Council acts as a proposing authority in the process of the appointment of judges in Kosovo, and may therefore bring vast experience in handling the process of the nomination of the candidacies for the position of the judge at the Constitutional Court.

Another independent institution that takes part in the workings of the Special Committee is the Ombudsperson who, pursuant to Article 132 [Role and Competencies of the Ombudsperson) of the Constitution, “*monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities*”, was chosen as member of the Committee (Article 6.2.4). The Ombudsperson would be well placed to test candidates on their knowledge of human

⁹³ Competences of the Kosovo Judicial Council are contemplated by the Kosovo Constitution in Article 108 and include: 1. *The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.* 2. *The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.* 3. *The Kosovo Judicial Council is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office. The Kosovo Judicial Council is also responsible for transfer and disciplinary proceedings of judges.* 4. *Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.* 5. *The Kosovo Judicial Council is responsible for conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts.*

rights and fundamental freedoms, the protection of which falls upon the Constitutional Court under Article 113.7 of the Constitution.⁹⁴

A further important element which emanates from Article 6.2 is the issue of community representation in the Committee (Article 6.2.5). To ensure representation of communities in this mechanism, the drafters of the Law determined the necessity of the participation of a representative of the Consultative Council for Communities, a constitutional body which, by virtue of Article 60 [Consultative Council for Communities] of the Constitution,⁹⁵ operates under the authority of the President of the Republic of Kosovo. The community issue is the more important, since by virtue of Article 114.3 of the Constitution, the decision to propose two (2) judges of the Court shall require the majority vote of the deputies of the Assembly present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the Communities not in the majority in Kosovo.

Finally, a representative of the Constitutional Court would have a seat in the Committee for the selection of appropriate candidates for the shortlist of qualified candidates to be presented to the Assembly (Article 6.2.6). At the establishment of the Court, when six (6) Kosovar judges were chosen for the first time in accordance with Article 152 [Temporary Composition of the Constitutional Court], the seat remained empty. At the selection of two (2) judges of the Court to replace those who served for a non-renewable term of three (3) years, the President of the Court or his representative will certainly occupy that reserved seat.

As to Article 6.3, the drafters have chosen the President of the Assembly to summon and chair the Committee as its President and, if absent, to be represented by his/her designated representative. The wording of Article 6.3, second sentence, is based upon the Rules of Procedure of the Assembly, which, in its Article 69 [Main and Functional Committees], paragraph 8, provide that “*Each committee shall have two vice-chairpersons, the first chairperson and the second chairperson, who shall belong to different parliamentary groups. At least one of the vice-chairpersons shall be of another community than the chairperson.*” However, Article 6.3 does not provide any details regarding the system of appointment of the deputy chairpersons. But provisions of the Rules of Procedure of the Assembly of Kosovo related to the work of parliamentary committees can be applied if the appointment of the deputy chairperson of the Special Committee is necessary.

It is not clear from the text in Article 6.4 whether the simple majority of votes mean a simple majority of votes of all members or a simple majority of votes of those present and voting. Since the selection of a candidate for the shortlist of candidates for Judges of the Constitutional Court is at stake, it could have been expected that the drafters would have been more precise in this respect. For the same reason, the question can be raised whether it would be appropriate that, in case of a tie, the vote of the President of the Assembly would be decisive. In such a situation, where it concerns the candidacy

⁹⁴ Article 113.7 of the Constitution provides: “*Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.*”

⁹⁵ Article 60.1 of the Constitution stipulates: “*A Consultative Council for Communities acts under the authority of the President of the Republic of Kosovo in which all Communities shall be represented.*”

for a seat in the Constitutional Court of the Republic of Kosovo, it would be more opportune to consider that the candidate concerned has not passed the test and should not be placed on the shortlist.

Article 6.5 leaves it apparently up to the member concerned to decide whether or not to disqualify him/herself from participating in the Committee, when he/she has a conflict of interest in relation to a particular candidacy. For instance, the chairman or other member of the Committee may be the brother of one of the candidates. Thus, in order to avoid any doubt whatsoever that the opinion of a member concerned might have been influenced by any relationship with or any special interest in a particular candidate, the Committee member should not participate in any proceedings concerning that candidate.

The provision is similar to Article 18 [Exclusion of a Judge], paragraph 5, of the Law, which provides that: *“Any judge who is aware that he fulfills at least one of the conditions for exclusion from proceedings should inform the President of the Constitutional Court in writing and should request his/her exclusion from the proceedings. [...] Article 6.5, however, lacks the possibility for a member, in case of a conflict of interest, to be removed from a case by the Committee”*⁹⁶. Nevertheless, the very existence of the provision makes the fairness of the proceedings less likely to be questioned. Also the Code of Ethics for Judges of ordinary courts contains a similar Article. According to the Code of Ethics for Judges of ordinary courts “if, for any reason, a judge feels unable to comply with the provisions of the previous paragraphs of this section, he/she must take immediate action including withdrawing from a case and requiring the President of the Court where he/she serves to be exempted from the case. In any event, if a judge is in a situation which might be questioned he/she is under the obligation to disclose it to the parties involved and agree with them his/her possible disqualification”⁹⁷.

Article 6.6 defines the manner in which the procedure for the determination of a shortlist of candidates for the position of judge of the Constitutional Court is instituted. The Committee is required to publish an invitation/call as widely spread as possible, in particular, in the institutions mentioned, although the list may not be exhaustive. This provides more reliability in terms of the selection procedure and increases the credibility of the selection, since the respective organizations are expected to nominate their best candidates for the position of constitutional court judge. It also provides more competition based on merit and professionalism and enables the selection of the most appropriate candidates for this important position.

The legislature has also provided that an individual may propose himself as a candidate. In order to give such individual a fair chance, it is expected that the Committee treats his/her application in the same way as it does with candidates proposed by one or more of the above institutions.⁹⁸

The conditions defined in the public invitation/call should be similar to the ones determined by Article 114 [Composition and Mandate of the Constitutional Court],

⁹⁶ Article 18 which will be commented on hereafter, also regulates the procedure for the exclusion of a judge by the Court from the proceedings (See Comments on Article 18)

⁹⁷ The Code of Ethics and Professional Conduct for Judges was adopted in 2006 by the Kosovo Judicial Council.

⁹⁸ See Law Nr. 03/L-121, Art. 6 para. 6.

paragraph 1, of the Constitution and Article 4 [Additional Conditions for Appointment of Judges] of the Law, as discussed above, since these conditions must be considered as mandatory. Consequently, the Committee is not at liberty to add any conditions to the ones to be mentioned in the invitation/call.

As to the deadline for proposing a candidate to the Committee, the Article is not precise regarding the question whether the candidacy and enclosures should be received by the Committee at the latest on the 20th day after the invitation/call has been published or whether the candidacy would still have been validly received, even after the deadline has expired, if it would bear the stamp of the 20th day. The last solution seems to be the right one, since the text of the Article mentions the deadline for proposing a candidate rather than the deadline for receiving the proposal. In this connection, reference is made to Rule 27 [Calculation of Time Periods] of the Rules of Procedure, setting out in which manner a time period determined by the Constitution, the Law or the Rules of Procedure shall be calculated by the Court.⁹⁹

Since, according to the Article, the conditions mentioned in the Constitution and the Law also determine the nature of the enclosures to be delivered with the proposal, the Committee does not seem to be empowered to ask for more or different enclosures.

Once the deadline has expired, the candidacies of candidates who do not fulfill the conditions for being elected judge of the Constitutional Court mentioned in Article 6.7, for instance, because they have not submitted all enclosures required or whose candidacy has not been proposed to the Committee within the time limits mentioned in Article 6.7 (as interpreted above) can only be rejected by the Committee as invalid. In case of doubt, the Committee does not seem to have the discretionary power to ask any candidate for additional information or enclosures.

The Article further provides that the Committee, when investigating whether a candidate matches the conditions laid down in the Constitution and the Law, should make use of similar practices developed for the selection and appointment of judges of ordinary courts. Such practices have been developed by the Kosovo Judicial Council (hereinafter: the "KJC") and are laid down in the Regulation on the proposal procedure for appointment and reappointment of judges adopted by the KJC on December 2012. A practice that has been developed for ordinary judges may serve as an example for the recruitment of constitutional judges. Article 7 of the KJC Regulation on the Appointment of Judges, for example, provides that candidates may be required to write an essay as part of the interview process, where the nature of questions that will be used during the process of interview are designed in the manner as to get the information relevant to the criteria for the appointment.¹⁰⁰ The writing of essays by the candidates for membership with the Constitutional Court may thus be based upon the KJC practice and the corresponding Regulation on the Appointment of Judges.

Once the Committee has found that a candidate complies with the conditions, it will interview him/her. The interview is an important instrument that enables the Committee to get acquainted with the profile of the candidates, who are, thus, given the opportunity to elaborate in greater detail about their professional experience and educational background and to state the reasons why they believe that they are

⁹⁹ See comments on Rule 27.

¹⁰⁰ Regulation on the procedure for proposals on appointment and reappointment of judges, Art. 7 para 5. The Regulation is available at the official website of the Kosovo Judicial Council <http://www.kgjk-ks.org>.

qualified for the position of constitutional court judge. The Committee may require from the applicants to submit additional documents or may seek additional explanations, which are believed to be relevant for its decision whether or not a candidate qualifies for being put on the short list, in particular, with regard to the Committee's obligation under Article 6(12) of the Law (see hereafter), whereby it is obliged to reason its decision.

Although the Article only mentions that the Committee will conduct an interview with the candidates, it may certainly have recourse to other means in order to test the knowledge and experience of the candidates more thoroughly, for instance, additional written tests or a further interview. No doubt, the Committee's authority to do so stems from the Article 6.6, providing that "[t]he procedure for determining the short list of judges", as commented on above. The interview is also part of the process of the appointment of ordinary judges according to the KJC Regulation on the Appointment of Judges. For example, the Regulation mandates the KJC to develop a sustainable methodological approach for interviewing the candidates. The Regulation further provides that "questions made during the interview shall be standard for all candidates applying for the same position."¹⁰¹

When the Committee draws up the short list of qualified candidates, it must ensure that the list includes at least more candidates than the number of vacant positions, but not more than five (5) for each vacant position. This means that, if, for instance, two new judges need to be appointed, the Committee must, at least, include more than two (2) candidates in the list, but not more than ten (10). The reason why the number of candidates exceeds the number of the announced vacancies for position of constitutional judge is merely to enable the Assembly to have a wider choice within the list of qualified candidates presented by the Committee. If the Assembly is prevented from choosing between the proposed candidates in the manner that is outlined in Article 6 para. 10 of the Law, it may lead to a situation where the Assembly would potentially refuse the candidates that the Committee proposed, which may thus avert the Assembly from fulfilling its constitutional duty. The current practice in the Assembly has so far been that in the event when only two candidates from the first round continued to the second round (*ballotage*) and not achieved the required majority of two thirds of the members present and voting, the Assembly of Kosovo has ordered repetition of the vacancy. However, Article 6.10 of the Law does not seem to be an obstacle in order for the Assembly members to proceed with the candidate who has received the largest number of votes after an indecisive second ballot to decide between two candidates. In this way, the Parliament will be able to avoid lengthy delays in the process of the appointment of candidates for Constitutional Court.

It seems to be that the drafters wanted the Committee to be fully transparent as to its choice of qualified candidates appearing on the short list, by requiring it to submit with its shortlist, the list of all candidates who complied with the conditions for being elected judge of the Court. However, it would have been more transparent, if the Committee would have been required to submit with the short list not only the presented data and interview results of the qualified candidates, but also the data and interview results of the candidates who complied with the conditions, but didn't make

¹⁰¹ Ibid, Art. 7.

it to the short list. Of course, the Committee would certainly do so, if requested by the Assembly, but it would have been preferable, if the Law had settled the issue.

To render the selection procedure for the short list even more transparent, the drafters made the Committee justify its choice of qualified candidates, by obliging it to indicate for each qualified candidate the reasons why it would give that candidate priority over other candidates. It is not sufficient for the purpose of the evaluation to only score the candidates and based on scoring to draw a short list which is presented to the Assembly for voting. The Law requires that the Committee provides reasons preferably in the written form to elaborate why the proposed candidates have been preferred for voting at the Assembly. The reasons to be elaborated include but are not limited to educational background, professional qualifications, moral reputation and other relevant qualifications that are important for the members of the Assembly to be taken into account in the course of the voting.

The candidates who had complied with the conditions, but were not included as a qualified candidate on the short list, could, thus, learn about the reasons for their non-inclusion. Of course, a meager consolation, because, in the absence of any complaint mechanism, they would not be able to do much with that knowledge.

Article 7 [Appointment and commencement of mandate]

- 7.1 Procedure for appointment of a new judge, pursuant to this Law, commences at least three (3) months before the expiry of the mandate of the previous judge.**
- 7.2 The mandate of the new judge shall begin on the day the mandate of the previous judge expires. A new judge shall be appointed by the President and shall take the oath in front of the President before commencement of his/her mandate. In case the mandate of the judge expires pursuant to Article 8 of this law, the mandate of the replacing judge shall begin upon the appointment by the President and taking the oath in front of the President.**
- 7.3 As exception from paragraphs 1 and 2 of this Article, the mandate of the first judges of the Constitutional Court shall begin upon the appointment by the President and taking the oath in front of the President.**
- 7.4 The text of the oath of a Constitutional Court judge shall be as follows:**
“I solemnly swear that in performing the duties as judge of the Constitutional Court of the Republic of Kosovo I shall uphold the Constitution of the Republic of Kosovo and shall perform the function of judge honorably, responsibly and impartially, respecting the rules of professional ethics.”

It must be assumed that the Article only deals with the appointment by the President of a new judge who has already been selected by the Assembly and whose appointment by the President of Kosovo is still outstanding. The provision addresses two different aspects, which are very important for the functioning of the Constitutional Court: (1) the commencement of the procedure of the appointment of a new judge by the President; and (2) the commencement of the mandate of the new judge once appointed.

Seen from this perspective, it is clear that the commencement of the appointment procedure cannot correspond with the commencement of the mandate of a new judge.

According to Article 7.1, the commencement of the procedure for the appointment of the new judge commences at least three (3) months before the expiry of the mandate of the judge to be replaced. The aim of commencing the procedure so early is to prevent situations in which the Constitutional Court would not be operating with all its judges, because the new judge has still not been appointed by the President. The above period of three (3) months should be sufficient for the President to do so in order to enable the new judge to commence his/her term of office on the day the mandate of the departing judge expires. It is evident that Article 7 aims at the continuity of the work of the Constitutional Court in case of the expiry of the regular mandate of a judge as provided for by Article 8.1.1.

Article 7.1 is not applicable in the case of a prior termination of the mandate of a judge, as laid down in Article 9 [Prior termination of the mandate], which will be commented on hereafter, for the reason that prior terminations of the mandate of a judge mentioned in that Article cannot be foreseen unlike the expiry of a regular mandate.

Although the Kosovo Constitution has introduced a system of separation of powers between the Parliament and the President as far as the selection of constitutional judges is concerned, this system of appointment must not diverge to the extent as to endanger the proper functioning of the Constitutional Court, a judicial body whose role is instrumental for ensuring the rule of law and protection of constitutional rights. It has been almost two years since the Constitutional Court is working with eight judges only. The problem that may arise (it happened in other countries with a similar system of appointment such as Albania) is when the Assembly fails to elect a judge for the Constitutional Court therefore ending up in a situation when appointments are not made in time. At the time of the writing of this commentary, the Constitutional Court is operating with eight judges “which may pose a challenge to constitute the quorum of seven judges”.¹⁰² There have been three repeated attempts by the Assembly to appoint the judge for the Constitutional Court but none of them were successful. There is of course no constitutional instrument to force the Assembly to decide among the proposed candidates “as there is no such sanction in the European panorama”.¹⁰³ It is clear that two-thirds of the deputies present and voting are not easily achieved in absence of political consensus, which oftentimes is not ensured. One solution to this problem would be as Kemelen suggests the institution of prorogation – that is the rule that the judge would remain in office until the selection of the successor. However, this could only be done in Kosovo with the change of the Law on the Constitutional Court which specifies that the mandate of the judge expires when the regular period for which he/she is elected comes to end.

As to the commencement of the mandate of a new judge the language used in this Article is clear: it commences on a fixed date, i.e. the day the mandate of the previous judge expires, after the new judge has been appointed by and taken the oath in front of the President. This is what happens in normal situations, that is to say, when nothing

¹⁰² See the EU Progress Report for Kosovo (2013). The document is available at http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/kosovo_2013.pdf

¹⁰³ Kelemen, Katalin. "Appointment of constitutional judges in a comparative perspective—with a proposal for a new model for Hungary." *Acta Juridica Hungarica* 54.1 (2013): 5-23.

extraordinary occurs which may shorten the regular period for which a judge was elected. If, however, the mandate of a judge expires prematurely, by virtue of Article 8.1.2 (see comments on this Article hereafter), the mandate of the replacing judge shall not begin on the date of the premature expiry of the mandate of the judge to be replaced, but only on the day that the new judge has been appointed by the President and has taken the oath in front of him/her.

In the absence of any specific provisions dealing with the replacement procedure of a judge whose mandate terminated prematurely, pursuant to Article 8.1.2, it must be understood that the normal procedure for the appointment of judges, laid down in Article 6 will have to be followed. The replacing judge will, in that case, start his own mandate and will not terminate the mandate of the departed judge. This is not the case in Albania, where Article 9 [Termination of Mandate], paragraph 3, of the Law on the Organization and Operation of the Constitutional Court provides that “*If the seat of a judge is vacant, the President of the Republic, with the consent of the Assembly, appoints within one month a new judge, who remains on duty until the end of the mandate of the departed judge*”.¹⁰⁴ Thus, the new judge continues the mandate of the departed judge until it terminates. Whether, in these circumstances, the new judge can be re-elected for a full term after having terminated the mandate of the departed judge, is not clear.

The Article was only meant to be applied on the occasion of the appointment of the first six (6) Kosovar judges of the Constitutional Court, although it gives the impression that it concerns “all” first judges. In fact, this transitional provision implemented former Article 152 [Temporary Composition of the Constitutional Court] of Chapter XIV Transitional Provisions of the Constitution, which, in its paragraph 1, provides that “*Six (6) out of nine (9) judges shall be appointed by the President of the Republic of Kosovo on the proposal of the Assembly*”.¹⁰⁵

Thus, the procedure laid down in Article 6 of the Law was followed in order to select six (6) judges whose mandate began on the day, when they were appointed by and took the oath in front of the President of Kosovo. However, although the mandates of the Kosovar judges began on the same day, they do not terminate on the same day, as will be discussed hereafter under Article 8 [Termination of mandate].

Besides the six (6) Kosovar judges, by virtue of the former Article 152.4 of the Constitution, “*Three (3) international judges shall be appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights. The three (3) international judges shall not be citizens of Kosovo or any neighbouring country.*” Furthermore, Article 154.5 of the Constitution deals with the length of the mandate of the international judges, by providing: “*The International Civilian Representative shall determine when the mandates of the international judges expire and the judges shall be replaced as set forth by the Constitution.*”

After a selection process, the details of which were published in a vacancy announcement by the International Civilian Office, three international judges, of American, Bulgarian and Portuguese nationality, were appointed by the International Civilian Representative and took the oath in front of the President of Kosovo. The

¹⁰⁴ See Article 9 of the Law on Organization and Operation of the Constitutional Court of the Republic of Albania, No.8577 of 10/02/2000.

¹⁰⁵ See for further details about the terms of each of the six judges former Article 152 of the Constitution.

reason for having the international judges in the Court are two-fold. First, this is a reflection of the “rule of law model promoted in Kosovo, from the inception of the UN mission in 1999 through the transition to EULEX” that is “inherently an international model”.¹⁰⁶ Second, the composition of the Kosovo Constitutional Court reflected also the Comprehensive proposal for Kosovo Status Settlement. This document gave the Court such configuration that provided for the presence of three international judges to be embedded at the Kosovo’s Constitutional Court.

Although neither the Constitution, nor the Law explicitly requires the international judges to take the oath in front of the President, since the International Civilian Representative appointed them, they have indeed done so, albeit on different dates. The Kosovar members of the Constitutional Court had already taken the oath before the President of Kosovo at an earlier date.¹⁰⁷ That constitutional court judges take the oath before the appointing authority is a normal practice in neighbouring countries. For instance, in Albania¹⁰⁸ and Croatia¹⁰⁹ the President appoints the constitutional court judges, who take the oath in front of him/her, whereas in Slovenia¹¹⁰ the judges are elected by the Assembly and also take the oath in front of the Assembly.

Another interesting example in the European constitutional arena is that of Poland, where the Law on the jurisdiction and organization of the Constitutional Tribunal of 1997 not only provides that a constitutional court judge takes an oath before taking office by declaring that, in discharging his/her duties, he/she will faithfully serve the Polish Nation, safeguard the Constitution and perform all such duties impartially and with the utmost diligence, but also provides that the refusal to take the oath is equivalent to a resignation from the office of judge of the Constitutional Tribunal.¹¹¹

A word should be said about the meaning of the terms “*respecting rules of professional ethics*” at the end of the oath. Since these words are nowhere to be found in the Constitution, the Law or the Rules of Procedure, the question may arise what their significance is. Do they refer to professional ethics in general, or do they rather refer to professional ethics of constitutional court judges, for whom the bar of ethics should be put even higher?

Whatever the drafters may have meant, Article 12 [Functions of the President] mentions in its paragraph 1(g), that [the President shall] “*ensure compliance with the Code of Conduct and maintain order within the premises and during proceedings of the Court;*”. This can only be interpreted to mean for the adoption of a Code of Conduct, which the Constitutional Court did on 19 June 2013 in order to satisfy the need for an explanation of the above words “*respecting rules of professional ethics,*” the Code of Conduct contains fundamental principles in order to “protect and to

¹⁰⁶ Zurn, Michael, Nollkaemper, Andre and Peerenboom, Randy. *Rule of Law Dynamics: In an Era of International and Transnational Governance*. Cambridge University Press: 2012, p.276.

¹⁰⁷ The judges are also required to preserve the secrecy of the deliberations of the Court, although this requirement is not expressly provided in Article 7(4). Pursuant to Rule 44 [Deliberations and Voting] of the Rules of Procedure, deliberations of the Court are not open to the public and remain confidential.

¹⁰⁸ Article 8 [Commencement of term], paragraph 1, of the Law on the Organization and Operation of the Constitutional Court of the Republic of Albania.

¹⁰⁹ Article 8 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.

¹¹⁰ Articles 14 and 15 of the Constitutional Court Act No. 64/07.

¹¹¹ Art. 5 of the Polish Law on the Jurisdiction and Organization of the Constitutional Tribunal, adopted in August 1997.

enhance public confidence in the independence and impartiality of the Court, and to provide guidance to the Judges in exercising their responsibilities”.¹¹²

Article 8 [Termination of the mandate]

- 8.1 The mandate of a judge of the Constitutional Court shall end upon:**
1.1 expiry of the regular period for which he/she is elected;
1.2 prior termination of the mandate pursuant to Article 9 of this Law.
- 8.2 Six (6) months before the mandate of a judge of the Constitutional Court terminates, pursuant to Paragraph 1.1.1 of this Article, the President of the Court shall inform the Assembly of the Republic of Kosovo in order for the Assembly to initiate the procedure for proposing a new judge.**

The expiry of the mandate of constitutional court judges should be seen from two perspectives: (1) the normal expiry of the mandate of a judge and (2) the expiry of the mandate prior to the regular period for which a judge was elected. As to the normal expiry of the mandate of a judge, no interference by any public body is required, since the expiry is self-executing. So, not even a declaration or decision of the Court itself is necessary. However, in case of an early expiry of the term of office of a judge for one of the reasons laid down in Article 9 [Prior termination of the mandate] of the Law, the early expiry is caused by (1) the judge concerned: death (Article 9.1.1) or resignation (Article 9.1.2) or (2) required by a public body: the ordinary court (Article 9.1.3), the Court itself (Article 9.1.4) or the President of Kosovo (Article 9.1.5) (see for further details the comments on Article 9 hereafter).

As mentioned before, neither the Law, nor the Rules of Procedure mention the regular period for which the judges of the Constitutional Court are elected. Only Article 114 [Composition and Mandate of the Constitutional Court], paragraph 2, of the Constitution provides: “*Judges shall be appointed by the President of the Republic of Kosovo upon the proposal of the Assembly and shall serve for a non-renewable mandate of nine (9) years.*” However, the situation in Albania is different from the one in Kosovo, since, by virtue of Article 7 [Composition of the Constitutional Court], paragraph 2, of the Law on the Organization and Operation of the Constitutional Court: “*The judges are appointed for nine years without the right to be reelected [...].*” In Slovenia and Croatia similar to Kosovo, the mandate of the judges of the Constitutional Court is also not laid down in the Law on the Constitutional Court, but in the Constitution¹¹³ and, thus, can only be changed by a 2/3 majority vote of the Assembly.

¹¹² The Code of Conduct for the judges of the Constitutional Court of Kosovo is available at http://gjk-ks.org/repository/docs/gjkk_kodi_i_miresjelljes_per_gjvqtare_ang.pdf.

¹¹³ Article 165 (Term of Office of Judges) of the Slovenian Constitution provides: (1) Constitutional Court judges are elected for a term of nine years. Constitutional Court judges may not be re-elected. (2) Upon the expiry of the term for which a Constitutional Court judge has been elected, he continues to perform his office until the election of a new judge. The Croatian Constitution in its Article 125 [Membership, President] provides: (1) The Constitutional Court of the Republic of Croatia shall consist of thirteen judges elected by the Croatian Parliament for a term of eight years from among notable jurists, especially judges, public prosecutors, lawyers and university professors of law. (2) Candidacy proceedings and the proposal for the judges of the Constitutional Court of the Republic of Croatia to the Croatian Parliament shall be carried out by the committee of the Croatian Parliament, authorized for the constitutional issues. (3) The Constitutional Court of the Republic of Croatia shall elect its President for a term of four years.

It is appropriate for the Constitution to determine the length of the mandate of constitutional judges. Such constitutional determination ensures a higher protection and independence of the judges because constitutional norms are much more difficult to be changed. The Assembly will be therefore prevented from reducing the length of the mandate of constitutional judges through legislative measures.

However, for the first Kosovar judges of the Court (initial period judges) the regular period of the non-renewable mandate is not the same for all of them, as laid down in Article 152 [Temporary Composition of the Constitutional Court] which provides: *“Until the end of the international supervision of the implementation of the Comprehensive Proposal for the Kosovo Status settlement, dated 26 March 2007, the Constitutional Court shall be composed as follows: [...] 2. Of the six (6) judges two (2) judges shall serve for a non-renewable term of three (3) years, two (2) judges shall serve for a non-renewable term of six (6) years, and two (2) judges shall serve for a non-renewable term of nine (9) years. Mandates of initial period judges shall be chosen by lot by the President of the Republic of Kosovo immediately after their appointment.”*

As Helmut Steinberger argues: “if a Constitutional Court shall be established for the first time, for the same reason the tenure of the first set of judges should not be equal in length; the first judges should rather be divided into several groups, one group serving the full term, another for two thirds, and the last one third of the term in order to have the court partially renewed after certain periods successively”.¹¹⁴

As far as the mandate of the international judges is concerned, Article 152.5 of the Constitution only specifies that: *“The International Civilian Representative shall determine when the mandates of the international judges expire and the judges shall be replaced as set forth by the Constitution.”* In September 2009, the International Civilian Representative (ICR) appointed the three (3) international judges for a period of 3 years, and extended their mandate for another two years i.e. until 2014 when the mandate of international judges was expected to come to an end.¹¹⁵ However, the mandate of international judges was continued by the President under Article 84 para. 4 of the Constitution, Article 2 of the Law on the Ratification of International Agreement between the Republic of Kosovo and the European Union over the EU Mission's Rule of Law Mission in Kosovo (04 / L-274) and, in accordance with the content of the letter no. 693, 25 August 2014, the EULEX Head of Mission to the President. The Presidential decree on the extension of the mandate of the international judges was challenged by the Ombudsperson in Kosovo arguing that the decree of the President is contrary to the constitutional procedure for the election of judges to the Constitutional Court since the President continued the mandate of the three international judges without the proposal of the Assembly of the Republic of Kosovo. In its decision no. KO155-14, the Constitutional Court rejected the referral as unfounded claiming that the decree referred to the continuation of the mandate of the already appointed international judges and not to the appointment of new judges. Although the need for the continuation of the mandate of international judges can still be considered justified, the choice of method or procedure to extend the mandate of

¹¹⁴ Steinberger, (*supra* note 33).

¹¹⁵ See more on the potential postponement of the mandate of international judges in the Kosovo Constitutional Court <https://www.gazetaexpress.com/lajme/gjyqtaret-e-huaj-ne-pako-per-sundim-ligji-792/>

international judges must entirely rely on applicable constitutional norms that in each case, according to the Kosovo Constitution, prevail over international agreements and parliamentary statutes. It may be contented that after the repeal of Article 152 of the Constitution of Kosovo being a transitional provision, the extension of international judges could only be made based on parliamentary approval of constitutional amendments in the manner prescribed by the Constitution.

It is important that the procedure for filling the vacancy starts well in advance, so that a candidate is selected by the time the vacancy occurs. The legislature has, thus, set two moments in time for undertaking procedural action with regard to the selection process: (1) the initiation of the procedure for proposing a new judge under Article 8.2 and (2) the commencement of the procedure for the appointment of a new judge (Article 7.1). These legal provisions are an excellent illustration of the intention of the legislature to have judicial appointments made in a timely manner and to avoid unnecessary delays, when the regular mandate of a constitutional judge expires.

In Romania, for example, a new judge must be appointed at least one month before the end of the mandate of the previous judge.¹¹⁶ In Hungary, according to Article 8(4) of the Act on the Constitutional Court, a new judge must be elected at least three months before the end of the mandate of the preceding judge. Croatia¹¹⁷ has the same procedure as in Kosovo, while in Albania the judge, whose mandate has come to an end, can stay in office, until a successor is appointed. Probably for that reason, the Albanian Law does not mention any date for the commencement of the replacement procedure, because the judge to be replaced can continue to serve as long as the new judge has not been appointed. It should be noted that the judge who has his/her mandate expired should stop serving immediately and is not permitted to wait until the replacement of the new judge. In Kosovo constitutional judges are appointed by a presidential decree which stipulates the mandate within which the judge should serve in the Constitutional Court. The Law on the Constitutional Court also indicates that the mandate of the constitutional judge expires with expiry of the regular period for which the judge has been elected.

Article 9 [Prior termination of the mandate]

9.1 The mandate of a judge of the Constitutional Court shall end prior to the expiry of the regular period for which he/she is elected in case of:

1.1 resignation;

1.2 death;

1.3 permanent loss of ability to act as determined by the competent court;

1.4 illness or any other health problem, which makes it impossible for him/her to exercise his/her functions as a judge of the Constitutional Court;

¹¹⁶ Pursuant to article 68 “three months before expiration of the term of office of any of the Judges, the President of the Constitutional Court shall notify the President of the Chamber of Parliament which has appointed the respective Judge or, as the case may be, the President of Romania, calling for the appointment of another one; appointment shall be made at least one month before the end of the term of office held by the preceding Judge”.

¹¹⁷ Article 9(2) of the Constitutional Act on the Constitutional Court of the Republic of Croatia

1.5. dismissal pursuant to Article 118 of the Constitution.

- 9.2 The termination of a mandate pursuant to item 1.4. of Paragraph 1 of this Article shall be based upon a decision taken by the judges of the Constitutional Court following the examination of all relevant medical examination and findings. The said decision shall require a two thirds (2/3) majority of the judges of the Constitutional Court excluding the judge whose mandate is under consideration.**

The Article enumerates an exhaustive list of situations, in which the mandate of a judge ends prior to the expiry of the regular period for which the judge concerned was elected. These situations are the following:

Resignation is a formal act of giving up one's office or position, so, when, for instance, a constitutional court judge resigns, he/she chooses to leave his/her position in the Court voluntarily. The Article, however, does not provide any detail as to the possible formalities of the act of resignation by a judge of the Court. Such details are to be found in Rule 5 [Resignation] of the Rules of Procedure, supplementing Article 9.1.1 of the Law.¹¹⁸ The legal implications of resignation have been a subject matter of the Kosovo Constitutional Court in the referral of the President of the Republic of Kosovo for explanations regarding jurisdiction over the case of Rahovec Mayor, Mr. Qazim Qeska. The question was "which institution in the Republic of Kosovo is responsible for assessing the effectiveness and validity of the resignation and for confirming the eventual expiry of a mayor's term of office, based on communique addressed to the public, the uncertainty of which has prevented further actions by the President in compliance with the constitutional principle of free and equal elections?"¹¹⁹ The Constitutional Court stated that the Kosovo Constitution nor the Law on Local Self Government does not empower central level government bodies to carry out any action for acceptance of the resignation of a mayor leading to termination of the mandate. Therefore, according to the Constitutional Court "any resignation of any mayor is final and definitive and it puts an end of a Mayor's mandate".¹²⁰ In assessing the constitutional consequences of a mayor's resignation the Court stated that resignation of the mayor leads to "calling for elections by the President of the Republic in order to ensure the right of the citizens to enjoy the right to a free and equal vote in establishing their local self-government".

A further situation in which the mandate of a judge ends prior to the expiry of the regular period is, when he/she suddenly dies. In case the judge dies after a long illness, he/she will certainly already have resigned from the Court. With respect to the procedure to be followed to have the judge, who suddenly passed away, replaced as soon as possible, neither the Law nor the Rules of Procedure provide for such a procedure. It is assumed that the President of the Court informs the President of Kosovo of the sudden death of the judge as well as the President of the Assembly in

¹¹⁸ See hereafter comments on Rule 5.

¹¹⁹ Case No 80/10 related to the request of the President of the Republic for Interpretation of Constitutionality. Constitutional Court of Kosovo, 07 Oct. 2010. [Http://gjk-ks.org/](http://gjk-ks.org/). Judgment accessed on 6 June 2012.

¹²⁰ Ibid. para.35.

order for the Assembly to initiate the procedure for proposing a new judge without delay.

It is assumed that, if the President of the Court suddenly passes away, the Deputy President shall immediately take over the duties of the late President (see comments on Article 11 [President and Deputy President] hereafter) and inform the President of Kosovo as well as the President of the Assembly and the Government. Although the Article is silent on the issue, the judges of the Court will certainly elect a new President without delay. At the same time the Assembly will initiate the procedure for proposing a new judge, as mentioned above.

A further ground for the early termination of the mandate of a judge is, pursuant to this provision, permanent loss of the ability to legally act i.e. loss of legal capacity pronounced by a competent court. According to Article 31 of the Law on Non-Contested Procedure¹²¹, an adult can be declared “legally incapable” by a court of ordinary jurisdiction, if it finds that, due to the person's complete or partial inability to reason, he/she is unable to look after his/her own rights and interests.¹²² Such court action is initiated by an authorized party in case the person suffers from mental or emotional illness or in case of physical disabilities. When there are compelling legal reasons for the abolition of the legal capacity of the person concerned, the court may decide to do so fully or partially.

As to the termination of the mandate of a judge of the Constitutional Court in case of loss of his/her ability to act, Article 9.1.3 defines that such loss must be permanent. Thus, if the competent court determines that the judge concerned suffers from a temporary loss of ability to act, which hampers his/her ability to act only temporarily the situation might be solved on a case by case basis.

Another reason which could cause prior termination of the mandate of a judge of the Constitutional Court is illness or any other health problem, which makes it impossible for the judge to exercise his/her duties. There are two conditions that must be fulfilled in this respect: firstly, such decision must be based on a medical examination which should provide evidence confirming that, as a result of the health condition of the judge, he/she is unable to continue to exercise the functions as a judge of the Constitutional Court and, secondly, the termination of the mandate in terms of Article 9.1.4 must be decided by a 2/3 majority of the judges of the Constitutional Court (see also comments on Article 9(2) hereafter).

A further reason for the early termination of the mandate of a judge is, pursuant to Article 9.1.5, his/her dismissal as provided by Article 118 [Dismissal] of the Constitution, stipulating that “*Judges of the Constitutional Court may be dismissed by the President of the Republic of Kosovo upon the proposal of two thirds (2/3) of the judges of the Constitutional Court only for the commission of a serious crime or for serious neglect of duties*”.

It is worth emphasizing first that, in principle, the grounds for dismissal of a constitutional court judge must be restrictive. The circumstances, under which the dismissal of a judge may occur, are expressly provided by Article 118 of the Constitution and can, therefore, not simply be extended by law. The aim of the drafters of the Constitution must have been to ensure the independence of the Court and to

¹²¹ Art. 31 of Law No. 03/L-007 on Non-Contested Procedure, dated 20 November 2008.

¹²² Ibid.

protect its judges against political manoeuvres and the risk of being dismissed for other reasons than those indicated in Article 118 of the Constitution. The independence and impartiality of the Constitutional Court clearly implies that the judges are not accountable to anyone. It is for this reason that in most countries rules on dismissal are laid down in their constitutions and that appointing authorities can only dismiss a constitutional judge in compliance with the provisions of these constitutions.

Similar constitutional grounds for the dismissal of judges exist in other countries. For example, the German Basic Law provides in Article 98.2 that the Federal Constitutional Court, upon application of the Assembly, may by a 2/3 majority order a judge of the Constitutional Court or other federal judge in case of misconduct which seriously discredits the position of the judge concerned or if the judge is sentenced to imprisonment exceeding a duration of 6 months. In Albania, pursuant to Article 128 of the Constitution, a judge of the Constitutional Court can be removed from office by the Assembly by 2/3 of all its members for a violation of the Constitution, the commission of a crime, mental or physical incapacity, and acts and conduct that seriously discredit the position and reputation of the judge concerned. The decision of the Assembly is reviewed by the Constitutional Court, which, upon verification that such grounds exist, declares the judge removed from duty.

The grounds on which a dismissal may be constitutionally justifiable under Article 118 of the Constitution of Kosovo are not all entirely clear from a legal point of view. For instance, the definition "serious crime" for purposes of the dismissal is not further defined by the Article. Also the law applicable in Kosovo does not provide sufficient legal clarity as to the meaning of the wording "serious crime". The question which may be raised in this context is whether, for the purposes of a dismissal, the concept of "serious crime" should be interpreted in a broader sense, so as to imply every criminal act prosecuted by an indictment. The applicable criminal law in Kosovo does not define serious or less serious crimes.¹²³ It should be the competence of the Constitutional Court to demarcate the boundaries of the term "serious crime" for the purpose of Article 118 of the Constitution.

What is, however, equally important is the interpretation of the wording "the commission of a serious crime". Taking into account the seriousness of a situation in which a judge of the Constitutional Court risks to be dismissed by the President of the Republic of Kosovo, it can only mean that, prior to the dismissal, a criminal court must have found the judge concerned guilty of having committed a crime, which should be considered as "serious". Therefore, the procedure to dismiss a judge of the Court should, in principle, only start after the final verdict in the criminal case against that judge. This is linked with the principle of innocence being one of the rights contemplated by the constitution. Article 31 para. 5 of the Constitution provides that "Everyone charged with a criminal offense is presumed innocent until proven guilty according to law".¹²⁴

¹²³ The Criminal Code of Kosovo only provides for following section regarding the serious crimes: "The law may provide for the punishment of life long imprisonment for the most serious criminal offenses committed under especially aggravating circumstances or criminal offenses that have caused severe consequences", see Art. 44 of the Criminal Code of the Republic of Kosovo no. 04/I-082 (published 13.07.2012),

¹²⁴ See more on the principle of innocence Tadros, Victor. "The Ideal of the Presumption of Innocence." *Criminal Law and Philosophy* (2013): 1-19; Duff, R. A. "Pre-trial detention and the

However, since the criminal proceedings against a judge of the Court would directly affect the dignity and serenity of the Court as a whole, it would be preferable for the Court to suspend the judge concerned from his/her functions as long as the criminal proceedings are pending. Only after the final verdict will the Court have to decide to lift the suspension or to propose the dismissal of the judge concerned. Neither the Constitution, nor the Law apparently provide for the possibility to suspend a judge from his/her functions in the above situation (see also the comments on Rule 6 [Dismissal Procedures] hereafter).

As to the second constitutional ground for the prior termination of the mandate of a judge, i.e. for serious neglect of duties, a similar question arises: how to distinguish between a "simple" neglect of duties and a "serious" neglect of duties. Again, it will be the Constitutional Court itself, which will have to interpret these terms and indicate the boundaries of this concept, albeit on a case by case basis. In this connection, it may be interesting to quote an example of the constitutional interpretation of the conditions related to the dismissal of the Attorney General, taken from the jurisprudence of the Constitutional Court of Albania.

In Decision No. 75, dated 19 April 2002, the Constitutional Court issued an interpretative decision on the meaning of the following term: "acts and behavior that seriously discredit the position and image..." and "serious violations of law in the exercise of functions" of the Attorney General. In this case the Constitutional Court determined that, from all grounds for dismissal of senior officials provided in the relevant articles of the Constitution, two of those grounds, namely "the commission of a crime" and "mental or physical inability", are such that they can be applied directly by the Assembly, since they require to be established and certified beforehand by competent bodies.

Moreover, the Constitutional Court distanced itself from any form of law-making, stressing *inter alia* that "for the interpretation of these norms, the Constitutional Court does not take over the performance of the role of a positive legislative authority, by foreseeing all cases that may be included in these constitutional reasons, since that would be practically impossible, while the Constitution, laws or court decisions may not accurately codify the acts and behaviours that seriously discredit the position and reputation of the judge or prosecutor, or cases of serious violation of the law".¹²⁵

According to the Albanian Constitutional Court "actions or omissions of [these] senior state officials, which can be included into the constitutional grounds for their dismissal, are such that they can be evaluated only on a case by case basis, by the body that performs the dismissal procedure. However, in any case, they are related to improper and indecent behaviour of these senior officials, not only in exercising their duties, but also outside their duties, by abusing and violating the public trust, which is mainly associated with damage they bring to society and the state. Indecent acts and behaviour that they have committed must be so serious, have so seriously discredited the image

presumption of innocence." *Oxford University Press, Forthcoming* (2012): 12-31; Gray, Anthony. "Constitutionally protecting the presumption of innocence." *U. Tas. L. Rev.* 31 (2012): 132; Weiß, Wolfgang. "Human rights in the EU: rethinking the role of the European convention on human rights after Lisbon." *European Constitutional Law Review* 7.1 (2011): 64-95.

¹²⁵ Case no. 75/2002 regarding the request of the Albanian Assembly for interpretation of Arts. 128, 140, 149 of the Constitution of Albania. Constitutional Court of Albania. 19 Apr. 2002. <http://www.gjk.gov.al>. accessed on Web. 1 Mar. 2014.

and position as a judge or prosecutor and have diminished the dignity of the institution they represent, as to compel the competent body to take the measure of dismissal from office".¹²⁶

According to the majority of the Albanian constitutional court judges, the most accurate meaning of "serious violations of law while exercising the function" should always be analysed and evaluated in its entirety, taking into account several factors related to the severity of the violation, the consequences that have resulted or could have resulted from this violation, the duration of these consequences and the difficulties for their repair, as well as the subjective position of the person, who has committed the violation, about the violation made and its consequences. Also, the qualification "serious", used in the case of discrediting the position and image of the judge and prosecutor, as well as the violation of the law, serves simultaneously to the competent body, that initiates the dismissal procedures, to distinguish these activities from the misconduct of a lesser extent, which cannot be used to motivate the cause of dismissal".¹²⁷

The considerations and findings of the Albanian Constitutional Court could serve as guidelines for the Constitutional Court of Kosovo, whenever a similar case may arise regarding one of its judges.

Article 9.1.5 of the Law is supplemented by Rule 6 [Dismissal Procedures] of the Rules of Procedure

The first sentence of the Article contains a small textual error: "item 1.4 of Paragraph 1 of this Article" should read "item 4 of Paragraph 1 of this Article". It is obvious that, before deciding to terminate the mandate of a judge, who is ill or has another health problem preventing him/her from exercising his/her functions as a judge of the Court, the other judges need to thoroughly examine all relevant medical examinations and findings in order to allow them to determine the seriousness of the medical condition of their colleague. It does not seem to matter, whether the health condition in question is caused by a serious illness or a serious injury.

What matters is that the medical file should contain an accurate medical diagnosis, supported by the necessary medical documentation and a medical opinion signed by more than one specialist as to whether the judge will be able to resume his/her functions after recovery within a certain time, or, in case of a serious illness or injury, will most probably not be able to return to the Court. The remaining judges of the Court will, thus, have to decide, whether to continue without the judge concerned until he/she will have sufficiently recovered, or, if the chances of recovery are very slim, whether it would be advisable to terminate the mandate of the judge, pursuant to Articles 9.1.4 and 9.2, so that the procedure for proposing a new judge could be initiated.

Article 9.4 is silent on the procedure to be followed, when a 2/3 majority¹²⁸ of the judges decides that the mandate of the judge concerned should be terminated. However, it is assumed that the President of the Court shall enable the judges to take

¹²⁶ Ibid.

¹²⁷ Case no. 75/2002 regarding the request of the Albanian Assembly for interpretation of Arts. 128, 140, 149 of the Constitution of Albania. Constitutional Court of Albania. 19 Apr. 2002. <http://www.gjk.gov.al> accessed on Web. 1 Mar. 2014.

¹²⁸ For a 2/3 majority vote of 8 judges, still 6 judges must vote in favour.

due notice of the relevant medical examinations and findings before putting the proposal to terminate the mandate of the judge concerned to the vote. Once the proposal is adopted, the President of the Court must forward the decision of the judges to the President of the Republic, who, in the capacity of appointing authority of the judges of the Constitutional Court, will terminate the mandate of the ailing judge. It is further assumed, that, immediately thereafter, the President of the Court will inform the Assembly of the termination of the mandate of the judge concerned by the President of the Republic in order for the Assembly to initiate the procedure for proposing a new judge.

Article 9 is supplemented by Rule 5 and Rule 11 of the Rules of Procedure.

Rule 5 [Resignation] of the Rules of Procedure

- 5.1 A Judge shall submit a letter of resignation to the President of the Republic of Kosovo with copies submitted to the President of the Court and to the Secretariat.**
- 5.2 The Secretariat shall immediately communicate a copy of the letter of resignation to all other Judges and to other appropriate parties.**
- 5.3 The resignation of a Judge is irrevocable and does not depend on acceptance to be effective.**
- 5.4 Unless a different date is stated in the letter of resignation, the resignation of a Judge shall become effective on the day it is submitted to the President of the Republic of Kosovo.**

A letter of resignation submitted by a judge of the Court is an official document, confirming that he/she has freely chosen to leave the Court. Resignation letters may come in different styles and forms depending on the circumstances, but should, in general, contain information about the day on which the resignation will become effective (for instance, with immediate effect or on a fixed date) and, if the judge concerned feels the need to do so, an explanation as to the reasons for the resignation. Upon this notification a vacancy will arise on the bench, depending on the date indicated in the notification.

The letter of resignation is addressed to the appointing authority, i.e. the President of Kosovo, while copies are submitted to the President of the Court and the Secretary General as Head of the Secretariat. The notification is self-executing and does not need a specific action from any of the interested parties to become effective (see Rule 5.3 hereafter).

The letter of resignation shall not only be communicated to all other judges, but also to other appropriate parties, such as, the President of the Republic and the Chairman of the Assembly of Kosovo. Notification of the President of the Republic is self-implied given the fact that the President acted as an appointing authority for the judge resigned. Therefore, the submission of the resignation letter to the President of the Republic is consistent with constitutional norms.

It is interesting to observe that Rule 5.3 does not require that the resignation of a judge be considered and voted upon by the other judges of the Court in order to become effective. The irrevocability of a decision to resign was favored by the drafters, who

were of the opinion that the resignation by a judge should be respected and should, therefore, not be examined and voted upon. The resigning judge may disclose the reasons for his/her resignation, if he/she so wishes, but under no circumstances can he/she be forced to divulge the reason for the resignation.

In other countries, such as Albania, the resignation of a judge is reviewed and voted upon in plenary session of the Constitutional Court. In Slovenia, the Assembly, as the appointing authority, will dismiss the judge on the day he/she proposed the resignation¹²⁹, while in Croatia the Assembly decides on the request of the judge to be relieved from his/her office and, if the Assembly does not act within three months after the request has been made, the mandate of the judge will be ended by virtue of the Constitutional Court Act.¹³⁰

The resigning judge may choose to include the effective date of his/her resignation, but this is not mandatory. If the judge leaves the date open, the effective date, according to the Rule, will be the day on which the letter of resignation was submitted to the appointing authority, i.e. the President of Kosovo. In case of the letter of resignation being sent by registered mail, the effective date should be the day on which the letter was received at the President's Office. If the letter of resignation was presented to the President's Office by hand, the date of presentation should be considered as the effective date.

Rule 6 [Dismissal Procedures] of the Rules of Procedure

- 6.1 A Judge of the Constitutional Court may be dismissed only on the grounds of (a) commission of a serious crime, (b) serious neglect of duties, (c) permanent loss of the ability to act, or (d) illness or any other health problem which makes it impossible to exercise the responsibilities and functions of a Judge.**
- 6.2 Dismissal may be proposed in a written document setting forth the grounds for dismissal and signed by one or more Judges and submitted to the President. Documents containing any relevant facts shall be attached to the proposed dismissal. The dismissal proposal shall be confidential and must be provided as soon as possible to all judges.**
- 6.3 The President shall inform in writing the Judge who is proposed to be dismissed regarding the grounds for the proposed dismissal and provide to the Judge the written proposed dismissal and all attached relevant facts. If the President is proposed for dismissal, the Deputy President shall provide the same notice to the President.**
- 6.4 The Judges shall convene a confidential meeting to discuss the proposed dismissal. The Judge proposed for dismissal shall have the right to be present at the confidential meeting and shall have the right to respond to the proposed dismissal, furnish any explanations or information and answer questions from the Judges.**
- 6.5 The Judges shall convene a subsequent confidential meeting at which the Judge proposed for dismissal shall be excluded. The Judges shall determine**

¹²⁹ Article 19.3 of the Constitutional Court Act of the Republic of Slovenia.

¹³⁰ Article 12 of the Constitutional Act on the Constitutional Court of the Republic of Croatia.

at this meeting whether to propose dismissal to the President of the Republic of Kosovo. The President of the Court shall preside over this meeting and the discussion of the Judges shall remain confidential. To propose dismissal to the President of the Republic of Kosovo, a 2/3 majority vote of all remaining Judges on the Court must vote affirmatively for the dismissal. The Judges shall have the right, also by a 2/3 majority vote, to impose sanctions or discipline that is less severe than dismissal if circumstances warrant.

The Rule apparently deals not only with the “dismissal” of a judge pursuant to Article 118 of the Constitution (items a) and b) of the Rule), but also mentions other grounds for dismissal, namely (c) permanent loss of the ability to act, and (d) illness or any other health problem which makes it impossible to exercise the responsibilities and functions of a judge. However, it is obvious that the dismissal procedure of Rule 6 does neither apply to item (c) “permanent loss of ability to act as determined by the competent court” (as mentioned in Article 9.1.3 of the Law), nor to item (d) “illness or any other health problem” (as mentioned in Article 9.1.4 of the Law), for the reason that they do not constitute “grounds for dismissal” mentioned in Article 118 [Dismissal] of the Constitution, but “grounds to terminate the mandate” of the judge concerned. As commented on Article 9.1.3 above, it is the task of the ordinary courts to pronounce the permanent loss of ability to act, whereas Article 9.2 contains details of the special procedure for the termination of the mandate of a judge who is suffering from an illness or other health problem. It is, therefore, suggested to correct Rule 6(1) accordingly by deleting items c) and d) from the text.

The proposal for dismissal of a judge must contain two important elements in order for the President of the Court to initiate dismissal proceedings. Firstly, it should contain a valid legal ground for justifying the proposed dismissal, meaning the grounds indicated in Article 118 of the Constitution: the commission of a serious crime or the serious neglect of duties. These grounds have already been extensively commented on above under Article 9.1.5 of the Law.

Secondly, the dismissal proposal must contain the signature of one or more judges. The question could be raised, whether the signature of only one or two judges would be sufficient to enable the President to initiate a dismissal procedure. Dismissal of a judge is a very serious matter and a dismissal proposal should, therefore, not be lightly submitted to the President, but should contain serious accusations based on relevant facts. Otherwise this procedure could be easily abused by one judge accusing another judge of serious neglect of duties without being able to submit sufficient grounds for his/her allegations. For instance, Article 10 [Removal of a Constitutional Court judge] of the Albanian Law on the Organization and Operation of the Constitutional Court stipulates that: “[...] 2. The procedure in the Assembly for removing a Constitutional Court judge for one of the reasons contemplated in item 1 of this Article¹³¹ starts upon a reasoned request [made] by not less than half of all members of the Assembly.” The Albanian requirement appears to be a much more difficult hurdle to take than the one of Rule 6.2.

¹³¹ “commission of a crime, mental or physical incapacity, or acts and behavior that seriously discredit integrity and reputation.”

The Rule further provides that documents containing any relevant facts i.e. prima facie evidence on which the grounds for dismissal should be based, are to be attached to the dismissal proposal, which is confidential and must be provided as soon as possible (by the President or the Secretary General) to all judges. Apparently, the judge who is proposed to be dismissed is not included amongst “all judges”, but will be informed separately “in writing” by the President of the dismissal proposal, pursuant to Rule 6.3 commented on hereafter.

The Rule is silent as to the time limit within which the President has to inform the judge concerned of the proposal for his/her dismissal, but for the sake of transparency and in order for the judge concerned to be able to start preparing his/her defense as soon as possible, the President needs to notify the judge concerned immediately since at the same time “all judges” will have been provided with the proposal and relevant facts attached.

Rule 6.3 is also silent on the question whether or not the judge in question should be suspended by the President during the proceedings concerning the dismissal proposal. For instance, Article 13 of the Croatian Constitutional Act on the Constitutional Court, determines that a judge may be suspended (in all cases of prior termination of his/her mandate) at the proposal made by three judges and by majority of votes of all judges (this may mean that the judge concerned could also vote). Although the Constitution and the Law on the Constitutional Court do not specifically address the circumstances upon which a judge can be suspended prior to its dismissal, it might be useful if Rules of Procedure would authorize the judges to pronounce the measure of suspension in particular in those situations when the degree and severity of the violation is so obvious. The Similar to the Croatian example, the procedure for pronouncement of the measure of dismissal can be initially requested at the proposal made by three judges and the decision can be taken by majority of votes of all judges.

The Rule finally provides that, if the proposal for dismissal is directed against the President of the Court, the written document setting forth the grounds for his/her dismissal as a judge should be submitted to the Deputy President who will “provide the same notice to the President”. The Rule is equally silent on the question whether the judges could decide to suspend the President not from performing his/her duties as a judge, but as President.

The next procedural step that can undertaken when request for dismissal is made is that the President (or, as in the case of Rule 6.3, last sentence: the Deputy President) will call for the confidential meeting to discuss the proposed dismissal, but will not do so without having first given the judge proposed for dismissal adequate time for the preparation of his/her defense. The Rule contains more elements of “fairness” by providing the judge concerned with the opportunity to be present at the confidential meeting, present oral and documentary evidence in response to the proposed dismissal, and answer questions from the judges. It is also assumed that all papers, documents, and records of the proceedings related to possible investigations conducted in connection with the dismissal procedure, will remain confidential and will not be disclosed by any person at any time and in any proceedings, except as provided for by law.

It is also results that also in the circumstances of Rule 6.5 the President of the Court will convene the subsequent confidential meeting and that, if the President is proposed

for dismissal, the Deputy President shall convene the meeting and preside over it. Taking into account that the judge proposed for dismissal is excluded from this meeting and that, as a consequence, there will be only 8 remaining judges present, it will be somewhat difficult, although not impossible, to use the concept of a “2/3 majority vote of all remaining judges on the Court”. Since a 2/3 majority of 8 judges means more than 5 judges, a majority of 6 judges is needed to vote affirmatively for the dismissal.¹³²

It is also important to note that the Rule enables the members of the Court to pronounce less severe measures than dismissal “if circumstances warrant”, although neither the Constitution, nor the Law on the Constitutional Court provides for the pronouncement of these measures. It is, therefore, not directly clear what kind of sanctions or discipline “less severe than dismissal” are meant. However, although the purpose of such a Rule may be laudable, the question could arise whether the affirmative vote for the dismissal of a judge could be watered down by way of Rules of Procedure to the imposition of less severe sanctions or discipline.

Of course, there may be circumstances, for instance, in which a judge, whose conduct was defined by the initial dismissal proposal as “serious neglect of duties”, was able to convince the other judges in the first confidential meeting of judges, that his/her alleged neglect of duties could not be qualified as “serious”. In such a case, a less severe sanction may be justified. But once the judges have decided that the judge proposed for dismissal has committed a serious crime or has seriously neglected his/her duties”, the only sanction to be proposed to the President of the Republic is dismissal, in accordance with Article 118 of the Constitution.

As noted earlier in this Commentary, the Constitutional Court has adopted its Code of Conduct (similar to the one elaborated by the Kosovo Judicial Council¹³³) the relevant provisions of which could be taken into account by the judges, when considering a proposal for dismissal. A Code of Conduct provides guidance to the judges on a range of other issues, from integrity, judicial independence, diligence and impartiality, to permissible extra-judicial activities and the avoidance of improper behaviour or the appearance thereof. It should be added that the dismissal of a judge does not invalidate the acts and decisions in which he/she participated. Moreover, the 2/3 majority vote of the judges must be considered final and conclusive and not judicially reviewable or otherwise.

Finally, it should be mentioned that the Rule is silent on the question whether the President of the Republic, to whom the dismissal of the judge concerned is proposed, is obliged to follow that proposal in all circumstances. In this respect, reference should be made to Article 118 of the Constitution, which clearly stipulates that judges of the Constitutional Court “*may*” be dismissed by the President. This seems to leave the latter a certain margin of appreciation, although it is not immediately clear whether the President would be authorized under Article 118 to impose an alternative sanction. What might be an option, is that, instead of being dismissed by the President, the latter would invite the judge concerned to resign from his functions as a judge of the Constitutional Court.

¹³² See also comments on Article 9.4 above.

¹³³ This Code of Conduct was adopted by the Kosovo Judicial Council on 25 April 2006.

Rule 11 [Resignation of President or Deputy President] of the Rules of Procedure

- 11.1 The President shall submit a letter of resignation as President to the Deputy President and to the Secretariat. The Deputy President shall submit a letter of resignation as Deputy President to the President and to the Secretariat.**
- 11.2 In either case the Secretariat, shall immediately communicate a copy of the letter of resignation to all other Judges and to other appropriate parties.**
- 11.3 The resignation shall be effective on the date indicated in the letter of resignation, or if no date is indicated, the resignation shall be effective immediately. The resignation shall not be dependent on acceptance.**
- 11.4 The interim administration of the Court and the election of a new President or Deputy President shall occur in accordance with the terms of Rule 10.**

It is unclear why the election and resignation of the President and Deputy President of the Court are not dealt with in the Law, which, in its Article 11 [President and Deputy President] only mentions their duties. It is, in fact, Article 114.5 of the Constitution, which deals with details of the election to these offices: *“The President and Deputy President of the Constitutional Court shall be elected from the judges of the Constitutional Court by a secret ballot of the judges of the Court for a term of three (3) years. Election to these offices shall not extend the regular mandate of the judge.”*

The Rules of Procedure make a distinction between the resignation of a judge and the resignation of the President or Deputy President of the Constitutional Court, although the procedure for the submission of resignation as provided in Rule 11 of the Rules of Procedure bears striking similarities with the process of the resignation of judges provided in Rule 5 of the Rules of Procedure. To ensure continuity in the administration of the Court, Rule 10.2 of the Rules of Procedure determines that “the President of the Court, if still a Judge and when possible, shall continue to exercise the functions of the President until a new President has been elected and has taken office.”¹³⁴

In case of an immediate vacancy in the office of President, the election for President shall be held as soon as possible, and the Deputy President shall serve as interim President until the effective date of the new President’s term. If there is no Deputy President, the most senior Judge on the Court shall serve as interim President. If one or more Judges on the Court have equal seniority with the Court, then the oldest judge shall be considered the most senior Judge for purposes of this Rule”.¹³⁵

See comments on Rule 5.2 above.

See comments on Rule 5.4 above.

Article 10 [Duties of judges]

- 10.1 The judges of the Constitutional Court are obliged to perform their functions with conscience and impartiality, to decide with their own free will in compliance with the Constitution.**

¹³⁴ See comments on Rule 10 above.

¹³⁵ Art.11, Rules of Procedure.

10.2 Judges of the Constitutional Court are obliged to preserve the reputation and dignity of the Constitutional Court.

10.3 Each judge is obliged to participate in the work and decision-making process of the Court, and to perform any other duties as defined in this Law and Rules of Procedure.

The core of the concept of judicial independence is the principle of impartiality. This principle is not a prerogative or a privilege in the interest of judges, but in the interest of the rule of law and of those seeking and expecting justice.¹³⁶ As the Consultative Council of European Judges has stated in its opinion in 2001 reflecting on the independence of the judges and requirement for their impartiality:

“Judicial independence presupposes total impartiality on the part of judges. When adjudicating between any parties, judges must be impartial, that is free from any connection, inclination or bias, which affects - or may be seen as affecting - their ability to adjudicate independently. In this regard, judicial independence is an elaboration of the fundamental principle that “no man may be judge in his own cause”. This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined”¹³⁷

It should be noted that, at the European level, the issue of the independence of courts is linked with the right to an independent and impartial tribunal guaranteed by Art. 6 of the ECHR, which provides that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]”.

One of the most relevant legal instruments on the independence of judges at the European level (except for the European Convention on Human Rights and Fundamental Freedoms) is Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe to Member States on independence, efficiency and role of judges, adopted on 13 October 1994. The Recommendation provides, inter alia, that “*in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the*

¹³⁶ Venice Commission Report on comments on constitutional amendments reforming the judicial system in Bulgaria available at [http://venice.coe.int/docs/2003/CDL\(2003\)060-e.asp](http://venice.coe.int/docs/2003/CDL(2003)060-e.asp).

¹³⁷ Consultative Council of European Judges, Council of Europe, “on standards concerning the independence of the judiciary and the irremovability of judges” (2001), CCJE 200123 November 2001. The document can be accessed at http://coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%201_EN.pdf.

prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."¹³⁸

Not less important is Opinion No. 1 of the Consultative Council of European Judges (CCEJ) on standards concerning the independence of the judiciary and the irremovability of judges¹³⁹ as well as the European Charter on the Statute of Judges¹⁴⁰ which was approved at a multilateral meeting organized by the Directorate of Legal Affairs of the Council of Europe in Strasbourg in July 1998. These European legal instruments provide a set of legal guarantees, ensuring the independence and impartiality of judges.

As to Article 10.1 of the Law, it contains important elements for the development of an appropriate system of constitutional control. Constitutional control is very important, since it addresses fundamental aspects of the administration of justice, while, at the same time, it represents the final stage in the administration of justice. Therefore, it is very important that during the process of constitutional control and the settlement of constitutional disputes, factors such as impartiality and free conviction of the judge are given due care.

Certainly, a practical, but at the same time significant requirement is the one of external impartiality. This means that Constitutional Court decisions should not be influenced by personal or private interests, political or any other external factors. Moreover, the constitutional judges must avoid any external situation which may diminish or be seen to diminish their impartiality or endanger their objectivity, when resolving a constitutional issue. In this regard, it is important to emphasize the legal *adagio* related to the impartiality test "justice must not only be done: it must be seen to be done". Legal theory and practice recognize two tests to measure the impartiality of a judge: the so-called subjective and the objective test of impartiality in a judicial process.¹⁴¹

The subjective test consists of endeavouring to ascertain the personal conviction of a given judge in a given case. It is, of course, notoriously difficult to substantiate allegations of actual bias of a judge and the European Court of Human Rights has made it clear that personal impartiality is to be presumed until proof to the contrary.¹⁴²

Although the nature of constitutional control is somewhat specific and differs from ordinary trials, the observation of these standards is important for the European Court, which has assessed the impartiality principle in a number of cases. In the case *Saraiva de Carvalho v. Portugal*, it has elaborated the impartiality test by stating that:

"the existence of impartiality for the purposes of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a

¹³⁸ Recommendation No. (94) 12. of the Committee of Ministers to Member States on independence, efficiency and role of judges. The Recommendation was adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

¹³⁹ *Opinion No. 1 of the Consultative Council of European Judges is available online at CCEJ* http://venice.coe.int/site/main/texts/JD_docs/CCJE_Opinion_1_E.htm.

¹⁴⁰ The Charter is available at http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf.

¹⁴¹ See more on the impartiality of judges, Thomas, Clarence. "Judging." U. Kan. L. Rev. 45 (1996): 1; Voeten, Erik. "The impartiality of international judges: Evidence from the European Court of Human Rights." American Political Science Review 102.04 (2008): 417-433; Kaufman, Irving R. "The Essence of Judicial Independence." Columbia Law Review (1980): 671-701;

¹⁴² Luzius Wildhaber "Judicial Impartiality Under the European Convention on Human Rights", a working paper available online at <http://www.concourt.am/hr/ccl/vestnik/2.12-2001/wildhaber-eng.htm>. (accessed on 03 June 2014).

particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.”¹⁴³

The avoidance of situations that could constitute potential conflicts of interest in cases that are being reviewed and adjudicated is an important aspect of the impartiality of judges of the Constitutional Court. The purpose is to prevent judges from taking part in the resolution of cases, when there are legal reasons compromising their impartiality and to avoid any behaviour that may put into question the fundamentals of the administration of justice or diminish their dignity.

Article 18 [Exclusion of a judge] of the Law deals, in particular, with the exclusion of a judge from the proceedings before the Court, *ex officio*, upon the request of a party or of the judge concerned, when he/she has some involvement in a case which is subject to review by the Constitutional Court. This Article will be commented on in detail hereafter.

With this broad and comprehensive provision, the legislature may have wished to show the importance of maintaining the reputation and dignity of the judges of the Constitutional Court during the process of constitutional control. Maintaining their dignity, reputation and integrity is a very important aspect of their work. In carrying out their functions, judges should be guided by the principle that the reputation and dignity of the Court must be preserved at all times. Such conduct applies not only during working hours, but also during private activities, which should be arranged in such a way that potential conflicts with his or her judicial duties would be avoided or, at least, reduced to a minimum. In other words, the image of a constitutional court judge must be that of a person who inspires confidence, respects the law and the Constitution and enhances the rule of law.

As the European Charter on the Status of Judges provides: “judges must show, in discharging their duties, availability, respect for individuals, and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion - decisions on which depend the guarantee of individual rights and in preserving the secrecy of information which is entrusted to them in the course of proceedings.”¹⁴⁴ The European Charter further provides that “judges must therefore refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence.”¹⁴⁵

As mentioned above, the Constitutional Court has adopted its own Code of Conduct, the existence of which is mentioned in Rule 12 [Functions of the President], (1) (g) of the Rules of Procedure, providing that: “[the President shall] ensure compliance with the Code of Conduct and maintain order within the premises and during proceedings of the Court”. Rule 12 is commented on in detail hereafter, when Article 11 [President and Deputy President] is being discussed.

The Article seems to refer first to the duties of each judge in the constitutional adjudication of referrals submitted under Article 113 [Jurisdiction and Authorized Parties] of the Constitution, like, for instance, acting as Judge Rapporteur or Member

¹⁴³ Saraiva de Carvalho v Portugal (Application No. 15651/89 decided on 23 March 1994).

¹⁴⁴ The Council of Europe's European Charter on the Statute for Judges, (*supra* note 78).

¹⁴⁵ *Ibid.*, art. 4, para. 3.

of a Review Panel; participating in oral hearings; voting for or against the admissibility and merits of constitutional complaints; preserving confidentiality of the deliberations. Furthermore, judges of the Court perform other duties, like the election of the President and Deputy President; the appointment of the Secretary General and Chief Legal Advisor; participating, pursuant to Rule 14 of the Rules of Procedure (which supplements Article 10.3 of the Law), in administrative sessions (see comments hereafter); representing the Court at official events in- and outside Kosovo; participating in outreach programs; teaching at university and other institutions of public and private education.

Article 11 [President and Deputy President]

11.1 The President of the Constitutional Court shall:

- 1.1 coordinate activities of the Constitutional Court and the work of judges of the Constitutional Court;**
- 1.2 summon and chair sessions of the Constitutional Court;**
- 1.3 represent the Constitutional Court;**
- 1.4 sign acts of the Constitutional Court;**
- 1.5 perform other duties defined in this Law or in Rules of Procedure of the Constitutional Court.**

11.2 The Deputy President of the Constitutional Court shall perform the duties of the President of the Constitutional Court when the latter is absent or for any reason is unable to perform his/her duties. The President of the Constitutional Court may delegate to the Deputy President certain duties to support the President in performing his/her duties.

It has to be emphasized that the Law, instead of what might have been expected, does not regulate the election of the President and Deputy President of the Court. Only Article 114 [Composition and Mandate of the Constitutional Court], paragraph 5, of the Constitution determines that “The President and Deputy President of the Constitutional Court shall be elected from the judges of the Constitutional Court by a secret ballot of the judges of the Court for a term of three (3) years. Election to these offices shall not extend the regular mandate of the judge.” The Article does not define who will conduct the election of the first President and Deputy President of the Court. Moreover, since the first judges on the Court have all equal seniority, the only reasonable solution for the election of President is that the most senior judge in age should conduct the election. As soon as the President has been elected, he/she can conduct the election of the Deputy President.

It is interesting to note that, when the drafters of the Constitution needed to clarify the dilemma whether or not the election of a judge to the office of President or Deputy President of the Constitutional Court would imply the beginning of a new judicial mandate, they choose the rule laid down in Article 114.5 of the Constitution, which clearly determines that the election to the offices of President and Deputy President shall not extend the regular mandate of the judge.

As to the question whether the appointment of President of the Cassation Court implied the extension of the judicial mandate of the judge concerned, the Constitutional Court

of Albania concluded, in its interpretative Decision no. 51/99 dated 30 July 1999, that “the concrete constitutional provision does not separate the mandate of the judge from the mandate of the President of this Court, instead it unifies them”. According to this constitutional provision, the mandate of the member, Deputy President and the President of the Court of Cassation, are unified in the mandate of the judge. It is exactly the basic capacity of a judge of the Court of Cassation from which the function of a Deputy President and President of this Court derives.”¹⁴⁶ According to the same principle, the election to the office of the President/Deputy President of the Constitutional Court must not be interpreted as the commencement of a new mandate for the judge of the Constitutional Court, as laid down in Article 114.5 of the Constitution.

The election procedure mentioned in Article 114.5 of the Constitution is also used in, for instance, Bulgaria, Croatia, Hungary, Macedonia, Slovenia and Turkey.¹⁴⁷ In Albania, however, the President of the Constitutional Court is appointed, from among its ranks, by the President of the Republic with the consent of the Assembly for a three-year term.¹⁴⁸

More details about the election of the President and Deputy President of the Court are to be found in Rule 10 [Election of President and Deputy President] of the Rules of Procedure.¹⁴⁹

What is the “position” of President of the Constitutional Court amongst the other judges of the Court? When reading the relevant provisions of the Law and the Rules of Procedure, it emerges that the legal status of constitutional court judges is, in principle, that of equality. As stated in a report of the Venice Commission for Democracy through Law¹⁵⁰, the President of the Constitutional Court is usually a *primus inter pares*, who directs the institution of the Constitutional Court, but who does, in principle, not exercise jurisdictional functions which are higher than that of other judges.

Moreover, Rule 4(2) of the Rules of Procedure provides that “unless otherwise provided in these Rules, the Judges, in the exercise of their responsibilities, are of equal status, regardless of age, priority of appointment, length of service or duration of mandate”. The status of equality is, however, without prejudice to the powers of the President and the Deputy President of the Court as regulated by the Law and the Rules of Procedure.

Pursuant to Article 11.1.1, the President of the Constitutional Court is in charge of coordinating the activities of the Court and the work of the judges. Such activities consist of, inter alia: scheduling the sessions and establishing the agenda; scheduling oral hearings; appointing the Judges Rapporteur and members of the Review Panels in referrals submitted to the Court; and giving instructions to the Secretary General. Such activities by the President are meant to ensure the effective functioning of the Court.

¹⁴⁶ Shehu vs President of the Republic of Albania No. 51/99. Constitutional Court of Albania. 30 July 1999. <http://www.gjk.gov.al/>. Accessed on Web. 02 Oct. 2013.

¹⁴⁷ See Report of the Venice Commission, (supra note 14).

¹⁴⁸ See Law on the Constitutional Court of Albania, Art. 7 para. 4. The Law is available at http://www.gjk.gov.al/web/ligji_per_organizimin_dhe_funksionimin_e_gjykates_kushtetues_82.pdf.

¹⁴⁹ See comments on Rule 10 above.

¹⁵⁰ See Report of the Venice Commission, (supra note 14).

According to the provision of Article 11.1.2, the President is also tasked to summon and chair the judicial sessions (oral hearings and deliberations) and administrative sessions of the Court. As to oral hearings, the President ensures the correctness of the proceedings and maintains the order at the hearing. Furthermore, he/she opens and closes the hearing and is responsible for its proper conduct. The President also ascertains the attendance of the parties and their representatives, if any and the measures he/she can take, if they don't.¹⁵¹ At the deliberations of the Court, the judges discuss the outcome of the oral hearings and the Preliminary Reports of Judges Rapporteur and Review Panels and take the decisions.

It should be added that upon application of any of the parties, the President may postpone a hearing, if the party shows that it is prevented from appearing at the hearing for an important reason¹⁵² or that there is no quorum. However, when the President grants a request for postponement of the hearing, he may order that the requesting party pays the costs which that party has caused the other party or parties to incur.¹⁵³

In addition to oral hearings, the President is also entitled to summon and chair administrative sessions of the Court, which, pursuant to Rule 14, are called by the President at least twice yearly or upon the written request of any Judge or the Secretariat¹⁵⁴ (see for detailed comments on Rule 14 [Administrative Sessions] Rules of Procedure.

To represent the Constitutional Court, as laid down in Article of 11.1.3 is, of course, a typical task for the President of the Court. In this connection, Rule 21 [Domestic and International Cooperation], paragraph 1, of the Rules of Procedure determines a number of specific circumstances, where the President will represent and direct the Court, namely, when it establishes and maintains cooperation with the Kosovo institutions (Presidency, Assembly, Government, Supreme Court and other courts, Ombudsperson, institutions of local self-government and other public entities), foreign constitutional courts¹⁵⁵, and domestic and international organizations active in the rule of law area¹⁵⁶.

Furthermore, the President represents the Court in its daily relations with the above institutions, as well as with the media. However, the President is equally responsible for preserving the independence of the Court, laid down in the Constitution and the Law, in all circumstances. In the field of domestic and international cooperation, Rule 21.2 clearly stipulates that “*Cooperation [by the Court] shall be conducted in a manner that preserves the independence of the Court as mandated by the Constitution of the Republic of Kosovo.*”

Finally, it should be mentioned that the President represents the Court at the solemn inauguration of each Judicial Year, in the presence of the Presidents of other constitutional courts and high-ranking Kosovo and international authorities, and in the outreach programs organized by the Court.

¹⁵¹ Rule 43.1 of the Rules of Procedure.

¹⁵² Rule 42.2 of the Rules of Procedure.

¹⁵³ Rule 42.2 of the Rules of Procedure.

¹⁵⁴ Rule 14.2 of the Rules of Procedure.

¹⁵⁵ See for details the Annual Reports of the Constitutional Court.

¹⁵⁶ East West Management Institute (EWMI); United Kingdom Department for International Development (DIFID); International Civilian Office (ICO); Deutsches Gesellschaft fuer internationale Zusammenarbeit (GIZ); and the German Foundation for International Legal Cooperation (IRZ Foundation).

A further task of the President is to sign acts of the Constitutional Court (Article 11.1.4), for instance, resolutions on inadmissibility, judgments, decisions on interim measures, clarifications, and other Court decisions, but also decisions taken at administrative sessions on Court policies, nomination of legal advisors and the Secretary General, the Annual Budget (pursuant to the Law on Public Financial Management and Accountability) and Annual Report, Minutes of Court sessions after adoption by the judges and other matters mentioned in Rule 14 [Administrative Sessions] commented on above.

Finally, the President shall also perform other duties defined in this Law or in the Rules of Procedure (Article 11.1.5). In this connection, reference is made, in particular, to Rule 12 [Functions of the President] of the Rules of Procedure, which, together with Rule 14, supplements Article 11 of the Law in certain aspects.

Article 11.2 apparently refers to the primary responsibility of the Deputy President, which is to serve as interim President in all events, where the President is unable to perform his/her duties, pursuant to the provisions of Article 9 above. The Deputy President will assume all functions and powers of the President discussed and commented on above, without exception.

The President may also delegate the exercise of a certain duty or part of a certain duty, conferred to him under the Law and the Rules of Procedure, to the Deputy President, subject to such conditions and restrictions as may be specified in such delegation. However, the delegation of such a duty to the Deputy President does not remove the responsibility of the President for that duty. Since the Law does not provide any restriction on the nature of the duties to be delegated, the President is entitled to delegate whatever function he/she deems fit. For instance, the Deputy President may assume duties of the President, such as being present at official events that the President may be too busy to attend, but also to chair the deliberations of the Court, whenever the President has to step out for a short period of time. The President may resume his or her duties by notifying the Deputy President and the other judges of the Court, that the reasons that prevented him/her from exercising such duties have ceased to exist.

Article 11 is supplemented by Rules 10 and 12 of the Rules of Procedure.

Rule 10 [Election of President and Deputy President] of the Rules of Procedure

- 10.1 The President and Deputy President of the Court shall be elected by the Judges of the Court and the terms of office shall commence on the effective date stated in the election decision of the Court.**
- 10.2 The election for President and the election for Deputy President shall be held one month prior to the expiration of the term of the incumbent President or the incumbent Deputy President. The President of the Court, if still a Judge and when possible, shall continue to exercise the functions of the President until a new President has been elected and has taken office. In case of an immediate vacancy in the office of President, the election for President shall be held as soon as possible, and the Deputy President shall serve as interim President until the effective date of the new President's term. If there is no Deputy President, the most senior Judge on the Court**

shall serve as interim President. If one or more Judges on the Court have equal seniority with the Court, then the oldest judge shall be considered the most senior Judge for purposes of this Rule.

- 10.3 The President shall conduct the election of a President and Deputy President. If the President is no longer a Judge or is unable to act, the Deputy President shall conduct the elections. If the Deputy President is no longer a Judge or unable to act, the most senior Judge shall conduct the elections.**
- 10.4 The elections for President and for Deputy President shall be held separately, in the same manner, and shall be by secret ballot. All Judges must be given sufficient notice of the election in order to participate in the elections. At least seven Judges shall be present at the meeting at which the elections are conducted. A Judge obtaining the majority of all Judges participating and voting in the election shall be declared elected and the Court shall determine the date the Judge assumes the responsibilities of the position.**
- 10.5 In case no Judge receives a majority after three ballots, the Judges shall choose between the two Judges receiving the highest number of votes, and the Judge receiving the most votes on the fourth ballot shall be elected. In determining whether a Judge has received a majority of the votes, only the votes for the two final candidates shall be counted. If, on the third ballot, three Judges each receive three votes, the final two candidates shall be determined by drawing lots. If, on the fourth ballot, no Judge receives a majority of the vote, the election shall be determined by drawing lots.**

The Rule does not specify the duration of the term of office of the President and Deputy President, which, pursuant to Article 114.5 of the Constitution, is three (3) years, but could be shorter, if their mandate as a judge concerned terminates at an earlier date. The election of the current President, Prof. Dr. Enver Hasani, took place on 14 June 2009 and his term of office commenced on the same day. On 14 May 2012, one month prior to the expiration of his term as President (see Rule 11.2), he was re-elected for a further term of 3 years.

Several scenario's for the election of President and Deputy President are dealt with in the Rule:

1. the election for President and Deputy President shall be held one month prior to the expiration of their mandates as President and Deputy President;
2. if the term of the President expires, but not his/her mandate as judge, he/she will continue as President after the election of the new President, until the new President has taken office. It is worth mentioning that the Rule does not prohibit the renewal of the President's mandate for another term. Furthermore, it is unclear for what reason the same procedure for the Deputy President is not mentioned. Both procedures may be understood to be implied in Rule 10.2;
3. if the President/Deputy President's term as a judge expires, the election of the new President/Deputy President should be held one month prior to the expiration of their term as a judge. The procedure may be understood to be implied in Rule 10.2;

4. if there is an immediate vacancy in the office of President, by virtue of Article 9 [Prior termination of the mandate]: resignation and death, or the President is absent due to a permanent ability or health issue, the Deputy President will act as interim President, until a new President has been elected and has taken office (“until the effective date of the new President’s term”). If the ability and health issue are of a temporary nature, it is assumed that the Deputy President will act as interim President, until the President returns;
5. if the term of the Deputy President expires while acting as interim President, the election of Deputy President should be held one month prior to the expiration of his/her term. If not re-elected, the Deputy President will continue as interim President until the expiration of his/her normal term as Deputy President or until an earlier date, if a new President is elected. If re-elected, he/she will continue to act as interim President, until a new President is elected and has taken office;
6. if the term of the Deputy President, who is acting as interim President, expires as a judge, the election of the new Deputy President should be held one month prior to the expiration of his/her term as a judge. The new Deputy President shall serve as interim President, until a new President is elected and has taken office;
7. if there is no Deputy President, the most senior judge will serve as interim President and conduct the election of a new President. If the term of the most senior judge expires, the next oldest judge shall serve interim President until a new President is elected.
8. if one or more judges on the Court have equal seniority with the Court, then the oldest judge shall be considered the most senior judge for purposes of Rule 10.

The Rule simply provides that the President will conduct the election for President and Deputy President. Obviously, these elections will not take place at the same time. Pursuant to Rule 10(4) (see comments above), stipulating that “*The elections for President and Deputy President shall be held separately*, “ the President will first conduct the election for President and thereafter the one for Deputy President.

The Rule further provides that in case the President is no longer a judge or is unable to act, the Deputy President shall conduct the elections. However, it is more logical that, since the date of the expiration of the mandate as judge is clearly known, the election for President will be conducted one month prior to the expiration of the mandate as judge. The scenario of Rule 10.3 that the President is no longer a judge and that the Deputy President would conduct the election for President, may, therefore, not occur.

Although not expressly mentioned by the Rule, it is assumed that, since the elections of the new President and Deputy President shall be held separately, the elections of the President will take place first. As soon as the new President has taken office, he/she will conduct the elections of Deputy President. For the elections of a new President and Deputy President to take place, the normal quorum of 7 judges is mandatory. The secret ballot will of course enable the Judges of the Constitutional Court to ensure a sincere choice by preventing any attempts of influencing the voting procedure.

According to the Rule, the judge who obtains the majority of votes of the seven or more judges present and voting shall commence his/her mandate of President or Deputy President as determined by the Court. A similar rule is provided for in Rule 10.1, as commented on above. The date will normally be the day after the mandate of the incumbent President or Deputy President expires. If the incumbent President or

Deputy President is re-elected, the new mandate will simply commence after the expiration of the present one.

If at least seven judges are present and voting, the final result will be reached more easily and the drawing of lots will not be necessary, since, at most, three rounds will be necessary. In case there are 8 judges present and voting, and two judges will end up in the fourth round with 4 votes each, the drawing of lots will be necessary.

Rule 12 [Functions of the President] of the Rules of Procedure

12.1 In addition to the functions provided by the Constitution and the Law on the Constitutional Court and other provisions in these Rules, the President shall:

- (a) take all necessary and appropriate measures to ensure the efficient and effective functioning of the Court;**
- (b) coordinate the work of the Judges, and summon judicial and administrative sessions of the Court;**
- (c) coordinate and supervise the administration of all Court activities;**
- (d) represent the Court and establish and ensure cooperation with other institutions and public authorities at national and international level;**
- (e) establish working groups to discuss and make recommendations on subjects which warrant wide or interdisciplinary consideration;**
- (f) preside over all judicial and administrative meetings of the Court;**
- (g) ensure compliance with the Code of Conduct and maintain order within the premises and during proceedings of the Court;**
- (h) inform all Judges of all ongoing and forthcoming issues, processes and actions related to the Court.**

12.2 The Deputy President shall perform the duties of the President when the President is absent or for any other reason is unable to perform the duties of President.

12.3 The President may delegate duties and responsibilities to the Deputy President or to other Judges.

The Rule overlaps partly the provisions of Article 11 of the Law. Where it does, the pertinent provision of the Rule will not be commented on; only reference will be made to the corresponding provisions of Article 11.

Rule 12.1 (a) mainly repeats the contents of Article 11.1.1 and will not be commented on further.

As to Rule 12.1 (b), see comments on Articles 11.1.1 and 11.1.2 of the Law above.

These tasks under Rule 12.1 (c) belong clearly to the daily work of the President and may consist mostly in running the Court from an administrative point of view with the assistance of the Secretary General of the Court who directly reports to him/her, pursuant to Article 12 [Secretariat] of the Law and Rule 16 [Secretary General] of the Rules of Procedure.

As to Rule 12.1 (d), see comments on Article 11.1.3 of the Law above.

It is not entirely clear how to interpret “wide or interdisciplinary consideration” under Rule 12.1 (e). The idea may be to compose working groups composed of judges and,

possibly, the Secretary General and one or more legal advisers, to advise the Court on certain issues which are interdisciplinary in nature. Since the establishment of the Court, several working groups have already been established, consisting of one or more judges and one or more legal advisers, one of which drafted a proposal for a Legal Unit within the Court and another which revised the Referral Form and drafted Guidelines for how to reply to the different questions contained in the Referral Form.

As to Rule 12.1 (f), see comments on Article 11.1(2) of the Law above.

In 2011, the Secretariat drafted a Code of Ethics for the staff of the Court. The Code of Ethics is based on the Code of Conduct for Civil Servants of the Kosovo institutions, since, by virtue of Rule 17 [Staffing of the Secretariat], paragraph 2, the staff of the Secretariat are civil servants. Furthermore, the requirement for the Secretariat to have such a Code stems from Article 17.4, providing that “All staff hired by the Secretariat must take an oath to comply with the Code of Ethics.”

Furthermore, in 2013 the Judges adopted the “Code of Judicial Conduct” taking into consideration the important responsibilities entrusted to the Court in the Constitution of the Republic of Kosovo and, thus, adopted these principles to guide and govern their judicial conduct. As laid down in this Code, the purpose of these principles is to protect and to enhance public confidence in the independence and impartiality of the Court, and to provide guidance to the Judges in exercising their responsibilities.

As to the further duties of the President, it is important to mention the one to maintain order within the premises of the Court, which may not be as easy as it sounds, since the Court does not have a its own security apparatus/Court Police. The Court has indeed special policemen in charge of guarding the entrances to the Court’s compound, but no court police in charge of maintaining order within the court building, in particular during oral hearings of the Court held in the courtroom at the second floor of the building. In this connections, reference may be made to Rule 41 [Participation in Hearings] providing that the President may warn any party, representative, witness or other hearing participant that his/her behaviour is unacceptable and order discipline to be imposed, including the imposition of a fine or exclusion from the hearing. Without a proper court police, it will be difficult for the President to “order discipline” at a hearing.

Based on the principles of collegiality, equal status and transparency (Rule 12.1 (h)), it is obvious that the President needs to inform the other judges at the administrative sessions of whatever issue, processes, actions and activities which relate to the Court in order to ensure that they can exercise their responsibilities in the full knowledge of all relevant Court matters.

The wording of Rule 12.2 is identical to the wording of Article 11.2 and, therefore, does not need to be commented on separately.

The President is apparently empowered by Rule 12.3 to delegate any duty or responsibility not only to the Deputy President, but also to any other judge of the Constitutional Court.

3. Administration of the Constitutional Court

Article 12 [Secretariat]

- 12.1 The Constitutional Court shall have its Secretariat which shall be chaired by the Secretary General of the Constitutional Court.**
- 12.2 The Secretariat performs administrative works and is obliged to support the work of the Constitutional Court. The Secretariat:**
 - 1.1 receives and sends all documents and other official communications;**
 - 1.2 maintains the registry of the Court;**
 - 1.3 ensures recording as defined in the Law;**
 - 1.4 prepares transcripts and minutes;**
 - 1.5 performs public information works and replies to request for information about the work of the Constitutional Court;**
 - 1.6 keeps the stamp of the Constitutional Court; and**
 - 1.7 performs other works as defined in the Law and Rules of Procedure of the Constitutional Court.**
- 12.3 The organization and the work of the Secretariat shall be further regulated by the Rules of Procedure.**
- 12.4 The Secretary General is responsible for the organization and administration of the Secretariat. The Secretary General is elected and appointed by judges of the Constitutional Court with a simple majority vote. Details about election, appointment, terms of work and salary of the Secretary General shall be defined in the Rules of Procedure of the Constitutional Court. The Secretary General reports to the President of the Constitutional Court and shall be accountable for his/her work to all the judges of the Constitutional Court.**
- 12.5 The Secretary General appoints and dismisses employees of the Secretariat in compliance with the applicable law on civil service. Legal provisions foreseen for civil servants shall apply for employees of the Secretariat.**

The Secretariat constitutes the administrative and executive office of the Constitutional Court and is chaired by the Secretary General. It is interesting to note that, when the status and scope of the Secretariat of the Court was discussed among the members of the Working Group, there was a dilemma as to the name and the competences of the Secretariat. In particular, the opinions were divided as to whether the Secretariat should be competent to review the admissibility of a referral. Given the model upon which the administration of the European constitutional courts is based and taking into consideration the advice of international experts, the drafters of the Law decided to establish initially an Interim Secretariat which would then be replaced by a permanent Secretariat chaired by a Secretary General to be appointed by a majority vote of the judges of the Constitutional Court. The establishment of the Interim Secretariat has been laid down in Article 57 [Interim Secretariat of the Constitutional Court] of Chapter IV [Final and Transitional Provisions] of the Law (see comments on Article 57 hereafter).

The Secretariat is the engine and administrative support of the Court. Without it, the Court would not be able to function and if performing poorly, the Court would not be able to function properly. It is, therefore, of utmost importance for the Court that it can rely on a Secretariat which fulfils its duties impeccably under the chairmanship of an excellent Secretary General.

The scope of receiving and sending all official communications is certainly very broad: it may range from outgoing Court acts (Reports on Inadmissibility, Judgments and other decisions) for publication in the Official Gazette of the Republic of Kosovo to the issuing of summons for oral hearings and the dispatching of mail and other correspondence to parties in the proceedings before the Court as well as the circulation of official communications inside the Court.

However, the role of the Secretariat is not only administrative and technical. With respect to the itinerary which a constitutional referral follows within the Court, pursuant to the Law and the Rules of Procedure, the Secretariat plays an important role in its processing. According to Article 22 of the Law [Processing Referrals], the Secretariat is a connecting mechanism which interacts between the applicant on the one hand and the judges of the Constitutional Court on the other hand. It is indeed the Secretariat which puts in motion the process of constitutional review upon the registration of a referral in the register of the Constitutional Court according to its order of submission and it forwards copies of the referral to the opposing party and other interested parties or participants in the procedure for comments.

But the role of the Secretariat does not end at this stage of the proceedings. Since Article 22 of the Law has reserved to the opposing party or participant the right to reply to a referral within forty-five (45) days from the reception of the referral, the Secretariat forwards to the Judge Rapporteur, who is assigned by the President of the Court to prepare a Preliminary Report (on facts, admissibility and grounds of the referral), a copy of the referral and, thereafter, the reply to the referral, as soon as it is received (see detailed comments on Article 22 of the Law hereafter).

However, it should be pointed out that neither the Law nor the Rules of Procedure has vested the Secretariat with the competence to decide on the admissibility of a referral as is the case with the State Council in Greece and the Supreme Courts in Ireland and Luxemburg, where a filtering mechanism by the Secretariat regarding the admissibility of constitutional complaints exist.¹⁵⁷ When it comes to the preliminary assessment of the admissibility of a referral in the Kosovo context, the Rules of Procedure provide that the Secretariat shall register a referral only, when all necessary documents are filed. It may, thus, advise the Applicant to refrain from the submission of a referral, in the event that the referral is incomplete or even that it is evidently and undoubtedly inadmissible, and explain to the parties the reasons for that.¹⁵⁸ This task is normally performed by members (Legal Advisors and Legal Researchers) of the Court's Legal Unit (see comments on Article 13 [Legal Advisors] of the Law. However, if the party insists, the complaint will be registered.

¹⁵⁷ The Venice Commission Working Paper: "Statute and Functions of General Secretary of Constitutional Courts and equivalent bodies". The paper is available at [http://www.venice.coe.int/docs/2004/CDL-JU\(2004\)034-e.asp](http://www.venice.coe.int/docs/2004/CDL-JU(2004)034-e.asp). (accessed on 3 June 2014).

¹⁵⁸ Rule 30.1 of the Rules of Procedure.

Furthermore, the Secretariat will process official communications addressed to public institutions in Kosovo and, whenever necessary, prepare draft letters to be signed by the President, the Secretary General or a judge. Official communications to and from foreign addressees may concern correspondence between the President of the Court and his colleagues of constitutional courts of other countries.¹⁵⁹

Although Article 12.2.2 is silent on the issue, it is assumed that the registry mentioned here, means the registry for referrals. Apart from this registry, the Secretariat certainly keeps an additional registry where all other incoming and outgoing communications are registered. In the registry for referrals, the Secretariat files all referrals by date and time of filing, name of the applicant (authorized parties of Article 113 [Authorized Parties] of the Constitution) submitting the referral, the respondent or interested party, the registration number, the Judge Rapporteur as well as the Members of the Review Panel appointed by the President under Article 22 [Processing Referrals] of the Law (see comments on Article 29).¹⁶⁰ The Secretariat is also responsible for keeping all Court acts, files, records, and archives, while its Department for Case Management assigns a registration number to each referral and establishes a case file which includes all documents related to the referral, including all communications with the parties and materials produced during the proceedings.¹⁶¹

As to the meaning of “recording”, Article 12.2.3 does not provide any further details, except for the reference to the “Law”. However, the Law on the Constitutional Court is silent on the issue. What is certainly meant is the audio recording by the Secretariat of the oral hearings of the Court and the handling of such recordings thereafter. While the Rules of Procedure, in its Rule 15 [Secretariat], paragraph 1(a) only mentions that the Secretariat provides “support services for hearings of the Court”, Article 28 [Recording of Public Hearings], paragraph 3, of the Rules of Procedure of the Constitutional Court of Slovenia is much more explicit, by stipulating “Recording of public hearings are made and kept as audio recordings.” It is assumed that Article 12.2.3 of the Law could be interpreted in a similar way.

The provision of Article 12.2.4 vests the Secretariat with the authority to ensure that transcripts and minutes are prepared, but no further details are given. According to Rule 43 [Hearing Procedure], paragraph 9, apparently transcripts and minutes “of hearings” are meant¹⁶², which should be signed by the President. Transcripts are normally copies of the record of a hearing as prepared by a court reporter (word-for-word typing of everything that was said on the record during the trial), but they may also be the printed record of an audio recording. It is not clear whether transcripts are open to the public in order to inspect and obtain a copy of the information. According to Rule 22 only parties are entitled to view official files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court.

Minutes, however, only mention what took place during the hearing or Court session, for instance: information about date and hours of the session, place of the session;

¹⁵⁹ Rule 15 of the Rules of Procedure

¹⁶⁰ Rule 30 of the Rules of Procedure.

¹⁶¹ Rule 30.3 of the Rules of Procedure.

¹⁶² Rule 43(9) provides: “The Secretary General shall ensure that transcripts and minutes of the hearing are prepared and signed by the President.”

names of judges present and in what capacity (President, Deputy-President, Judges, Judge Rapporteur, Member of the Review Panel, Presiding Judge); information concerning the parties, representatives and other participants at the hearing like witnesses, experts and *amicus curiae*; summary of presentations by the Judge Rapporteur, parties and other participants; questions and answers and summaries of final statements. However, the Secretariat will also ensure the preparation of Minutes of administrative sessions and deliberations of the Court.

The performance of public information activities by the Secretariat forms part of the Court's outreach program, established to bring the Court and its responsibilities nearer to the public. For example, the Secretariat maintains the official web site of the Court, which contains the full text of all its resolutions, judgments and other decisions in Albanian, Serbian, English and Turkish, and provides general information about the Court and its activities.

Details about scheduled hearings of the Court are also presented there, which makes the whole process of constitutional adjudication more transparent. The website further includes the integral texts of the Constitution, the Law and the Rules of Procedure. Public information activities, like publications and outreach events are not only undertaken by the Secretariat, but also by the judges and legal advisors who speak at seminars and workshops for legal practitioners and other interested parties about the Court and its activities, as well as how to submit a referral to the Court.

The Secretariat equally replies to questions for information about the work of the Court. For that purpose, the Secretariat has recruited a spokesperson, whose job is to answer questions of journalists or other persons, who contact the Court asking for information about the work of the Court in general or about specific cases which are pending before the Court or have already been adjudicated.

The stamp or more officially "the seal" of the Court is kept by the Secretariat in order to certify all official Court communications and documents. Although not expressly provided, the President and the Secretary General may also possess a seal of the Court in the exercise of their functions.

Other tasks which the Secretariat performs as determined by the Law and the Rules of Procedure, are, for instance, the ones mentioned in Article 22 [Processing Referrals] of the Law, where the Secretariat has been charged with the immediate registration of each referral in the register of the Constitutional Court according to its order of submission and with the sending of copies of the referral to the opposing party and other party (ies) or participants in the procedure.

Examples of additional tasks entrusted to the Secretariat by the Court under its Rules of Procedure are multiple. They range from the preparation of a list of locations which would be suitable to conduct meetings and hearings of the Court outside its seat in Pristina (Rule 2 [Seat of the Court] and the communication of a copy of the letter of resignation of a judge to all other judges and other appropriate parties (Rule 5 [Resignation of Judges]) to the drafting, at the direction of the President, of policy proposals for review and approval by the Court at administrative sessions (Rule 14 [Administrative Sessions], paragraph 1, and the notification of the registration and registration number to the person who filed the referral and to any opposing party or other interested party as well as the summons to the hearing of parties (Rule 42 [Notice of Hearing]) and the advance payments to witnesses and experts for reasonable travel

expenses (Rule 50 [Reimbursement of Witnesses and Experts]). These tasks will be commented on hereafter.

By virtue of this provision (Article 12.3), the legislator has authorized the Constitutional Court, through its Rules of Procedure, to further determine the overall responsibility of the Secretariat for support services to the Court and the organizational structure and additional tasks of the Secretariat. The Court has done so, in particular, by adopting Rule 15 [Secretariat] of its Rules of Procedure, which supplements Article 12.3 of the Law. As to additional tasks given by the Court to the Secretariat on top of those mentioned in Rule 15, they have already been mentioned under the comments on Article 12.2.7 above, which partly overlaps Article 12.3.

Although the Law and the Rules are silent on the issue, it is implied that the legal status of the Secretary General is that of a civil servant and, as such, he/she would fall under the Law on Civil Servants.¹⁶³ Reference to application of provisions of the Civil Service is mentioned in Art. 12 para. 5 of the Law which provide enable the Secretary General to act in compliance with the applicable law on civil service when appointing and dismissing employees of the Secretariat. As the chief executive officer of the Secretariat, the Secretary General is responsible for its organization and administration as well as its proper functioning. He/she is elected by simple majority vote of the judges, but the Article does not indicate whether a simple majority of judges present and voting (provided that a quorum of seven judges is present) is required or a simple majority of all judges. However, the Article has delegated the establishment of details about election, appointment, terms of work and salary of the Secretary General to the Court to the Rules of Procedure, which contain such details in Rule 16 (see, for further details, the comments on Rule 16). Hence the Rules of Procedure in its Rule 16 provide that “the Secretary General shall be appointed by a majority vote of the Judges present and voting at an administrative session” based on a transparent, open and competitive selection process.

Although, according to Article 12.4, the Secretary General reports directly to the President of the Court, he/she is accountable to all the judges of the Court. This can only mean that, if the judges consider that the Secretary General does not manage the Secretariat in an effective and efficient manner and/or does not perform his/her other functions and responsibilities in a satisfactory way, he/she may be dismissed or temporarily suspended by a majority vote of the judges, as defined by Rule 16 (5).

Furthermore, the Secretary General must follow the instructions of the President, for instance, to organize oral hearings, the solemn inauguration of the new Judicial Year and official visits to the constitutional courts of other countries.

Pursuant to Article 12.5, the Secretary General is responsible for the recruitment and dismissal of staff members of the Secretariat, in accordance with the provisions of the Law on Civil Service. Thus, the employees of the Secretariat enjoy all the rights and privileges under that Law, and are entitled to use all remedies provided by it, if they deem to have been treated in a manner contrary to that Law, for instance, in case of unfair dismissal. It is interesting to note that the Rule of procedure (Rule 17) provide that “in order to maintain the Court’s constitutional and legal independence, and considering the Court’s important role in constitutional interpretation, rules established by the Law on Civil Service for recruitment of staff, salaries, allowances, working

¹⁶³ Law No.03/L –149 on the Civil Service of the Republic of Kosovo.

hours and holidays, shall not apply”. It can be argued that although the purposes for protection of the constitutional independence of the Court are reasonable, one should take into account the fact that Rules of Procedure receive their authority from the higher legal act, such as the Law on the Constitutional Court, which has not mandated the Constitutional Court to regulate the appointment and dismissal of administrative staff on the basis of Rule of Procedure. The Law only calls upon the Secretary General to act in the compliance with the applicable law on civil service on matters regarding the appointment and dismissal of administrative staff. The same goes for the official holidays, to which the Rule of Procedure refers. The Assembly of Kosovo has enacted a Law on the Official Holidays to which all constitutional bodies, including the Constitutional Court should abide.¹⁶⁴

Furthermore, when establishing the Secretariat, the Secretary General was obliged to follow recruitment policies based on Article 11 (3) of the Law on Civil Service, stipulating: “*Within the civil service in institutions of central level a minimum of 10% of positions should be reserved for persons belonging to communities that are not majority in Kosovo and who fulfill the specific employment criteria*”.¹⁶⁵

As a result, it appears that, during the year 2010, recruitment procedures were followed, through which non-discriminatory policies were executed, in particular with a view to equal gender and multi-ethnic representation. Following the evaluation of the Court’s strategic plan for the years 2010 – 2013 as well as the Recruitment Plan for Staff for 2010, the percentage provided by the Law on the recruitment of members of non-majority Communities and the satisfactory participation of female staff has been achieved.¹⁶⁶

Under the Law on Civil Service, the Secretary General is also empowered to suspend and discipline staff members in the circumstances laid down in the Law on Civil Service. At the same time, the staff members are held to fulfill the requirements of the Law concerning work performance, loyalty, confidentiality, efficiency and other work related obligations. At the same time, they must take an oath to comply with the Code of Ethics¹⁶⁷, elaborated by the Secretariat in 2011.

Articles 12 of the Law are supplemented by Rules 15 [Secretariat], 16 [Secretary General] and 17 [Staffing of the Secretariat] of the Rules of Procedure.

Rule 15 [Secretariat] of the Rules of Procedure

15.1 In addition to the functions required by the Law on the Constitutional Court, the Secretariat of the Constitutional Court (“Secretariat”) shall have overall responsibility for the provision of administrative, technical and other related support services to the Court, including, but not limited to:

- (a) support services for hearings of the Court;**
- (b) printing of documents and other materials;**
- (c) interpretation and translation services;**

¹⁶⁴ Law no. 03/L-064 on Official Holidays in Republic of Kosovo.

¹⁶⁵ See Annual Report of the Constitutional Court, Department of Administration and Human Resources (DAHR), page 132. The annual report can be found at the webpage of the Court at <http://gjk-ks.org/>.

¹⁶⁶ Ibidem

¹⁶⁷ The Code of Ethics can be found on the webpage of the Court at <http://gjk-ks.org/>

- (d) **budgetary, payment, internal auditing, procurement and personnel services;**
 - (e) **building management services, technical services, office facilities, vehicle services, post services, fire precaution and other security measures;**
 - (f) **support services in drafting and publishing the Annual Report, and**
 - (g) **other support services required by the Court.**
- 15.2 The organizational structure of the Secretariat shall be determined by the Judges in administrative session upon approval of a written proposal by the Secretary General. The Secretary General, with the approval of the Judges, may establish or eliminate departments, sections or units as necessary for the effective and efficient discharge of the functions and responsibilities of the Secretariat.**

Rule 15.1 provides for a non-exhaustive list of administrative, technical and other related support services by the Secretariat to the Court, which does not call for further comments. Under sub-paragraph (g), the Court can require the Secretariat to provide whatever other support services it may need and which are not mentioned in the Law or the Rules of Procedure.

It is the task of the Secretary General¹⁶⁸ to prepare a draft proposal on the basis of which the judges would be able to determine the organizational structure of the Secretariat. Once established, the Secretary General may make changes in the Secretariat's organizational structure in order to improve its functioning and efficiency upon the approval of the judges. Such improvements may include, as mentioned by the Article, the establishment or abolishment of departments, sections or units, so that the Secretariat may discharge its functions and responsibilities more effectively and efficiently.

Thus, the Secretary General is not authorized to make any changes in the organizational structure of the Secretariat on his/her account, but only with the approval of the judges. Presently, the organizational structure of the Constitutional Court includes four departments under the authority of the Secretary General: (1) Department of Administration and Human Resources, (2) Department for Case Registration, Statistics and Archive; (3) Department of Professional Support; and (4) Budget and Finance Department. Furthermore, organizational units have been established for procurement, foreign relations, internal audit, public information and certification which report directly to the Secretary-General.

Rule 16 [Secretary General and Deputy Secretary General] of the Rules of Procedure

- 16.1 The Secretary General shall be the chief executive officer of the Secretariat, shall report to the President, and shall be responsible for:**
- (a) **overall administration and management of the Secretariat to ensure that all functions are performed in an effective and efficient manner;**

¹⁶⁸ See for details Article 12.4 and Rule 16 hereafter.

- (b) issuance of regulations and instructions on matters relating to the functioning of the Secretariat and related administrative matters;
 - (c) implementation in a timely manner of the decisions of the Constitutional Court related to administrative matters;
 - (d) efficient and effective management of resources;
 - (e) organization and staffing of the Secretariat, ensuring that recruitment of staff is based on professional qualifications, competence and merit and is undertaken through open and fair competition; and
 - (f) implementation of non-discriminatory personnel policies within the Secretariat, including equitable gender representation and ensuring that the composition of personnel reflects the multi-ethnic character of the Republic of Kosovo.
- 16.2 The Secretary General shall be appointed by a majority vote of the Judges present and voting at an administrative session. The appointment must be based on a transparent, open and competitive selection process.
- 16.3 The Secretary General must possess the following minimum qualifications:
- (a) an advanced university degree in law, economics, management or administration;
 - (b) a minimum of five years experience, of which at least two years includes professional leadership experience in administration and management; and
 - (c) be a person of highest personal and moral integrity.
- 16.4 Avacancy in the position of Secretary General shall be advertised in at least three newspapers widely circulated in Kosovo. Applications shall be reviewed by a selection panel consisting of three Judges appointed by the President. The selection panel shall submit to the Judges a list of the persons who have applied and who fulfill the requirements set forth in paragraph (3).
- 16.5 The Secretary General may be dismissed or temporarily suspended by majority vote of the Judges present and voting at an administrative session of the Court.
- 16.6 When the Secretary General is absent or unable to exercise the functions of the position, the President shall appoint a high ranking official responsible for general administration to perform the duties of the Secretary General on an interim basis.
- 16.7 The President shall appoint Deputy Secretary General, who will in particular be responsible for logistic, procurement and finance of the Court. The Deputy Secretary General will be one of the Directors of the Secretariat who will in the same time continue to exercise his/her function as the Director. The mandate of the Deputy Secretary General will be three (3) years and his/her income shall be 15% less than the income of the Secretary General.

The Venice Commission's Special Bulletin provides a detailed analysis of the status and functions of the secretary general of constitutional courts.¹⁶⁹ As to Rule 16, it is

¹⁶⁹ The bulletin can be found at <http://venice.coe.int/files/Bulletin/SpecBull-Secretaries-General-e.pdf>.

assumed that the responsibilities of the Secretary General mentioned in paragraph (1) are not exhaustive and that others may be added, as deemed fit by the judges. It is, therefore, suggested to add at the end of Rule 16 (1) a sub-paragraph (g) providing: “*Other responsibilities as required by the judges*”.

Rule 16.1(a) emphasizes that the Secretary General must run the Secretariat in such a way that all its functions are performed effectively and efficiently by the different departments and their staff members and interfere without delay, whenever this is not done in a satisfactory manner. The Secretary General is, thus, also responsible for “quality imposition” and “quality control”.

Examples of instructions related to administrative matters and issued by the Secretary General are, for instance, the administrative instructions, for instance, on the use of official vehicles of the Constitutional Court; the use of landlines and mobile phones in the Court; and the allocation of representation expenses. Furthermore, as mentioned above, the Secretariat also drafted a Code of Ethics together with a Statement of Oath for the Court’s civil service staff, as required by Rule 14 [Administrative Sessions], paragraph 3(h), which was approved by the judges at an administrative session of the Court.

The decisions referred to are those taken by the judges at the administrative sessions. It is the task of the Secretary General to carry out such decisions as soon as possible and to keep the President and judges informed about their follow-up and possible problems encountered in their implementation. As part of its outreach policy, the Court publishes such decisions on its webpage.

The Secretary General is also entrusted with the task to efficiently and effectively manage the financial resources attributed to the Court by the Assembly for a particular budget year. He/she is assisted in that task by the Financial Director and the Internal Auditor of the Court. Moreover, at the end of every year the expenditures of the Court are audited by the Auditor General of Kosovo, who, pursuant to Article 137 [Competencies of the Auditor-General of Kosovo] of the Constitution, is, empowered, *inter alia*, to audit the use and safeguarding of public funds by central and local authorities¹⁷⁰.

As to the hiring of staff members of the Secretariat, the Secretary General is responsible for the requirements of the Rule to be fully observed. Similar requirements are defined by the provisions of the Law on Civil Servants and should be scrupulously complied with. On the basis thereof, the recruitment procedure should be fair and transparent and, as much as possible, be monitored by one or more judges. Moreover, in case an unsuccessful candidate has any doubt about the fairness of the recruitment procedure, there should first be a proper investigation by the Secretary General before the person concerned might wish to make use of any remedies under the provisions of the Law on Civil Service, if any.

It is assumed that the personnel policies mentioned by the Rule stem from the Law on Civil Service and are based on human rights principles laid down in the Constitution. Non-observance of these personnel policies may lead to the temporary suspension or dismissal of the Secretary General by the judges of the Court (see comments on Rule 16.5 hereafter).

¹⁷⁰ See for details of the responsibilities and competencies of the Auditor-General, Articles 136 to 138 of the Constitution.

The requirements of the selection process mentioned in the Rule are similar to those laid down in Article 12.4, apart from the requirement that the appointment must be based on a transparent, open and competitive selection process. This requirement is also laid down in Article 11 of the Law on Civil Service.¹⁷¹ It is understood that the transparent, open and competitive selection process in a manner stipulated in Rule 16.4 (see for detailed comments on Rule 16.4 hereafter).

It must be an oversight, that the Rules of Procedure do not require the Secretary General, after having been appointed, to take an oath before the commencement of his/her mandate, even though, pursuant to Rule 17, all staff hired by the Secretariat must take an oath to comply with the Code of Ethics. It is suggested to amend the Rules accordingly.

The minimum qualifications laid down in the Rule are cumulative, so any candidate who lacks any of these qualifications should be disqualified. It is assumed that the minimum requirement of an advanced university degree means not a bachelor, but a master's degree. Professional leadership experience of a minimum of five years seems to be rather low for such an important position of chief executive officer of the Secretariat of the Court, but will be to the advantage of candidates who have more years of experience.

Although not expressly mentioned by the Rule, the advertisement regarding the vacancy of the position of Secretary General should be published in the official languages in Kosovo, pursuant to the applicable Law on Civil Service. Furthermore, the Rule seems to be somewhat incomplete. The selection panel may well submit to the judges a list of persons who have fulfilled the requirements of Rule 16.3, but the Rule does not provide for what will happen next. Presumably, the candidates on the list would be interviewed by the judges who, after one or more rounds, would then choose the successful candidate by a majority vote of the judges present and voting at an administrative session, pursuant to Rule 16.2. However, this decisive part of the selection procedure should be properly determined by the Rules of Procedure and it is, thus, recommended that they are supplemented accordingly.

The Secretary General may be dismissed or temporarily suspended in the same way as he/she has been appointed, namely, by majority vote of the judges present and voting at an administrative session. The Rule does not provide any indication as to the circumstances in which the judges may be called upon to dismiss or suspend the Secretary General. The grounds for such measures have to be found in the Law on Civil Service and Regulation No. 01/2011 on termination, suspension, and ending of employment in civil service in Kosovo, which has laid down the conditions and procedures for pronouncing disciplinary measures and sanctions against civil servants in Kosovo.¹⁷²

It is assumed that dismissal or suspension of the Secretary General may be initiated in a similar way as the dismissal of a judge (see Rule 6 above). Based on that Rule, dismissal or suspension of the Secretary General may be proposed in a written document setting forth the grounds for dismissal or suspension signed by the President,

¹⁷¹ Law No.03/L –149 on the Civil Service of the Republic of Kosovo. The Law is available at <http://gazetazyrtare.rks-gov.net/SearchResults.aspx>

¹⁷² The Regulation No. 01/2011 on the termination, suspension, and ending of the employment in civil service is available at http://map.rks-gov.net/userfiles/file/document_page/Rreg_Nr_01_2011.pdf.

to whom the Secretary General reports directly, and submitted to the judges. Documents containing any relevant facts should be attached to the proposal and would be confidential.

Other details about the procedure to be followed should be derived from the above Law on Civil Service. When the Secretary General is dismissed by majority vote of the judges present and voting, the procedure to recruit a successor, laid down in Rules 16.2 and 16.4, should be put into motion without delay. If the Secretary General is temporarily suspended by the judges, the President of the Court should appoint a high ranking official responsible for general administration in the same way as provided for in Rule 16.4 hereafter.

The judges have recently decided to create the function of Deputy Secretary General, who will be one of the Directors of the Secretariat who will in the same time continue to exercise his/her function as the Director. The Rules of Procedure have explicitly stated that the Deputy Secretary General will support the Secretary General on matters regarding the logistics, procurement and finance. It should be noted that Rules of Procedure do not clearly provide that the Deputy Secretary General will replace the Secretary General in case of absence or inability to exercise his/her functions wherever this is necessary. However, such role of the Deputy Secretary General is obvious should the above-mentioned circumstances arise. Whenever the Secretary General cannot exercise his/her function, the duties can be temporarily assumed by the Deputy Secretary General who is appointed by the President of the Constitutional Court.

Rule 17 [Staffing of the Secretariat] of the Rules of Procedure

- 17.1 The Secretariat shall have staff that is required to enable the Secretariat to fulfill its functions in an efficient and effective manner within the budgetary resources allocated to the Court.**
- 17.2 Once employed by the Court, staff of the Secretariat shall be administrative staff. The Secretary General shall ensure that hiring of staff is based upon professional qualifications, competence and merit, and is undertaken through fair and open competition in accordance with the Law.**
- 17.3 The status of the administrative staff foreseen by Article 12 of the Law shall be applied to the extent such status does not impact the independence of the Court as guaranteed in Article 112.2 of the Constitution and Article 2 of the Law on the Constitutional Court.**
- 17.4 In order to maintain the Court's constitutional and legal independence, and considering the Court's important role in constitutional interpretation, rules established by the Law on Civil Service for recruitment of staff, salaries, allowances, working hours and holidays, shall not apply.**
- 17.5 The Secretary General, upon request by the Judges, may enter into contracts with experts and other professionals to perform services for the Court.**
- 17.6 All staff hired by the Secretariat must take an oath to comply with the Code of Ethics.**

In order for the Secretariat to fulfill its functions in an efficient and effective manner, it is necessary that an adequate number of staff members is recruited, who are able and willing to reach these goals. When staff members are recruited, the Secretariat is supposed to remain within the limits of the approved budgetary resources for the year concerned. That means that the Secretary General is not allowed to exceed the maximum number of employees indicated in the approved budget of a particular year. It is, however, assumed that, if required by the circumstances, extra staff may be recruited, using financial means from another budget line of the Court's budget with the approval of the judges. Although the Rule is silent on the issue, it is assumed that, if staff members do not fulfill their functions in an efficient and effective manner, as required by the Rule, they may be dismissed or disciplined in accordance with the rules applicable to civil servants.

In connection with the goal defined in Rule 17.1, reference is made to the 2010 Annual Report of the Constitutional Court, where it is mentioned that, during that year, the Secretariat has firmly concentrated on achieving strategic goals in priority areas that have been identified in the Strategic Development Plan of the Court for the period 2010 – 2013:

- Provision of necessary human capacities through the recruitment of meritorious, qualified and professional staff in order to complement the staff in line with the approved number and budget; ...¹⁷³.

In this connection, it should be added, that it may well be that the staff is required to enable the Secretariat to fulfill its functions in an efficient and effective manner under Rule 17.1, but this also entails the obligation of the Secretariat to enable the staff through adequate trainings to improve their capacities to do so. During the year 2010, the Department of Administration and Human Resources (hereinafter: DAHR) drafted a Framework Programme of the Trainings for civil servants of the Constitutional Court during 2011 – 2013 as well as the Agenda for the orientation training for new employees in the Court, which was implemented from the beginning of 2011.

According to the 2010 Annual Report, DAHR also "*implemented a continuing increase of skills for human resources and operational matters*", while, at the same time, "*Relevant officials of the Court have attended and successfully completed obligatory trainings organized by the Ministry of Economy and Finance, the Institute of Public Administration and other training programmes from other specialized Institutes*". Furthermore, "*Employees have been certified in matters of public procurement, finance and internal auditing and participated in study visits in the country and abroad*"¹⁷⁴. Similar quotation can be found in the 2011 and 2012 Annual Reports.

The hiring process of staff members of the Secretariat is apparently based, in its entirety, on the provisions of the Law on Civil Service. In particular, Article 11 of this Law must have inspired the drafting of this Rule.

There may be circumstances, in which the judges consider that, in the absence of adequate expertise within the Secretariat, certain services need to be outsourced, i.e. performed by experts and other professionals from outside the Court. For what reason

¹⁷³ See Annual Report of the Constitutional Court of Kosovo, page 125. This report is available online at <http://gjk-ks.org/>. Report accessed on 7 April 2014.

¹⁷⁴ Annual Report of the Constitutional Court for the Year 2010, 2011 and 2012 can be found in the Court's webpage <http://gjk-ks.org/>. Reports accessed on 7 April 2014.

the Secretary General needs to be “requested by the judges” to enter into contracts with the persons mentioned is not clear. Of course, under Article 12.4 of the Law, the Secretary General is accountable for his/her work to all judges, but that does not mean that he/she should seek the approval of all judges for each and every service hired from outside the Court or that he/she should wait to outsource services until “requested by the judges”, as the Rule seems to suggest.

In any event, in such cases, the Secretary General needs also to follow the relevant procurement rules, applicable to all public institutions. If not, he/she risks to be criticized by the Auditor-General of Kosovo in the yearly external audit report and/or to be suspended or dismissed by the judges. An example of a contract entered into with outside experts to perform services for the Court is the one relating to the translation of referrals and non-sensitive documents by an outside translation company which won the public tender issued by the Secretariat. It should be noted that the company and translators concerned will be required to sign a confidentiality clause.¹⁷⁵

As mentioned in the 2011 Annual Report of the Court, the Secretariat prepared and published a Code of Ethics to be respected by the staff, including the Secretary General. The Annual Report does not indicate whether the present staff has taken an oath to comply with the Code of Ethics as required by the Rule.

Article 13 [Legal Advisors]

Legal advisors shall support the professional work of the judges of the Constitutional Court. The terms of appointment, dismissal and status of legal advisors shall be defined in the Rules of Procedure of the Constitutional Court. Salaries of legal advisors shall be defined in accordance with applicable legislation.

In the practice of the Court it has been shown that the role of legal advisors in the adjudication of constitutional issues is fundamental. They play a crucial role in providing the judges with legal analyses, draft reports, resolutions on inadmissibility, decisions and judgments and other legal advice that may be relevant for the resolution of constitutional matters. Their role extends to legal research into the jurisprudence of other constitutional courts and, in particular of the European Court of Human Rights in Strasbourg, whose decisions are constitutionally binding on the Court in its interpretation of human rights and fundamental freedoms guaranteed by the Constitution.¹⁷⁶

It is, therefore, particularly important that a sufficient number of qualified legal advisors assist the judges of the newly established Constitutional Court, taking into account its broad jurisdiction and, thus, the large numbers of constitutional referrals, which may be filed with the Court, especially, referrals by individuals under Article 113.7 of the Constitution.

According to the Article, the terms of appointment, dismissal and status of legal advisors shall be defined in the Rules of Procedure. Rule 18 [Legal Advisors] of the

¹⁷⁵ In case of a violation of the clause, the contract may be terminated with immediate effect and damages may be claimed.

¹⁷⁶ See Article 53 of the Constitution.

Rules of Procedure contains the necessary details (see comments on Rule 18 hereafter). One of the main features of the Rule is that the provisions of the Law on Civil Service are not applicable to legal advisors, since they are not civil servants. Legal Advisors, thus, do not fall under the protection of that Law. As a consequence, the question arises, whether a contract between the Secretariat and a legal advisor contains similar protective clauses regarding his/her rights and obligations vis-à-vis the employer (Secretariat) as a staff member as he/she would have had under the Law on Civil Service.

During the drafting of the Law, two models for the appointment of legal advisors were considered. The first model aimed at concluding a permanent contract with the legal advisor, recruited after an open and competitive selection process, whereas the second variant opted for a process, whereby the legal advisor would “arrive” and “depart” at the same time as the judge for whom he/she had worked during that time. Some constitutional courts have chosen the first option, others the second one, while there are also examples in the region, such as the constitutional courts of the Former Yugoslav Republic of Macedonia and of Albania, where a more permanent engagement with the legal advisors was chosen in order not to lose their “institutional memory”. Thus, the appointment of legal advisors on a long-term basis may provide more consistency in the process of constitutional review and a higher degree of institutional memory, which are both important instruments for the creation of consistent constitutional jurisprudence.

Article 13 is rather vague by solely providing that the salaries of legal advisors shall be defined in accordance with applicable law. It is, however, not directly clear what is meant by the “applicable law”. The Labor Law may provide useful references regarding appointment, dismissal and status of legal advisors, but salary rates are not mentioned there (as is the case in the Law on Civil Service), since parties to a labor contract are free to agree on a particular salary. In the absence of any clear indication as to the salary issue, it may be appropriate to use Article 15 [Remuneration of Judges] of the Law (which provides that the remuneration of Constitutional Court judges shall be 1.3 times that of the judges of the Supreme Court) as a guideline for the establishment of the salaries of legal advisors of the Court, by determining that for instance their salaries should be 1.3 times higher than the salaries of legal advisors respectively of the professional associates of the Supreme Court.

It should also be noted that the Secretariat of the Court has recruited several junior legal researchers, who are tasked to assist legal advisors as well as judges in doing research into particular legal issues and domestic and international legal instruments, in particular, those which are part of the Constitution like the ECHR and the relevant jurisprudence. They may also assist in drafting reports and decisions of the Court, under the supervision of the legal advisor concerned. The legal researchers are staff members of the Secretariat and thus, unlike the legal advisors, civil servants. However, together with the legal advisors, they form part of the Legal Unit which was established in 2010 with the approved of the judges.

Article 13 is supplemented by Rule 18 [Legal Advisors] of the Rules of Procedure.

Rule 18 [Legal Advisors] of the Rules of Procedure

- 18.1** Legal Advisors shall support the professional work of the Judges by conducting legal research and analysis. The Legal Advisors shall assist in drafting decisions, reports and other legal materials produced by the Court. The Judges shall determine the number of Legal Advisors to be employed based upon the Court's needs and available budgetary resources.
- 18.2** Legal Advisors shall not be civil servants. The terms of contract of Legal Advisors shall be determined by the Court in accordance with relevant law.
- 18.3** Legal Advisors shall be appointed by majority vote of the Judges present and voting, based upon a transparent, open and competitive selection process. A Legal Advisor may be appointed only if the following qualifications are met:
- (a)** An advanced university degree in law, preferably with specialization in constitutional law, human rights law, public international law, or any other branch of public law;
 - (b)** A minimum of two years of relevant professional experience in legal affairs; and
 - (c)** A person of highest personal and moral integrity.
- 18.4** Vacancies for Legal Advisor shall be advertised in at least three newspapers widely circulated in the Republic of Kosovo. Applications shall be reviewed by a selection panel consisting of three Judges appointed by the President. The selection panel shall submit to the Judges a list of persons who fulfill the requirements in paragraph (3).
- 18.5** A Legal Advisor may be dismissed or temporarily suspended by a majority of the Judges present and voting in accordance with relevant law.
- 18.6** The Legal Advisors shall be supervised by the Chief Legal Advisor who shall be appointed by the Judges from among the Legal Advisors employed by the Court. The Chief Legal Advisor shall be appointed on a rotation basis among the Legal Advisors unless otherwise determined by the Court. The Chief Legal Advisor shall report to the President. After consultation with the President and the Judges, the Chief Legal Advisor may be dismissed as Chief Legal Advisor at any time by majority vote of the Judges present and voting at an administrative session.
- 18.7** A Legal Advisor may be dismissed or temporarily suspended by a majority of the Judges present and voting in accordance with relevant law.
- 18.8** The Legal Advisors shall be supervised by the Chief Legal Advisor elected by the Judges from the Legal Advisors employed by the Court. He/she will be assisted with two Deputy Chief Legal Advisors appointed by the President of Court.
- 18.9** The Chief Legal Advisor/Deputy Chief Legal Advisors shall be appointed on a rotation basis among the Legal Advisors unless otherwise determined by the Court.
- 18.10** The Chief Legal Advisor/Deputy Chief Legal Advisors shall report to the President. After consultation with the President and the Judges, the Chief Legal Advisor/Deputy Chief Legal Advisors may be dismissed as Chief

Legal Advisor/Deputy Chief Legal Advisors at any time by majority vote of the Judges present and voting at an administrative session.

- 18.11 The mandate of the Chief Legal Adviser and Deputy Chief Legal Advisers will be for one (1) year.**
- 18.12 The income of the Chief Legal Advisor will be increased for 10% for the time he/she exercise that function; whereas the income of the Deputy Chief Legal Advisors shall be 5 % less than the income of the Chief Legal Advisor.**
- 18.13 The Court has established the Legal Unit. The structure and organization of the Legal Unit includes the position of the Legal Advisors and other legal staff will be further regulated with the Practice Direction approved by the Court.**

As already mentioned under Article 13 of the Law above, legal advisors play a crucial role in providing the judges with legal assistance and support by drafting analyses, reports, resolutions on inadmissibility, judgments and other decisions relevant for the adjudication of referrals under Article 113 [Authorized Parties] of the Constitution. In practice, the legal advisors play already a role in the submission of referrals, when receiving prospective applicants or their representatives who come to the premises of the Court to file the referral in person. The practice is, that legal advisors (and also legal researchers) receive applicants at the Court in order to check whether the referral is complete and contains all necessary documents. If this is not the case, the persons are requested to complete the referral, which is not registered (see comments on Rule 30 hereafter).¹⁷⁷ Only after completion of the file, will the referral be registered and given a registration number.

Furthermore, a legal advisor assists the Judge Rapporteur, assigned to the case by the President¹⁷⁸, in drafting a preliminary Report to be submitted to the Review Panel¹⁷⁹. Once the referral is unanimously found to be inadmissible by the Review Panel, the legal advisor will assist its Presiding Judge in drafting a resolution on inadmissibility. If this is not the case, the referral will be forwarded to the full Court. Subsequently, the legal advisor will assist the Court and draft its final decision on the referral.¹⁸⁰

It is worth mentioning that, in the Slovenian Constitutional Court, the legal advisors have similar functions as those of the Kosovo Court. Pursuant to Article 16 [Legal Advisory Department] of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia, they equally “*prepare reports, draft decisions, orders, and opinions in cases within the jurisdiction of the Constitutional Court and perform other expert work as necessary for consideration and decision by the Constitutional Court*”. At the same time, judges may add or correct part of the reasoning of draft decisions, but the drafting remains primarily the task of the legal advisors¹⁸¹.

¹⁷⁷ Rule 30 [Registration of Referrals and Replies], paragraph 1 of the Rules of Procedure, provides: *The Secretary General shall register a referral only when all necessary documents are filed...*“.

¹⁷⁸ See further comments on Rule 7 [Appointment of Judge Rapporteur] of the Rules of Procedure.

¹⁷⁹ See further comments on Rule 34 [Report of Judge Rapporteur] of the Rules of Procedure.

¹⁸⁰ See further comments on Rule 56 [Types of Decisions] of the Rules of Procedure.

¹⁸¹ See the Venice Commission Report drafted by Jadranka Sovdat on the organization of the work of legal advisors in support of the decision-making of the constitutional court: presentation and experience of the constitutional court of the Republic of Slovenia.

Furthermore, in order to maximize the support services of the legal advisors by enhancing the quality of drafting legal analyses and decisions of the Court, training sessions for the legal advisors on specific topics continue to be organized by donor organizations, experienced in capacity building and legal education programs. Also other aspects of the work of legal advisors may need to be considered, as the Secretary General of the Constitutional Court in Slovenia very well highlighted at a conference for secretaries general, organized by the Venice Commission in Riga: “if we would like legal advisors to provide appropriate expert support to judicial work, we must primarily ensure appropriate conditions for their work. A pleasant work environment must be created and access to all data, expert literature, information technology, and anything needed for good and efficient work performance ensured. They must be given the opportunity to pursue further education not only in the field of law, but also in other fields, especially in mastering foreign languages. The latter allows them to study foreign legal orders and legal literature, as well as other relevant information. Therefore, the Constitutional Court provides grants for post graduate studies in various legal fields, encourages participation at relevant legal seminars in Slovenia as well as abroad, and organizes language courses (English, German, and French) at the Constitutional Court”¹⁸². Similar activities are also organized or in the course of being organized for the legal advisors of the Constitutional Court of Kosovo. Presently, the Court has 12 Kosovar legal advisors and three international ones, who have been recruited and placed at the disposal of the Court by the former International Civilian Office, *inter alia*, in order to assist in the capacity building of their Kosovar colleagues¹⁸³ as well as three Kosovar Junior Legal Advisers.

Rule 18.2 provides that legal advisors shall not be civil servants unlike the staff of the Secretariat of the Court, including the Secretary General. As already mentioned in the comments on Article 13 of the Law above, the contracts of the legal advisors concluded with the Court may not contain protective clauses similar to those contained in contracts of staff members of the Secretariat concluded with the Secretariat under the Law on Civil Service. It would be interesting to compare the terms of the different kind of contracts. Article 2 of the Law on Civil Service defines civil servants as persons “employed to exercise public administrative authority based on ability and capacity, who participate in making and implementing policies, monitoring the implementation of administrative rules and procedures, ensuring their execution and providing overall administrative support for their implementation”.

Although it is true that the work of legal advisors may not fit entirely into that definition, it appears that the legal advisors of other constitutional courts in the region indeed possess the status of civil servants¹⁸⁴. It is, therefore, not clear for what specific reason, the Court has chosen not to grant the legal advisors such status. In the absence

The Report is available at [http://venice.coe.int/docs/2005/CDL-JU\(2005\)041-e.asp](http://venice.coe.int/docs/2005/CDL-JU(2005)041-e.asp)

¹⁸² Ibid.

¹⁸³ Under Article 152 [Temporary Composition of the Constitutional Court] of the Constitution, the International Civilian Representative (ICR), appointed by an International Steering Group following consultations with the EU and tasked to supervise the implementation of the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan), has appointed three international judges to the Court and, under his authority, his Office has also recruited three international legal advisors to support the judges of the Court. The international legal advisors are not mentioned in the Law or the Rules of Procedure.

¹⁸⁴ For instance, constitutional courts of Albania, Slovenia and Macedonia.

of the protection of the provisions of the Law on Civil Service, the legal advisors should rather rely on relevant provisions of the Labor Law¹⁸⁵, dealing with the labor relationship between employer and employee and protective clauses for the latter.

The procedure, under which legal advisors are appointed by the judges, is very similar to the procedure under which the Secretary General of the Court (Rule 16 above) is appointed. With the exception of the required minimum number of years of experience (which in the case of the Secretary General is five years while for the Legal Advisors it is two years), the integrity requirement and the way in which the vacancy is advertised are fairly identical. A further requirement as part of the relevant professional experience is, however, missing, namely, the experience in legal drafting. Without such experience, it will take a newly recruited legal advisor certainly considerable time to learn how to draft reports and decisions in a satisfactory way. As a rule, “junior” legal advisors should be supervised and monitored by their “senior” colleagues, until they are considered capable of drafting without such supervision. The opinion of the judges should be an important factor in this process.

As to the necessary qualifications mentioned in the Rule, it strikes that an advanced level of English is not required, although the knowledge of English should be a necessary asset for legal advisors of the Court. For instance, Article 53 [Interpretation of Human Rights Provisions] of the Constitution of the Constitution stipulates that: *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”* In order to be able to understand and analyse these decisions, which the European Court publishes in English and French, legal advisors need to have, at least, an advanced knowledge of (legal) English. They would, otherwise, not be able to advise the judges on Strasbourg jurisprudence, which may be relevant for the adjudication of a constitutional complaint filed under Article 113 of the Constitution.

Furthermore, to master English has become even more important, given the presence in the Constitutional Court of the above mentioned three international judges and three international legal advisors appointed by the International Civilian Representative to support the work of the Court. It is absolutely necessary that legal advisors are able to communicate with the international judges and legal advisors without the assistance of an interpreter. However, in practice, the absence of this requirement as well as of the requirement suggested above regarding drafting abilities, may have become less important, since the candidates need to pass a written and oral test in English.

The comments on Rule 16.4 regarding the selection procedure of the Secretary General are also valid for the present Rule. The Rule is, however, silent on the way in which the judges will choose the legal advisor(s) from amongst the candidates appearing on the list submitted to them by the selection panel. Presumably, the judges will examine the candidates on the list through a written and oral test on the basis of which they will choose the successful candidate(s) by majority vote, pursuant to Rule 18.3. However, the Rule should regulate the procedure to be followed by the judges.

It is, therefore, suggested to supplement Rule 18.4 with such a procedure.

The similarity of Rule 18.5 with Rule 16.5 is striking, with the exception of any reference to “applicable law”, as mentioned in Rule 18.5. However, it is obvious that

¹⁸⁵ Law no.03/L –212 on Labour Relations. Official Gazette of the Republic of Kosovo/Year V/No. 90/01 December 2010.

dismissal and temporary suspension of the Secretary General is covered by the Law on Civil Service, whereas such dismissal and suspension of a legal advisor is not. Therefore, the reference to “relevant law” may not be superfluous, except for the fact that it is not directly clear which law would be relevant. As mentioned above, in the absence of any detailed procedure laid down in the Law or the Rules of Procedure, the provisions of the Labour Law,¹⁸⁶ aiming at regulating the rights and obligations from employment relationships, should be applicable. Therefore, once the judges would like to dismiss or suspend a legal advisor, they would only be able to do so in accordance with the terms of the contract concluded between the Secretariat and the legal advisor and the relevant provisions of the Labour Law. For instance, the legal advisor concerned should be given every opportunity to prepare his/her defense (with the assistance of a lawyer, if necessary) and be heard by the judges, before any decision is taken under this Rule.

The principal role of the Chief Legal Advisor is to supervise the above mentioned “Legal Unit”, composed of the legal advisors and the legal researchers. To properly organize the work of the Legal Unit in consultation with the President as well as the legal advisors necessarily requires the full attention and constant supervision of the Chief Legal Advisor, in particular, with a view to the efficient and effective adjudication of constitutional complaints by the Court within a reasonable time. The Chief Legal Advisor has also a coordinating role in preparing the list of referrals to be discussed at sessions of the Court, in consultation with the President and the Department of Case Management, Statistics and Archives.

Although, originally, the Chief Legal Advisor was chosen by the judges from amongst the international legal advisors, the judges have decided, after the rotation of the position among the international legal advisors had come to an end, to appoint one of the Kosovar legal advisors as Chief Legal Advisor for a determined period of time. The Kosovar Chief Legal Advisor is assisted by two Kosovar Deputies.

As to the dismissal of the Chief Legal Advisor and his/her deputies by the judges, the procedure seems to be simple, since it may be done at any time and for any reason by majority vote of the judges present and voting, for instance, for the simple reason that the judges wish another Chief Legal Advisor or Deputy. After having been dismissed, he/she will normally continue his/her work as legal advisor.

Article 14 [Budget]

14.1 The Constitutional Court shall be funded from the Kosovo Republic budget.

14.2 Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo for adoption. Neither the Government nor any other budget organization shall be entitled to amend or otherwise modify or influence the budget proposal prepared by the Constitutional Court. The budget proposed by the Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly for adoption

¹⁸⁶ Law No.03/L-212, adopted by the Assembly on 1 November 2010.

14.3 The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo.

As already commented above on Rule 15.2, to have its own budget is important for the independence of the Constitutional Court. The independence of a constitutional body cannot be imagined without a sufficient degree of financial independence, whereby such institutions, once their budget as part of the Republic of Kosovo Consolidated Budget has been adopted by the legislature, are protected from possible interference in the way in which they spend their budget. In one word, budgetary independence provides institutional independence.

The German Constitutional Court summarized the necessity for a constitutional court to have its own budget as follows: “A budget of its own for a constitutional court follows from its competence and the independence inseparably linked to this, and, at the same time, the Court absolutely needs its own budget in order to be independent, and this independent budget guarantees part of the Court’s structural independence”.¹⁸⁷

While Article 14.1 establishes that the Constitutional Court is financed by the state budget, Article 14.2 defines a variant of a budget proposal, which certainly protects the Constitutional Court from possible interference by the executive and other budget organizations and provides a direct communication with the Assembly in relation to the contents of the budget proposal. The opening words of Article 14.2, stipulating “Notwithstanding the provisions of other laws”, clearly express the intention of the legislature to elude any prevalence of other legal provisions applicable in the field of preparing budget proposals of constitutional bodies (especially the Law on Public Financial Management and Accountability¹⁸⁸) with respect to the way in which the Constitutional Court’s budget proposal is processed.

Although the Constitution, in its Chapter VIII [Constitutional Court], does not contain a provision that guarantees a form of budgetary independence of the Constitutional Court, the legislature, acting upon recommendations of international and local experts, has firmly established the budgetary independence of the Constitutional Court by clearly providing that “the Government or other budgetary organization has no right to change or in any other way modify or affect the budget proposal prepared by the Constitutional Court”. The message of the legislature related to this provision could not be clearer¹⁸⁹. As to the relevant procedure, the budget proposal, initially drafted by the Secretary General and approved in an administrative session by the judges of the Constitutional Court, is directly forwarded to the Budget Committee of the Kosovo Assembly for review and approval, thus avoiding the usual way of the draft budgets of

¹⁸⁷ See the report “the Constitutional Court budget as one of the guarantees of the independence of constitutional justice” drafted by Mrs. Elke Luise Barnstedt, Director at the Federal Constitutional Court of Germany as part of the Venice Commission/Seminar on “The budget of the Constitutional Court: a determining factor of its independence, Sarajevo, 14-15 October 2004.

¹⁸⁸ Law No. 2008/03- Law on Public Financial Management and Accountability.

¹⁸⁹ However, it appears from the Annual Report 2010, for instance, that the Ministry of Economy and Finance, on 2 occasions during that budget year, reduced the Court’s budget in the category of utilities and wages and allowances.

budgetary organizations being processed by the Ministry of Finance and Economy for review and approval.¹⁹⁰

This system of processing the budget is similar to the one in Poland, where the budget of the Constitutional Court is adopted by the Plenum of Judges and after signature by the President of the Court is submitted for approval to the Sejm (Assembly). It is also similar to the Hungarian model, where the Constitutional Court proposes its own budget and submits it for approval directly to the Parliament.¹⁹¹ As to the German model (laid down in Article 1 of the Constitutional Court Act of 12 March 1951 with amendments), the Constitutional Court enjoys a “more independent and autonomous position in comparison with other constitutional bodies.”¹⁹² The German Constitutional Courts, therefore, not financially subordinated to any other constitutional body, “but it is an autonomously managed and budgeted independent body”, whose “budget may be adopted only as a particular autonomous plan included in its entirety into the whole State budget”.¹⁹³ In Croatia, the Constitutional Court’s annual budget is adopted as a special part of the State budget by the Representative Chamber of the Parliament (Constitutional Court Act No. 13/1991, with amendments).

Article 14.2 is supplemented by Rule 20 [Budget and Fees] of the Rules of Procedure. Budget independence also brings with it the right to manage the budget independently, meaning that the Court is entitled to spend the allocated public funds within the limits of the appropriations. According to the Law on Public Financial Management and Accountability, the budget of the budget organizations is divided into wages and salaries, goods and services, contracted services (utilities), subsidies, transfers and capital expenditures. Consequently, regarding the respective categories, the Court enjoys full autonomy in the management of these public funds allocated for each category. The Court is, for example, entirely autonomous in entering into contracts or deciding on the recruitment of staff.

Moreover, the Court is free, to a certain extent, to re-appropriate funds from one budget category to another in accordance with the provisions of the above Law on Public Financial Management and Accountability. However, the administration of the budget by the Court is subject to the supervision of its internal auditor and the Auditor-General of Kosovo, who, pursuant to Article 136 [Auditor-General of Kosovo] of the

¹⁹⁰ It should be emphasized that the responsible body for reviewing the annual budget of the Republic of Kosovo is the Committee on Budget and Finance of the Assembly. Moreover, the Committee examines the potential costs that a draft could bear and makes recommendations to the relevant functional committee of the Assembly.

¹⁹¹ Article 2 of the Law no. XXXII (1989) regarding the Constitutional Court; See proceedings of the workshop on “Constitutional Court Budget Control and Management”, published by the Council of Europe (Venice Commission for Democracy through Law), 1 October 2004, [http://venice.coe.int/docs/2004/CDL-JU\(2004\)056-e.asp](http://venice.coe.int/docs/2004/CDL-JU(2004)056-e.asp). Kiev, Ukraine, 19-21 January 1998. See also Arne Mavcic, “Budget of the Constitutional Court, control and management with regard to independence and autonomy of the court”, Strasbourg, January 2008.

¹⁹² See the papers prepared by the Venice Commission (Documents CDL-JU(2004) 056 and CDL-JU(2004)059, submitted at the seminar on “The budget of the Constitutional Courts: a determining factor of its independence”), [http://venice.coe.int/docs/2004/CDL-JU\(2004\)056-e.asp](http://venice.coe.int/docs/2004/CDL-JU(2004)056-e.asp).

¹⁹³ See the papers prepared by the Venice Commission (Documents CDL-JU(2004) 056 and CDL-JU(2004)059, submitted at the seminar on “The budget of the Constitutional Courts: a determining factor of its independence”), [http://venice.coe.int/docs/2004/CDL-JU\(2004\)056-e.asp](http://venice.coe.int/docs/2004/CDL-JU(2004)056-e.asp).

Constitution, is the highest institution of economic and financial control and mandated to audit the Kosovo budget organizations.

Internal audits, conducted pursuant to the applicable legislation and in different departments of the Court, are intended to realize auditing objectives related to the internal control and improvement of work efficiency in order to avoid possible mistakes and to increase the value. Departments where mistakes are found, receive follow-up visits from the internal auditor in order to check whether the recommendations have been properly implemented.

As to the external auditing of the Court's financial statements by the Auditor General, the Court is held to address the issues contained in the Memo of the Auditor General by taking appropriate measures to implement them. For instance, the Memo of 2011 concluded that the Court, by implementing last year's recommendations generally in line with legal provisions, had successfully managed the allocated budget for 2011.¹⁹⁴

Rule 20 [Budget and Fees] of the Rules of Procedure

- 20.1 The Secretary General shall prepare a budget proposal, in consultation with the President, and submit it to the Judges for review and approval.**
- 20.2 The Judges in administrative session shall review, amend if necessary, and approve the final budget proposal. The President shall sign the approved budget proposal and the Secretary General shall submit the budget proposal in accordance with the Law on the Constitutional Court and the Law on Public Financial Management and Accountability.**
- 20.3 The Secretary General shall propose to the Judges a schedule for administrative services.**

The Secretary General is in charge of the preparation of the draft annual budget of the Court in accordance with the guidelines given to him/her by the President of the Court. The budget proposal, once prepared, will be submitted by the Secretary General to the judges who will discuss it in an administrative session as one of the policy matters ("the Court's budget") as determined by Rule 14 [Administrative Sessions], paragraph 3(a) (see comments above).

In an administrative session the judges will discuss, review and, if necessary, amend the individual items of the Secretariat's budget proposal for that particular year, before approving it. The budget will be approved by majority vote of the judges present and voting, provided that at least seven judges are present, as stipulated by Rule 14.4. After the President has signed the approved budget proposal, the Secretary General has to submit it to the Budget Committee of the Assembly, which is an important forum to present the justification for the funds necessary to implement the mandate of the Court for a particular year. Once approved by the Committee, the Court's budget will be included, as a separate item, in the relevant Kosovo annual budget to be adopted by the Assembly. After adoption, the allocated funds will be disbursed to the Court by the Ministry of Economy and Finance.

The administrative services mentioned by the Rule are provided for in Rule 23 [Access to Files and Documents], paragraph 2, stipulating: "*Parties shall have the right to*

¹⁹⁴ Memos and Reports of the Auditor General are published on the webpage concerned.

*obtain copies of files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court. The Court may charge an administrative fee for such copies”.*¹⁹⁵ Apparently, no such proposal has been made to the judges so far, because, once such fees would have been fixed, they should appear on the Court’s webpage as public information.

It is interesting to mention that some constitutional court systems have introduced the payment of a fee, when applicants file a referral, although the court may decide to exempt them from paying such a fee or to reduce it depending on their financial situation. However, most systems have not introduced such a system. On the one hand, the obligation to pay a fee may lower the number of referrals submitted to a constitutional court, but, on the other hand, it may restrict access to it, which may be problematic under the law and the ECHR, where applicable. In some countries, the payment of procedural costs is explicitly foreseen in cases of frivolous applications (for instance, Austria, Georgia, Germany, Malta, Portugal, Spain and Switzerland).¹⁹⁶

Article 15 [Remuneration of Judges]

15.1 The remuneration of Constitutional Court judges shall be 1.3 times that of the judges of the Supreme Court of the Republic of Kosovo.

15.2 International judges appointed in accordance with the Constitution and this Law shall continue to receive the salary specified in their appointment decision. The Government of Kosovo shall participate in providing funding for international judges for the determined period equivalent to the salary of national judges.

The legislature has fixed the salaries of the Constitutional Court judges by linking them to the salaries of the judges of the Supreme Court of Kosovo. Obviously, the legislature’s intention must have been to create a simple salary system based on an existing system, without being obliged to create a new or different system of salaries which “should be commensurate with the dignity of the profession [of the constitutional judges] and the burden of their responsibilities”.¹⁹⁷ However, what the legislature may not have foreseen is that the salary scheme of the judges of the Supreme Court may not be as transparent and easy to understand as it would have wished. For instance, the legislature has not regulated whether, with “remuneration” mentioned in Article 15, the “basic salary” is meant or a remuneration system based upon years of experience in other professions, including those passed in the Court, or upon other norms. Whether the judges of the Constitutional Court are allowed to regulate the details of the payment of their remuneration by the Rules of Procedure, is unclear. In any case, for the moment, no such Rule exists.

The Article is also silent on additional social guarantees, such as holidays, bonuses, allowances, and pensions, which the judges should enjoy on top of the remuneration

¹⁹⁵ See comments on Rule 23 hereafter.

¹⁹⁶ Mavcic, Arne. *Constitutional Court of the Republic of Slovenia*. Sarajevo: Venice Commission for European Democracy through Law, 2004.

¹⁹⁷ See Recommendation (94)12 of the Council of Ministers of the Council of Europe on the independence, efficiency and role of judges (supra note 138).

they receive. It is assumed that, in the absence of any other reference, the social benefits of the judges of the Supreme Court could be used as a reference, in the same way as is the case with the salaries. The legislature should regulate the payment of salaries and social guarantees in a more transparent way, the more so, “since they are closely linked to the independence and impartiality of the judges on the one hand and on the acceptance of privileges in the society on the other”.¹⁹⁸

Salaries of judges guaranteed by law are an internationally recognized standard. For instance, Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe of 13 October 1994 on independence, efficiency and role of judges provides that the salaries of judges should be regulated by law and must be “commensurate with the dignity of their profession and the volume of their duties and responsibilities”.¹⁹⁹ In the Republic of Albania, salaries of constitutional judges are determined by the Law on the Organization and Operation of the Constitutional Court, which stipulates that the salaries of a Constitutional Court judge is equal to the salary of the President of the High Court, while the salary of the President of the Constitutional Court is 20 percent higher than the salary of a Constitutional Court judge.²⁰⁰ Moreover, the Law also provides that “salaries and other benefits of a Constitutional Court judge cannot be lowered or adversely affected”. In this way, the sustainability and protection of the salaries of constitutional court judges which is very important for emerging constitutional democracies, are guaranteed. In the Federal Republic of Germany, salaries of members of the Federal Constitutional Court are determined by a special law. The Law on Salaries of Judges of the Federal Constitutional Court of Germany (FCCG) regulates in detail the salaries of the judges, but, besides the salary, the Law does not provide for other social or financial benefits.

There are various examples of countries, where different ways have been chosen to remunerate the judges of the constitutional court. In this connection, the example of the Belarus Constitutional Court Act is noteworthy. The Law provides that “the salaries of the President, Vice-President and judges of the Constitutional Court shall be fixed at the same salary scales as those of the Chairman, First Vice-Chairman and Vice-Chairmen of the Supreme Council, respectively”.²⁰¹ The Law further provides that “the Constitutional Court judges, who don’t possess accommodation, live in premises with several tenants or need better accommodation for other reasons, shall be granted comfortable accommodation in the city of Minsk at the expense of the budget of the Republic, no later than six months after their election to the position of judge...”.²⁰² Even if a Constitutional Court judge's term of office ceases, before he reaches retirement age or in the particular cases provided in the Act, “[the judge] may, at his request, return to his former post or be offered equivalent work, if the post is not available”.²⁰³

¹⁹⁸ Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, adopted by the Venice Commission at its 80th Plenary Session / Venice, 2009.

¹⁹⁹ See Recommendation (94)12 of the Council of Ministers of the Council of Europe on the independence, efficiency and role of judges (supra note 138).

²⁰⁰ Art. 17, Constitutional Court Act of Albania.

²⁰¹ Art 25(2) of the Belarus Constitutional Court Act.

²⁰² Art. 25(3), Constitutional Court Act

²⁰³ Art. 25(4), Constitutional Court Act.

In Slovenia, judges of the Constitutional Court enjoy the right to social insurance in accordance with the social insurance regulations for persons in permanent employment.²⁰⁴ These judges also enjoy the right of reimbursement of travel expenses to and from work, reimbursement of expenses for business trips (travel allowance, daily allowance, hotel expenses), allowance for meals during work, annual leave allowance, displacement allowance, reimbursement of costs incurred during days of traveling from the place of business residence to the place of permanent residence and back, reimbursement of training costs, long-service bonus and a retirement bonus.²⁰⁵

Article 15.2 [Amending and Supplementing the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (the Law)] was added to Article 15, pursuant to Article 2 of the Law amending and supplementing the Laws related to the Ending of International Supervision of Independence of Kosovo, adopted by the Assembly on 7 September 2012. According to Article 5.2, the Government of Kosovo will contribute to the payment of salaries of the international judges specified in the appointment decision by the International Civil Representative (ICR). So far, these salaries were solely covered by the international community. Thus, from the entry into force of the Law adopted on 7 September 2012 until the end of the “determined period” i.e. the period of their mandate, the Kosovo Government will participate in the funding of the international judges for an amount equivalent to the salary of the national judges mentioned in Article 5.1.

²⁰⁴ Art. 73, Constitutional Court Act.

²⁰⁵ Art. 74 (1), Constitutional Court Act.

Chapter II: Procedure

1. General procedural provisions

Article 16 [General Rule]

16.1 Provisions of this chapter shall apply for all court proceedings of the Constitutional Court, except if stated otherwise by this Law.

16.2 In the event of a lack of procedural provisions, the Court shall apply, in a reasonable and analogue manner, relevant provisions of other procedural laws, taking into consideration the nature of each matter and procedural specificities of the Constitutional Court.

- 1 Article 16.1 establishes the principle that the general procedural provisions (*lex generalis*) laid down in Chapter II of the Law will be applicable to all proceedings before the Constitutional Court. In this way, parties are well aware of their procedural rights during the proceedings before the Court, creating legal certainty and equal protection before the law, which are both fundamental principles of the rule of law, guaranteed by the Constitution. However, if a procedural provision elsewhere in the Law deviates from the general procedural provisions of Chapter II, that special procedural provision (*lex specialis*) will have to be applied instead of the general rule.

In fact, it is Chapter III [Special Procedures] of the Law which provides for special procedures which the Court must apply in matters referred to it in a legal manner by authorized parties defined by Article 113 [Jurisdiction and Authorized Parties] of the Constitution. Sub-Chapter 1 [Procedure for cases under Article 113.2, items 1 and 2 of the Constitution]²⁰⁶ to Sub-Chapter 12 [Procedure for cases defined under Article 113.9 of the Constitution]²⁰⁷ of Chapter III set out to what extent these special procedures differ from the general procedural provisions laid down in Chapter II and the way in which they must be applied by the Court. These exceptions to the general procedural provisions of Chapter II will be commented on in detail hereafter under Chapter III of the Law, together with the relevant Rules of Procedure.

The laws on the constitutional courts of most European countries contain special procedural provisions on similar matters.²⁰⁸

²⁰⁶ Article 113.2 of the Constitution provides: “The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court: (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government; (2) the compatibility with the Constitution of municipal statutes.

²⁰⁷ Article 113.9 of the Constitution provides: “The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution”.

²⁰⁸ Chapter VII [Special Procedures] of the Law on the Organization and Operation of the Constitutional Court of the Republic of Albania; Chapter VI [Resolving Jurisdictional Disputes between the Legislative,

Article 16.2 seems to mean that the Constitutional Court in a particular case, where the Law does not provide for appropriate procedural provisions, must make use of relevant provisions of other procedural laws “*in a reasonable and analogue manner* “. Although Article 16.2 does not specify which “*other procedural laws*” the Court should have recourse, and the Court has a considerable margin of appreciation in its choice of such provisions, it is restricted by three criteria: (1) the relevant procedural provisions shall be applied in a reasonable and analogue manner; (2) the nature of the case must lend itself to the application of such procedural provisions; and (3) the provisions to be applied must fit the procedural specificities of the proceedings before the Constitutional Court proceedings. If confronted with such a situation, it will be up to the Court to use these criteria skillfully.

The legislature must have given this tool to the Constitutional Court, only because it is fully independent in the performance of its responsibilities²⁰⁹ and will make use of it with the necessary self-restraint and, as stipulated by the Article, “*in a reasonable and analogue manner* “. Although, as stated above, the provision does not refer to any particular “*other procedural laws*”, it is assumed that the legislature may have envisaged procedures such as those laid down in, *inter alia*, the Law on Contested Procedure (Law No. 03/L-006 of 30 June 2008), the Law on Supplementation and Amendment of the Kosovo Provisional Code of Criminal Procedure (UNMIK/REG/2003/26 of 6 July 2003) as well as the Law on the Administrative Procedure (Law No. 02/L-28 of 22 July 2005).

As a final remark, it should be mentioned that, it is unclear why Article 16.2 only makes reference to the relevant provisions of other procedural laws, instead of first mentioning the Court’s Rules of Procedure, which already contain additional procedural rules, some of which might make up for the lack of procedural provisions under Chapters II and III of the Law. For instance, Article 25 [Evidence] of the Law stipulates that “*The procedure for evidence administration and consideration shall be defined in the Rules of Procedure of the Constitutional Court.*” So, instead of providing that the procedure for evidence administration and consideration should be similar to the relevant provisions of, for instance, the Law on Contested Procedure, the Article empowers the Court to define such procedure itself. Certainly, when preparing such rules, the Court may indeed have used the procedure on evidence administration of that Law as an example, but it may also have had recourse to a similar procedure of other laws. Even though this would have been very logical, the legal system immediately after the declaration of independence and adoption of the Constitution was in the state of flux. Several laws were in the process of drafting, in order to harmonize the legal system with

Executive and Judicial Branches] to Chapter X [Constitutional Court Procedures of Appeal] of the Constitutional Act on the Constitutional Court of the Republic of Croatia; Chapter VII [Procedure for Establishing the Accountability of the President of the Republic, the President of the Government or Ministers] to Chapter X [Opinion on the Conformity of Treaties with the Constitution] of the Constitutional Court Act of the Republic of Slovenia.

²⁰⁹ See Article 112.2 of the Constitution: *The Constitutional Court is fully independent in the performance of its responsibilities.*

the new Constitution.²¹⁰ Therefore, it is understandable that the optimal solution under the circumstances was to empower the Court to define such procedures itself. Further comments on Article 25 and the relevant Rules of Procedure will be dealt with hereafter.

At the same time, the Court should be entitled, whenever the circumstances so require, for instance, if in a given situation no relevant Rule of the Rules of Procedure or no relevant provision of another procedural law could be applied, to adopt itself an appropriate procedural provision, pursuant to Article 115 [Organization of the Constitutional Court], paragraph 1, of the Constitution and Article 2 [Organization of the Work of the Constitutional Court], paragraph 2, of the Law, which both provide that: “*The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law*”. If such a situation occurs, the Court should be under the obligation to mention it expressly in the decision concerned. According to the Court’s case law, no such situation has apparently occurred so far.

As to similar regulations of neighboring countries, reference may be made, for instance, to Article 34 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, which provide for an almost identical rule, stating that: “*If not differently provided by this Constitutional Act, the Constitutional Court shall subsidiarily meaningfully apply the provisions of the relevant procedural legislation of the Republic of Croatia.*”

Article 17 [Principle of Publicity]

- 17.1 Sessions, including the issuance of judgments are open to the public.**
- 17.2 The Constitutional Court may decide to exclude the public when it deems it necessary to protect:**
 - 1.1 national secret, public order or morals;**
 - 1.2 secret information which would be put at risk by public hearing;**
 - 1.3 private life or business secret of the party to the proceedings.**
- 17.3 The procedure for exclusion of the public, provided in Paragraph 2, may be initiated upon the request of a party.**
- 17.4 Only judges participate in the work of the Constitutional Court during consultation and voting when taking a decision.**

In view of its title, one would expect Article 17 to provide a general statement about the public character of the different aspects of the work of the Court. However, the Article only gives examples of the publicity principle, like (1) sessions are open to the public, (2) including sessions where judgments are issued as well as (3) the exceptions to the principle, but it does not confirm, in general, the public character of the Court’s work.

In fact, it is Rule 22.1 which sets out the publicity of the Court’s work in general: “*The work of the Court shall be transparent, open and accessible to the public to the*

²¹⁰ See the list of Laws published in the Official Gazette of the Republic of Kosova, available at: <http://gzk.rks-gov.net/ActsByCategoryInst.aspx?Index=1&InstID=1&CatID=6>, (accessed April 28, 2014).

greatest extent possible, consistent with the Constitution, the law and confidentiality requirements of the Court [...]. Rule 22 provides additional aspects of the publicity principle of Article 17 which will be commented on hereafter. From a legal point of view, it would have been more appropriate, if the general publicity principle of the work of the Court had been laid down in the Law, adopted by the Assembly, instead of leaving it to the Court to determine such general principle in its Rules of Procedure.

The constitutional courts acts of Slovenia and Croatia contain the general publicity principle, the Slovenian Constitutional Court Act, in its Article 3(1), stipulating: “*The work of the Constitutional Court is public where provided by this Act,*” while Article 3 of the Croatian Act on the Constitutional Court provides that: “*The work of the Constitutional Court shall be public.*”

An integral part of the principle of publicity, laid down in Article 17, is, apart from the right to attend an oral hearing, the right of access to and dissemination of information, which is closely connected with the right to freedom of expression. As the constitutions of all democratic countries, also the Kosovo Constitution defines this right by stipulating in its Article 40 [Freedom of Expression], paragraph 1: “*Freedom of expression is guaranteed. Freedom of expression includes the right to express oneself, to disseminate and receive information, opinions and other messages without impediment.*” The Constitution, thus, recognizes the fact that the right to obtain and share information is a central element of the freedom of expression and an integral part of the principle of publicity.²¹¹

Also the ECtHR consistently emphasizes in its case law, that Article 10 [Freedom of Expression] ECHR not only guarantees the right to disseminate information and ideas, but also includes the right of the public to be properly informed. Such information is, inter alia, laid down in public documents, including court documents, which should be accessible to the public to the greatest extent possible.

In this connection, an important judgment of the ECtHR of April 2009, in which the right of access to official documents is recognized, should be mentioned. In this Judgment, the ECtHR made it clear that, when public bodies possess information that is needed for public debate, the refusal to provide relevant documents to those who are requesting access to them, constitutes a violation of the right to freedom of expression and information, as guaranteed by Article 10 ECHR. The case concerned a request by the Társaság a Szabadságjogokért (Hungarian Civil Liberties Union - TASZ), addressed to Hungary’s Constitutional Court, to disclose a parliamentarian’s complaint questioning the legality of new criminal legislation on drug-related offences. The Constitutional Court refused to release the information. The ECtHR found that the applicant was involved in the legitimate gathering of information in a matter of public importance and that the Constitutional Court’s monopoly on information amounted to a form of censorship. It, therefore, concluded that the interference by the Constitutional Court with the applicant’s rights amounted to a violation of Article 10 ECHR.²¹²

The constitutional right of access to public documents in the possession of Kosovo institutions is laid down in Article 41 [Right of Access to Public Documents] of the Constitution, stipulating that 1. “*Every person enjoys the right of access to public*

²¹¹ Társaság a Szabadságjogokért v. Hungary, no. 37374/05, § 38, 14 April 2009, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171> (accessed June 9, 2014).

²¹² Ibid.

documents” and 2. “Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.” Article 41 of the Constitution is implemented by Law No. 03/L-215 [Access to Public Documents].

According to its Article 1, the purpose of the Law is “to guarantee the right of every natural and legal person to have access, without any discrimination on any grounds, following a prior application, to official documents maintained, drawn or received by the public institutions.” Article 3 defines a public document as an “official document, included but not limited to, all information recorded in any form, drawn and received by the public institutions, whereby any official document is any official letter serving to prove or establish something, regardless its physical form or characteristics, written or typed text, maps, schedules, pictures, drawings, sketches, working materials stored in magnetic or electronic form as a sound or voice, any form of optical or visual recordings, and portable equipment for automatic data processing by installed or transferable memories for electronic data storage.”

Since Court documents are covered by the Law, the Court is bound to follow the procedures and other rules for processing applications for access to public documents. The Court has supplemented the Law, by adopting Rules 22 [Accessibility] and 23 [Access to Files and Documents] of the Court’s Rules of Procedure, which provide details about the transparency, openness and accessibility of the Court’s work to the public, including the viewing of files and documents.

Apart from the general rule that “[T]he work of the Court shall be transparent, open and accessible to the public“, Rule 22 also provides specific aspects of the publicity principle, together with, inter alia, Article 20 [Decisions] and 24 [Oral Hearing] of the Law as well as Rule 23 [Access to Files and Documents] of the Rules of Procedure, which enumerate further aspects of the publicity principle mentioned in Article 17. They will be commented in detail hereafter.

1 As prescribed in this provision, the publicity requirement encompasses two elements: the public nature of the sessions of the Court and the public nature of the judgment of the Court. The Article uses the term “sessions” (in the English version), although it would be more accurate to use the term “plenary sessions”. According to Black’s Law Dictionary, the session of a court is “the time during which it actually sits for the transaction of judicial business, and hence terminates each day with the rising of the court.”²¹³ Thus, “sessions” could mean: closed or public hearings, deliberations and voting by the judges, issuance of judgments and other court business.

However, in the context of Article 17.1, the term “sessions” clearly does not cover deliberations and voting, which, by virtue of Rule 17.4 (“Only judges participate in the work of the Constitutional Court during consultation and voting when taking a decision”) and Rule 44.1 (“Deliberations of the Court shall not be open to the public and shall remain confidential.”) are closed to the public. Also administrative sessions, mentioned in Rule 14 [Administrative sessions], where judges discuss and decide on matters of policy related to the administration of the

²¹³ “Black’s Law Dictionary 1078 (2nd ed. 1995), Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed..”. <http://thelawdictionary.org/session> (accessed June 9, 2014).

Court, are normally closed to the public, although both the Law and the Rules are silent on the matter.

The ambit of “sessions” in Article 17.1 seems, therefore, to be restricted to (1) oral hearings; (2) sessions where the judgment is issued; and (3) those where other court business is conducted (for instance, official ceremonies at a session of the Court which the public can attend, etc). As to the issuance of judgments, the Court has adopted a different procedure, namely, it publishes its judgments on its webpage and in the Official Gazette (see for further details Article 20 [Decisions], paragraph 4, hereafter), instead of issuing them first at a public session of the Court.

According to Article 11.1 of the B&H Constitutional Court Rules of Procedure, sessions and public hearings are not identical. Apart from the general provision that: “*The work of the Court shall be public.*”, the Article stipulates that: “*The proceedings before the Court shall be made public: 1. by informing the public of the preparations and holding [of] the sessions of the Court as well as public hearings before the Court; [...]*”.

Thus, Article 11.1 of the B&H Rules of Procedure clearly distinguishes between “sessions” and “public hearings”, since it provides that the public will be informed of the preparations and holding of “*sessions of the Court as well as public hearings before the Court.*” This seems to be confirmed by Article 11.3 stipulating that participants in the proceedings and other interested persons are allowed “*to be present at the sessions of the Court, unless the President of the Court, in the interest of morals, public order or national security in the democratic society, decides otherwise; [...]*”.

In case of public hearings, however, according to Article 46 of Chapter 4 [Public Hearings] of the B&H Constitutional Court Rules, it is not the President, but the Court itself which decides on the exclusion of the public. Although the Rules of Procedure do not specify what is precisely meant by “*sessions of the Court*”, at least it is clear that they do not embrace “working sessions” which, together with sessions where the deliberations and voting take place, are closed to the public by virtue of Article 12 of the B&H Constitutional Court Rules.

Whatever the precise meaning of “sessions” is, the general rule appears to be that the public is entitled to be present at Court sessions and public hearings.

However, Article 17.1 does not grant a party the “right” to a hearing as Article 20 [Decisions] of the Law may be understood to do, but ostensibly deals with the situation that the Court has decided, by virtue of Rule 39 [Hearings and Deliberations], to hold an oral hearing which, according to the principle of publicity, is open to the public. Thus, (1) the parties have the right to be present and to participate in the hearing; (2) the public and media have the right to be present; and (3) the judgment shall be made public, which shows that the publicity principle is not only a subjective right of the parties in the proceedings, but also a constitutional principle, the purpose of which is to place the Court under the supervision of the public²¹⁴.

²¹⁴ See Open Society Justice Initiative (OSJI). “Report on Access to Judicial Information”, March 2009 <http://www.right2info.org/resources/publications> (accessed June 5, 2014). The report reviews the laws and practices of more than 15 countries on access to judicial records and information about the judiciary.

The principle of the public character of an oral hearing is embedded in Article 31 [Right to a Fair and Impartial Trial], paragraph 3, of the Constitution, stipulating that:

“3. Trials shall be open to the public except in limited circumstances in which the court determines that, in the interest of justice, the public or the media should be excluded, because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law”.

Article 31.3 of the Constitution and Article 17.1 of the Law are supplemented by Rule 22 [Accessibility], paragraph 1, and Rule 39.3 of the Rules of Procedure. Rule 22.1 provides”:

The work of the Court shall be transparent, open and accessible to the public to the greatest extent possible, consistent with the Constitution, the law and confidentiality requirements of the Court, including, but not limited to:

(a) informing the public about the date and time of hearings;

(b) providing information on the course of proceedings; [...].

Although the Rule does not expressly mentions that the hearings of the Court shall be open to the public, it determines at least that the public must be informed about the date and time of hearings as well as about the course of proceedings. This can only be understood to mean that hearings are, in principle, public, unless confidentiality requirements, as discussed above, would lead the Court to decide otherwise. (See further comments on Rule 22).

Rule 39 [Right to hearing and waiver] of Chapter IV. Hearings and Deliberations, though is much clearer in this respect, stipulating, in its paragraph 3, that: *“Court hearings shall be public, unless the Court orders otherwise when good cause is shown under law or these Rules.”*

A similar right is laid down in Article 6 [Right to Fair Trial] ECHR which together with seven (7) other international instruments on human rights²¹⁵, is directly applicable in Kosovo by virtue of Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution and in case of conflict has priority over provisions of laws and other acts of public authorities in Kosovo. The ECHR holds a special place amongst these international instruments, because the Constitution provides, in its Article 53 [Interpretation of Human Rights Provisions] that *“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights (ECtHR)”*. This means that, when adjudicating a referral in which the breach of a constitutional right or freedom is alleged, the Constitutional Court must follow the case-law of the Strasbourg Court with regard to the interpretation of that constitutional right (Article 53 will be commented on in detail hereafter).²¹⁶

²¹⁵ These human rights instruments are: (1) Universal Declaration of Human Rights; (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; (3) International Covenant on Civil and Political Rights; (4) Council of Europe Framework Convention for the Protection of National Minorities; (5) Convention on the Elimination of All Forms of Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

²¹⁶ See Case No.KI.41/09, AAB-RIINVEST University, Pristina, Resolution of 27 January 2010, para. 16.

Article 6 ECHR provides, in a similar way as Article 31 of the Constitution, that, inter alia, *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”*. The principle of publicity protects the parties to the dispute not only against the administration of justice without public control, but it also maintains public confidence in the administration of justice and in the courts themselves. Visibility of the administration of justice contributes to ensure the fairness of trials, which is the purpose of Article 6 and is regarded as fundamentally important in a democratic society. A public hearing also permits the press to exercise their vital role as public watchdog, the function also protected by Article 10 of the Convention.²¹⁷

Observance of the principle of publicity is the core of the right to a fair and impartial trial, and, as highlighted by the ECtHR, one of the pillars of a democratic society within the meaning of the Convention²¹⁸. This interpretation, which, as mentioned above, has binding force in Kosovo under Article 53 of the Constitution, requires that any exclusion from the entitlement to a hearing which is open to the public, should be interpreted restrictively, in that the exclusion must have a legitimate aim and be applied in a manner proportionate to the aim sought to be achieved.

As to the publicity principle of Article 17 that a hearing before the Constitutional Court should be open to the public, the Strasbourg Court has decided to apply all requirements of Article 6 also to constitutional courts. It did so in its Judgment of 3 March 2000, *Krcmar v. the Czech Republic*, stating in a sweeping manner that *“Moreover, according to the Court’s case-law, Article 6.1 applies to proceedings before constitutional courts”*.²¹⁹ Until then, the ECtHR had ruled in a number of cases that only certain aspects of the rights guaranteed by Article 6 ECHR were applicable to such proceedings.

However, according to the ECtHR, constitutional courts enjoy a special status and play a special role in adjudicating constitutional complaints. Thus, although they fall in principle within the scope of application of the requirements of Article 6 ECHR, constitutional courts still enjoy a certain margin of appreciation, for instance, as to the right to a public hearing.²²⁰ Although this right is of primary importance for the ordinary courts, it is not of the same importance for proceedings before the Constitutional Court, since, in principle, constitutional proceedings are

²¹⁷ “INTERIGHTS Manual for Lawyers – Right to A Fair Trial under the ECHR (Article 6)”. <http://www.inte-rights.org/files/107/INTERIGHTS%20Article%206%20Manual.pdf> (accessed June 9, 2014). Article 10 ECHR provides: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]”.

²¹⁸ See *Öllinger v. Austria*, no. 76900/01, ECHR 2006-IX; *Werner v. Austria*, 24 November 1997, Reports of Judgments and Decisions 1997-VII; *Diennet v. France*, 26 September 1995, Series A no. 325-A; *Pretto and Others v. Italy*, 8 December 1983, Series A no. 71; *Axen v. Germany*, 8 December 1983, Series A no. 72.

²¹⁹ See *Krčmář and Others v. the Czech Republic*, no. 35376/97, § 36, 3 March 2000.

²²⁰ See, for more details Kuijer, Martin. *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*. Wolf Legal Productions, 2004.

limited to the examination of questions of constitutionality and, therefore, do not normally entail an assessment of points of fact or of points of law.

However, once the Court has decided to hold an oral hearing, the parties shall have the right to be present and participate in the hearing, which, at the same time, must be open to the public and media, unless the Court decides to exclude them from the hearing for reasons laid down in Article 31 [Right to Fair and Impartial Trial] of the Constitution, Article 17.2 of the Law and Rules 39 [Right to Hearing and Waiver] and 41 [Participation in Hearings] of the Rules of Procedure.

- 2 Despite the public nature of oral hearings, the Court may exclude the public and press for one of the reasons outlined in the Article. Such exceptions to the rule are also foreseen by Article 31 of the Constitution, Article 6 ECHR and Rules 39.3 and 41.1 of the Rules of Procedure. In the interest of justice the exclusion of the “*public or media*” would be justified only, as stipulated by Article 31 of the Constitution, if their presence would endanger: “*public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.*”

The list of reasons set out in Article 17.2 is, in some aspects, different from the one provided by Article 31 of the Constitution, since Article 17.2 also allows the Court to exclude the public and press from the hearing: “*for the protection of national secret, morals, secret information and business secret of a party to the proceedings.*” Rule 39.3 does not really add any additional reason, since it only states that the Court can order the exclusion of the public, “*when good cause is shown under law or these Rules.*” Thus, it only refers to the reasons already mentioned above and those laid down in Rule 41 allowing the Court to exclude the public from the hearing, “*if such exclusion is required to protect the safety of the parties or their representatives or such exclusion is required by considerations of public safety and order.*”

Apart from the above legal provisions, also Article 6 ECHR contains a number of reasons for the exclusion of the public and the press from the hearing “*in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*”

The last reason (exclusion in special circumstances where publicity would prejudice the interests of justice) seems to leave a great margin of appreciation to a court and could lead to abuse, if the term “*interests of justice*” is not clearly defined by the ECHR and/or ECtHR. Article 31 of the Constitution seems to have been copied from Article 6 ECHR, except for the reference to “*morals*”. The reference to “*the interests of justice*” has also been taken over and, in case an interpretation is asked for from the Court, should be interpreted consistent with the ECtHR’s interpretation.

The Court will certainly not decide to exclude the public and media lightly, since, if it would exclude them, the Court would deprive them (1) of their fundamental right to be able to control the proper administration of justice of the Constitutional

Court²²¹ and (2) of their additional right to receive and impart information as part of their freedom of expression, guaranteed by Article 40 [Freedom of Expression] of the Constitution and Article 10 [Freedom of expression] ECHR (see for details hereafter).

N.B. Articles 17.1 and 17.2 are further supplemented by Rule 41 [Participation in Hearings] of the Rules of Procedure.

- 3 This provision (Article 17.3) enables a party to the proceedings to request the Court to initiate the procedure to exclude the public (and the press) from the oral hearings in his/her case for the same reasons as enumerated in Article 17.2 of the Law. In such a case, the Court will certainly expect the party to convince it of the necessity of the measure by sufficiently substantiating his/her request. The Article is silent on the issue whether the Court should also hear the other party before taking a decision on the request. However, it seems to be appropriate that, in view of the “equality of arms” principle, the Court should give the other party the opportunity to comment on the request.

So far, no party to the Court proceedings has requested that the public and the press be excluded from an oral hearing before the Court.

- 4 It is assumed that the term “consultation” in Article 17.4 stands for “deliberations” as is the case in Rule 44 [Deliberations and Voting]. As mentioned above, deliberations and voting is only done in closed sessions (*in camera*) which are not open to the public. The Court does, therefore, not need to render a decision on the exclusion of the public.

Although the Article gives the impression that “Only judges participate in the work of the Court during consultation and voting when taking a decision”, Rule 44.2 has extended the circle of persons allowed to be present to the Secretary General, the Chief Legal Advisor as well as other staff of the Secretariat or Legal Advisors. Article 17.4 does not itself provide details of the manner in which the judges take decisions. This is done by Article 19 [Taking of the decisions], which is commented on hereafter.

No proper legal definition of the secrecy of deliberations (*in camera*) appears to exist, but it can be deduced from legal literature that the secrecy of deliberations includes the activities that take place in the course of judicial deliberation, *i.e.* the discussion between the judges with the aim to reach a decision and the subsequent voting.²²² The secrecy of deliberations allows for the names of the judges in the judgment to be mentioned. Maintaining the secrecy of deliberations is justified, since it guarantees the authority of the court and the collegiality, unity and independence of the judges.

²²¹ In accordance with the famous adagio: “Justice must not only be done, it must be seen to be done”. More on the principle see Aall, Jørgen. “Waiver of Human Rights: Waiver of Procedural Rights According to ECHR Article 6.” *Nordic Journal of Human Rights* 2011 29: 206–278.

²²² Laffranque, Julia. “Dissenting opinion and judicial independence.” *Juridica International* 8 (2003): 162–166. http://www.juridicainternational.eu/public/pdf/ji_2003_1_162.pdf (accessed April 28, 2014), Kelemen, Katalin. “Dissenting Opinions in Constitutional Courts.” *German LJ* 14 (2013): 1345. <http://www.diva-portal.org/smash/get/diva2:662804/FULLTEXT01.pdf> (accessed April 28, 2014).

The new Law on Courts, in its Article 34 [Duties of Judges], paragraphs 3 and 4, although not applicable to the Constitutional Court, contains the following rules: *“During the exercise of judicial functions, judges shall protect the confidentiality of all non-public information;”* and *“Judges shall not comment to the media on the composition, evidences and decisions of any cases.”*

Generally speaking, the secrecy of deliberations is considered as a sacred issue which guarantees judicial independence. Thus, the preparations for the judgment must take place independently and secretly without any external influences, whereas the judgment itself shall be public. The judges must maintain the confidentiality of the deliberations even after their mandate has come to an end.²²³

Article 17.4 of the Law is supplemented by Rule 44 [Deliberations and Voting] of the Rules of Procedure which sets out the confidentiality of the deliberations, the persons to be present, the preparation of minutes and the preparation of the final text of the judgment of the Court. However, since, according to Article 24 [Oral hearing], *“[...] the procedure of the oral hearing shall be defined in the Rules of Procedure of the Constitutional Court,”* Rule 44 will be commented in conjunction with Rules 39 [Right to Hearing and Waiver] to 43 [Schedule of Hearings] These Rules deal with the procedure of the oral hearing in detail and will be commented on after the comments on Article 24.

Rule 22 [Accessibility] of the Rules of Procedure

- 22.1 The work of the Court shall be transparent, open and accessible to the public to the greatest extent possible, consistent with the Constitution, law and confidentiality requirements of the Court, including, but not limited to:**
- (a) informing the public about the date and time of hearings;**
 - (b) providing information on the course of proceedings;**
 - (c) permitting viewing of files and documents;**
 - (d) publication of all Judgments and decisions;**
 - (e) any other form of communication as authorized by the Court.**
- 22.2 The Secretary General shall publish Judgments and decisions on the Court's webpage immediately following the approval of the final text, and shall ensure regular publication of printed Judgments and decisions.**
- 22.3 When necessary, the Court may issue press releases or hold press conferences. Press releases issued by the Court shall be issued by the Secretary General only after approval of the content by the President. Judges shall receive copies of all press releases as soon as possible.**
- I. Rule 22.1 does not only deal with accessibility to documents, but defines a range of other aspects of the accessibility, openness and transparency of the work of the Court. Such accessibility is essential in order to enable the public, media and other third parties to directly monitor the work of the Court and the development and administration of constitutional justice. At the same time, access to the information**

²²³ Hambro, Edvard. "Dissenting and individual opinions in the International Court of Justice." *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht (ZaöRV)* (1956): p. 229 - 48. http://www.hjpp.de/17_1956_57/17_1956_2_a_229_248.pdf (accessed April 28, 2014).

mentioned in Rule 22.1 is central to build and maintain public confidence in constitutional justice and the rule of law.

As to Rule 22.1(a) and (b), once the Court has decided to hold an oral hearing, it should announce, well in advance of the hearing, the date and time as well as the parties involved and other information about the course of the proceedings on its website and on a public information board outside the Court premises and in the main newspapers. It may not be unreasonable for the public and media to be able to obtain such information by telephone, if need be. Moreover, the Court should also provide the public and the media with information on the course of the proceedings, like postponement, suspension or termination of the proceedings.

Rule 22.1(c) contains the right of access to files and documents without giving further details. Although Rule 22.1(c) is silent, it is assumed that this will also happen, when the public wishes to view files and documents.

Such details are to be found in Rule 23 [Access to Files and Documents] hereafter.

That the work of the Court should be open and transparent through the publication of the Court's judgments and decisions, as required by Rule 22.1(d), is consistent with Article 20 [Decisions], paragraph 4, of the Law which defines that "*The Decision is sent to each party ex officio and is published in the Official Gazette.*" The Court also publishes its judgments and decisions on its web-page.

The intention of Rule 22.1(e) to render the work of the Court transparent and open through "*any other form of communication as authorized by the Court*", may refer to the establishment of the outreach programs as the Court has developed since its establishment.²²⁴

- II. Rule 22.2 specifies that the Court, through the Secretary General, should be proactive in ensuring the transparency of its work through the immediate publication of Court judgments and decisions on the Court's webpage. The judgments and decisions on the webpage may be equipped with indicators, in order to facilitate the search for a particular judgment or decision. This Rule is neither a substitute for the requirement, laid down in Article 20.4 of the Law, to publish decisions of the Constitutional Court in the Official Gazette, nor a substitute for the requirement of Article 20.3 that decisions of the Constitutional Court shall be announced publicly. It only establishes for the Secretary General how to publish the judgment and decisions of the Court.
- III. It has become the Court's practice to inform the public, through press releases, the organization of press conferences or electronically (not mentioned in the Rule), about its activities (for instance, visits to other constitutional courts or training of judges and public prosecutors), matters of administrative nature (for instance,

²²⁴ See Annual Report of the Constitutional Court of Kosovo 2010, 170. Available at: http://www.gjks.org/repository/docs/RAPORTI_2010.pdf, (accessed April 28, 2014).

Annual Report of the Constitutional Court of Kosovo 2011, 53-54. Available at: <http://www.gjks.org/repository/docs/Raporti%20Vjetor%202011%20Versioni%20Final.pdf>, (accessed April 28, 2014).

Annual Report of the Constitutional Court of Kosovo 2012, 59. Available at <http://www.gjks.org/repository/docs/RAPORTI%20VJETOR%202012.pdf>, (accessed April 28, 2014).

Annual Report of the Constitutional Court of Kosovo 2013, 61 – 62. Available at http://www.gjks.org/repository/docs/gjkk_raporti_vjetor_2013.pdf, (accessed April 28, 2014).

information about vacancies) or information on judges (for instance, the appointment of new judges, their biography, etc.). Such means of information dissemination could also be used for the public announcement of the date on which a hearing will be held or a judgment will be handed down. Furthermore, the Court could issue a summary of the judgment which it has just adopted, but the text of which has not been finalized yet.²²⁵

Rule 23 [Access to Files and Documents] of the Rules of Procedure

- 23.1 Parties shall have the right to view official files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court. Parties shall request viewing the document at least 24 hours in advance. The viewing shall be conducted at the Court during regular working hours in the presence of Secretariat staff.**
- 23.2 Parties shall have the right to obtain copies of files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court. The Court may charge an administrative fee for such copies.**
- 23.3 The Report of the Judge Rapporteur, the draft decision by the Review Panel, any information on Judges' discussions or voting, draft decisions, and any notes made by Judges during case proceedings and deliberations, and any other material designated by the Court shall be considered confidential and shall not be accessible to parties or the public. The Court may authorize release of any confidential document if the Court determines that such release is necessary in the public interest.**

- I. Rule 23.1 deals with the right of parties to view official files and documents, but only in their own case. Moreover, although parties can solely see "*official files and documents*", it is presumed that they can also see "non-official" files and documents, if there are any such documents in the case in which they are a party. The right of parties to view the (official) files and documents in their own case is one of the aspects of the principle of equality of arms (parties to the proceedings have the same rights and obligations), which is a feature of the right to a fair trial. The right of parties to view official files and documents only in their own case seems to be rather restricted and raises the question, why parties should not be entitled to view files and documents in other cases, for instance, in cases of a similar nature, which could provide important arguments for their case. As mentioned above, the public has a similar right under Rule 22.1(c), the scope of which appears to be broader, since it permits "*to view files and documents*", without the Rule restricting the access to a particular case, as Rule 23.1 apparently does. Rule 23.1 further provides that parties have no right to view files and documents which the Court has designated as confidential. The Rule, however, does not mention the confidentiality criteria on the basis of which access to files and

²²⁵ See for instance Press Release of 3 September 2013 in respect to Case KO 108/13, <http://www.gjks.org/?cid=2,28,347>, (accessed April 28, 2014)..

documents could be restricted for the parties. Such criteria may rank from national security or safety to business interests and be mentioned by the Court, when determining the confidentiality of the relevant files and documents. The restriction of access to confidential files and documents applied by the Court to the parties in a particular case, should also be applied, *mutatis mutandis*, to the request from a member of the public to have access to the same documents. Confidential files or documents are enumerated in the comments on Rule 23.3.

It may well be, that a party, when viewing the case file, notices that a document (official or not) is not present, but is in the possession of the other party. In that case the party interested in the contents of that document, may make use of the procedure specified in Rule 51 [Documents], paragraph 3, of the Rules of Procedure.

Rule 23.1 further regulates the manner in which official files and documents can be viewed by the parties, providing that the request must have been submitted 24 hours in advance and that the viewing can only take place in the presence of Secretariat staff during regular working hours. The presence of the staff member is necessary in order to ensure that the viewing of files and documents happens in an orderly manner and that documents which are confidential are not viewed unintentionally.

- II.** Rule 23.2 allows the parties to obtain copies of files and documents they are entitled to view by virtue of Rule 23.1, but only “*in the case in which they are a party*” (Rule 23.2 does not mention that the files and documents should be “official” as is the case in Rule 23.1). This right can be limited for the same reason as mentioned in Rule 23.1, namely, when the Court determines that the files or documents to be viewed are confidential. The Rule further provides that the Court may charge an administrative fee for such copies.

It is assumed that also a member of the public is entitled to obtain copies of any files and documents against an administrative fee, if any, unless the file or document is confidential as determined by the Court.

- III.** The Court documents expressly mentioned in the Rule are confidential *ex officio*, but the Court can decide to lift the confidential character of any of such documents “in the public interest”. The question may arise whether the Rule would also allow a party or a member of the public to request the release of a confidential document “in the interest of that party or that member of the public”. The Rule does not provide an answer to that question, but there does not seem to be an obstacle for the Court to grant such a request in exceptional circumstances and only if the request is duly justified.

Apart from the Court documents mentioned, the Court can designate that any other material is considered confidential. As in Rule 23.1, no reasons for such confidentiality are especially mentioned, but it is assumed that this may occur, when, in the Court’s view, such additional material contains information the disclosure of which could be prejudicial to certain interests, for instance, national interest or security, public morality and private and business interests, etc. Such confidential files and documents cannot be viewed by the parties and the public, but, as in the

case of the Court documents, the Court may, if it deems the release of all or part of the additional confidential material necessary in the public (or, possibly, other) interest, make an exception to the confidentiality rule and release any particular confidential document.

As to the access to files and documents allowed by other constitutional courts, for instance, the German Federal Constitutional Court Act enables third parties, since 1999 to obtain summary information of the files of the Constitutional Court, under condition to demonstrate "reasonable interest", unless the "party involved" in the case has a justified interest in the information not being disclosed.²²⁶

The Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina stipulate, in its Article 11.3, that, apart from participants in the proceedings, also "*other interested persons are allowed to inspect the case-files relating to cases which are being decided by the Court*" (it is supposed that the inspection of case-files which have been adjudicated, are equally accessible).²²⁷ Moreover, the Constitutional Court adopted Guidelines which in principle allow the public access to all information and data that are in the Court's possession.²²⁸

As to the application by the Croatian Constitutional Court of the publicity principle on Constitutional Court documents, the Constitutional Court's approach appears to be similar to other constitutional courts, when a member of the public would like to obtain a copy of unpublished decisions, rulings and reports of the Court. The interested person must only submit a written request to the Court, in accordance with Article 57 [Availability of Unpublished Decisions, Rulings and Reports] of the Rules of Procedure to obtain copies of such unpublished decisions, rulings and reports (at least one copy of each free of charge).

However, in case of a request to obtain documents from a particular case file, the situation is apparently different. Pursuant to Article 62 [Constitutional Court Case Files], paragraph 1 of the Court's Rules of Procedure: "A Constitutional Court case file shall include the initial filings, whereby a Constitutional Court case was instituted or which proposed the institution of Constitutional Court proceedings, briefs, memorandums, expert works and separate opinions of Constitutional Court legal advisers who cooperated in processing the case, written opinions by scientific legal advisers of the Constitutional Court, written observations from state bodies received during the carrying out of the Constitutional Court proceedings, dissenting opinions by judges and the written statement of reasons regarding the vote of dissent, and the original text and certified transcripts of the decision, judgment and report." According to Article 62.2, "The documentation contained in the Constitutional Court case file shall serve the needs of the judges and Constitutional Court legal advisers in proceedings for identical or similar Constitutional Court cases." Only authorized persons are allowed to review portions of the documentation contained in the Constitutional Court case file prior to the conclusion of the proceedings, in the circumstances described in Article 94

²²⁶ Article 35b can be found under: <http://www.iuscomp.org/gla/statutes/BVerfGG.htm#35b>, (accessed April 28, 2014).

²²⁷ See the Court's web-page: www.ccbh.ba.

²²⁸ The Guide on Access to Information of the Constitutional Court of Bosnia and Herzegovina can be found at http://www.ccbh.ba/eng/p_stream.php?kat=90, (accessed April 28, 2014).

[Review of Constitutional Court Case Files for the Duration of Proceedings] of the Rules of Procedure: “(1) Participants to Constitutional Court proceedings, their agents and other persons vested with legal interest may request to review the following documentation from the corresponding Constitutional Court case file until the conclusion of the proceedings:

1. filings whereby the Constitutional Court proceedings were proposed or instituted;
2. written observations of the opposing parties (if sought and submitted);
3. written opinions of scientific legal advisers of the Constitutional Court (if sought and submitted);
4. written observations of state bodies that emerged or were received during the processing of the case (if sought and submitted).

[...].”

Article 63 [Confidential Constitutional Court Documentation, Files of Courts and Other State Bodies] of the Court’s Rules of Procedure restricts the access to documentation from the case file even further by stipulating that:

- (1) “Confidential Constitutional Court documentation shall include the results of voting and minutes on voting, draft decisions, rulings and reports, proposed amendments to enacting terms and statements of reasons of draft decisions and rulings, proposed amendments to phrases in draft decisions, rulings and reports, hand written or signed notations by judges rapporteur and Constitutional Court legal advisers who participated in the processing of a given case, and data based on documentation from courts and other State bodies classified as state, military, official or business secrets which have not yet been classified.
- (2) Confidential Constitutional Court documentation shall not be deemed a component of the Constitutional Court case file and shall be stored in the appropriate manner together with the Constitutional Court case file. Access to such documentation shall not be permitted to anyone apart from the judges and Constitutional Court legal advisers.
- (3) Files from courts that pertain to the subject of constitutional complaints, case files and documentation from other state bodies requested by a judge-rapporteur during the course of Constitutional Court proceedings (Article 69 of the Constitutional Act) and documents and notifications obtained during the course of Constitutional Court proceedings (Article 25 of the Constitutional Act) shall not be deemed a part of the Constitutional Court case file.
- (4) Copies of the files received from courts and other state bodies from Paragraph 3 of this Article shall be stored in the appropriate manner with the corresponding Constitutional Court case file. Access to such files shall not be permitted to anybody outside of the judges and Constitutional Court legal advisers.”

Even the right of access to a case file, after it has been concluded, may be difficult to obtain by participant in those proceedings, since, according to Article 64 [Review of Constitutional Court Case Files After the Conclusion of Proceedings], he/she will have to notify the President of the Court “in writing that he or she is preparing an application for the protection of rights before the European Court of

Human Rights in Strasbourg, and states the reasons why a review of the case file is deemed necessary.”

Only for very specific reasons may the President of the Court approve a review of the case file under Article 62.1 to a natural person who has not been a participant in the proceedings after the Constitutional Court proceedings have been concluded and the case has been designated as “a.a”, if the person unequivocally proves that there are justified professional, scholarly, research or similar interests, and submits a written and signed guarantee that no personal names, names of legal persons and names of places and foreign states contained in the case file [...] shall be disclosed.”

Article 93 [Information on the Course of Constitutional Court Proceedings] of the Rules of Procedure stipulates that only:

“(1) Participants in Constitutional Court proceedings and their agents may seek information on the course thereof up until the conclusions of these proceedings.

(2) The information from Paragraph 1 of this Article shall be provided by the Secretary for the Constitutional Court Operations based on data from the Register and Constitutional Court case files.”

Moreover, the documentation which may be requested is rather limited as indicated in Article 94 [Review of Constitutional Court Case files for the Duration of Proceedings], although, apart from participants in Constitutional Court proceedings and their agents, also “other persons vested with legal interest may request to review certain documentation from the relevant case file. Article 94 provides as follows:

“ ...

(1) Participants to Constitutional Court proceedings, their agents and other persons vested with legal interest may request to review the following documentation from the corresponding Constitutional Court case file until the conclusion of the proceedings:

1. filings whereby the Constitutional Court proceedings were proposed or instituted;

2. written observations of the opposing parties (if sought and submitted);

3. written opinions of scientific legal advisers of the Constitutional Court (if sought and submitted);

4. written observations of state bodies that emerged or were received during the processing of the case (if sought and submitted).

(2) The request to review the documentation from Paragraph 1 of this Article shall be submitted in writing to the Secretary for the Constitutional Court Operations.

(3) The review shall be conducted in the Reception Office of the Secretariat for the Constitutional Court Operations at a time determined by the Secretary for the Constitutional Court Operations.

(4) The review of Constitutional Court documentation shall imply the right to transcripts of the entire documentation from Paragraph 1 of this Article or portions thereof or the right to copies of the documentation at the expense of the authorised party who requests the review based on the rates posted on the bulletin board of the Constitutional Court.

...”

The above example of restricted access of the Constitutional Court case file under the Croatian Constitutional Act and Rules of Procedure shows that the access to files and documents under Rule 23 of the Constitutional Court of Kosovo is much more liberal.

The principle of access to information on the status of the proceedings before the Constitutional Court is laid down in Rule 24 [Information on Status of Proceedings] of the Rules of Procedure.

Rule 24 [Information on Status of Proceedings] of the Rules of Procedure

Upon a written request by any person, the Secretary-General shall provide information on the status of any proceedings before the Court.

Rule 24, which forms part of the publicity principle, is of particular importance to the Court, as it requires it to maintain a properly functioning case management system in order to be able to comply with this Rule by providing any person, including the parties or a member of the public, with the information on the status of proceedings, as requested:

1. by providing information about the course of the proceedings;
2. by allowing the participants in the proceedings and other interested persons to inspect the case-files relating to cases which are being decided by the Court; by allowing them to be present at the sessions of the Court, unless the President of the Court, in the interest of morals, public order or national security in the democratic society, decides otherwise; and to be present at other events from which the public is not excluded under the Rules of Procedure;
3. by publishing the adopted decisions;
4. by publishing the Court's Bulletin in which more important decisions, rulings and other acts are published;
5. in any other way permitted by the Court.

Article 17 of the Law is also supplemented by Rule 41 of the Rules of Procedure.

Also Rule 39.3 provides that: "Court hearings shall be public, unless the Court orders otherwise when good cause is shown under law or these Rules.", supplements Article 17 but will be commented on hereafter in connection with Article 20 Decisions of the Law.

Rule 41 [Participation in Hearings] of the Rules of Procedure

- 41.1 All hearings shall be open to the public, except when the Court orders exclusion of the public from a hearing, if such exclusion is required to protect the safety of any of the parties or their representatives or such exclusion is required by considerations of public safety and order.
- 41.2 Any party, representative, witness or other hearing participant whose conduct directed at Judges or the Secretary General is incompatible with the dignity of the Court, or who acts offensively toward another party or that party's representative, may be warned by the President and given an opportunity to present a defense. The President, in consultation with the

Judges, may order discipline to be imposed, including the imposition of a fine in accordance with the rates set by the Court or, in exceptional cases, exclusion from the hearing.

41.3 If an observer's conduct is incompatible with the dignity of the Court or if an observer disrupts a hearing, the President may order that the observer be excluded from the hearing.

- I. Rule 41.1 makes clear that, if the Court decides to exclude the public, it has to issue an order, based on law and properly reasoned in accordance with the criteria laid down in Article 17(2) of the Law and the Rule itself. Rule 41.1 introduces some additional grounds for excluding the public from a hearing, which are not mentioned in Article 17 of the Law²²⁹, namely, *"to protect the safety of any of the parties or their representatives or such exclusion is required by considerations of public safety..."*. These additional reasons concern the "safety" of the parties and their representatives which may be at stake, if the public (and media) attend the hearing.²³⁰ In other words, the reason for the Court to exclude the public and others from the hearing may also be justified in their own interest in order to avoid that any harm is inflicted upon them, while attending the hearing.

For instance, the Court may have received serious threats or reliable information that a member of the public may try to disrupt the proceedings and use violence. In such a case, the Court could consider it advisable²³¹ not to allow the public (and the media) to attend the oral hearing in order not to endanger the safety of the judges, parties and other participants as well as members of the public present in the courtroom. Even in the absence of any threat, the Court should not hesitate, in the absence of a proper Court Police, to ask for special protection in the Court room from the police, guarding the premises, or a specialized security organization, whenever it plans to hold an oral hearing.

For instance, the Albanian Constitutional Court is entitled to possess its own court police, by virtue of Article 15 [Security] of the Law on the Constitutional Court of the Republic of Albania, stipulating that: *"1. To preserve its security, the Constitutional Court is entitled to have police at its service"*; and *"2. The number and duties of the police are approved by the Minister of Public Order at the proposal of the President of the Constitutional Court."*

Rule 41.1 is silent on alternative methods enabling the public (and the media) to follow the Court proceedings, for instance, in case of a safety issue, the President could decide to accommodate the public and journalists elsewhere in the Court premises, where the proceedings could be followed on a television screen. In such a way, the public nature of the oral hearing might be preserved as well as the above rights of the public and the press to attend the oral hearing concerned.

²²⁹ See comments re. Article 17.2 of the Law, providing that: The Constitutional Court may decide to exclude the public, when it deems it necessary to protect: 17.2.1 national secret, public order or morals; 17.2.2 secret information which would be put at risk by public hearing; 17.2.3 private life or business secret of the party to the proceedings.

²³⁰ There may well be other cases, which would call for a similar Court decision, for instance, where the safety of "other hearing participants" (see Section 41(2)), like witnesses and experts, is at stake.

²³¹ The Constitutional Court does not dispose of a court police, as is the rule in proceedings before criminal courts.

Also Article 445 of Law No. 03/L-006 on Contested Procedure provides for similar grounds, on the basis of which the public may be excluded from the hearing:

“The court allows based on justifiable grounds, that the trial is partly or entirely closed to the public, when:

- (a) an official secret should be kept or when it concerns the public order;*
- (b) if there are mentioned trade secrets, inventions, whose publications will cause interference with the interests protected by law;*
- (c) private details about the parties, or other people involved in the process, are mentioned.”*

- II.** Rule 41.2 allows the Court to exclude any of the hearing participants for (1) “contempt of court” and (2) offensive behavior towards the other party or that party’s representative. In general, contempt of court occurs, when the contemptuous person disrespects the authority and dignity of a court or disobeys a court order, thereby obstructing or interfering with the administration of justice and undermining the authority of the court. By punishing the contemptuous person, the court protects its authority and legitimacy.

According to Strasbourg case-law, measures ordered by courts due to disorderly conduct during the proceedings (contempt of court) are considered as falling outside the ambit of Article 6 ECHR, because they are akin to the exercise of disciplinary powers.²³² However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as criminal (see *Kyprianou v. Cyprus*, no. 73797/01 of 15 December 2005).

Rule 41.2 seems to be incomplete, since it only makes mention of offensive behavior of “any party, representative, witness or other hearing participant” towards “another party or that party’s representative”, but does not refer to offensive behavior toward another witness or other participants in the hearing. It also does not mention unacceptable conduct towards a staff member of the Court other than the Secretary General, or members of the public, court room personnel, journalists or any other person present in the courtroom. It is suggested to amend the Rules of Procedure accordingly.

If a warning by the President of the Court does not have the desired effect, or the presentation of a defense was fully unsatisfactory, he/she can impose sanctions, in consultation with the judges, varying from the payment of a fine to the exclusion from the hearing. If the Court envisages to exclude a party from the hearing, it must seriously balance the right guaranteed by Article 31 of the Constitution and Article 6(1) ECHR against the measure of exclusion and make sure that the measure must have a legitimate aim and be applied in a manner which is not disproportionate to the aim sought to be achieved.

- III.** It is assumed that with “observer” a member of the public is meant. The person concerned only risks to be excluded from the hearing without any further sanction being imposed. Of course, if the person has caused damage to the premises or has attacked a participant in the hearing or another member of the public, he/she may

²³² See *Ravnsborg v. Sweden*, Judgment of 23 March 1994, Series A, No. 283 – B; (1994) 18 EHRR 38

be sued in the ordinary courts for damages or be prosecuted for having caused bodily harm or worse.

Article 18 [Exclusion of a Judge]

- 18.1 A judge is excluded from participation in a proceeding ex officio or upon the request of any party when the judge:**
- 1.1 is involved in the case that is subject of consideration by the Constitutional Court;**
 - 1.2 is in marital or extramarital relationship or family relationship with any party in the proceeding, in accordance with applicable law;**
 - 1.3 in his/her official capacity has dealt before with the case before it was referred to the Constitutional Court.**
- 18.2 A Judge is not included in the case, as per paragraph 1, item 1, only because he belongs to a certain social group or gender group, a profession or political entity, the interest of which may be affected by the outcome of the process in the Constitutional Court.**
- 18.3 Paragraph 1, item 3, does not include participation in legislative procedures and expressions of professional or academic opinion on a legal matter which could be important for the process in the Constitutional Court.**
- 18.4 The decision for exclusion of a judge should be reasoned.**
- 18.5 Any judge who is aware that he fulfills at least one of the conditions for exclusion from proceedings should inform the President of the Constitutional Court in writing and should request his/her exclusion from the proceedings. In such a case, Paragraphs 3 and 4 shall apply as appropriate.**

The decision to exclude a judge from participating in a case before the Constitutional Court is a serious matter and must, therefore, only be taken, when, for the reasons laid down in Article, the judge concerned is found not to be able “*to perform his/her functions with conscience and impartiality, to decide with their own free will in compliance with the Constitution,*” as required by Article 10 [Duties of judges], paragraph 1, of the Law.

- 1** When a judge meets the conditions for exclusion from participating in a proceeding as laid down in Article 18.1, the wording of the Article does not seem to leave to the Court any other choice than to exclude – *ex officio* or at the request of any of any party – the judge from participating in the proceedings concerned. The list of reasons for the exclusion of a judge, as mentioned in Article 18.1, is clearly enumerative, meaning that the Law would not allow the Court to use any other reasons for excluding a judge. If that were not the case, Article 18 would have contained a specific provision to that effect, which it does not.
- The scope of Article 18.1.1 seems to be rather broad, since the judge has to be excluded, when he/she is “*involved*” in the case pending before the Court. The wording seems to imply that the involvement (apparently meaning: “any possible link with the case”) must be ongoing. Although it might be logical to also include

any involvement which occurred in a distant or less distant past, this issue appears to be covered by Article 18.1.3 which will be commented on hereafter.

Thus, the question raised by Article 18.1.1 is not whether there is actual bias on the part of the judge (lack of subjective impartiality²³³), but whether the simple fact of being involved in the case may raise doubts as to his/her impartiality (lack of objective impartiality).²³⁴ In case of subjective impartiality, the Court, ex officio, or the party challenging the judge, would have to show proof of actual bias on the part of the judge, meaning that the personal impartiality of the judge is presumed, unless there is evidence to the contrary. This is a very strong presumption and, in practice, it is very difficult to prove personal bias. However, Article 18.1.1 deals with the objective impartiality of a judge, meaning that it has to be shown that there are ascertainable facts (for instance, his/her involvement in the case) which raise doubts as to his/her impartiality, leading to his/her exclusion. Thus, even an appearance of involvement may be sufficient to exclude a judge.²³⁵

The criteria for the exclusion of a judge, mentioned in Article 18.1.2 appear to be clear: the *marital or extramarital relationship* with any party in the proceedings automatically disqualifies a judge from participating in the case. However, whether his/her *family relationship* with any party in the proceedings would also disqualify a judge seems to be less clear. The provision, namely, does not indicate any specific degree of family relationship. In a small country like Kosovo, with about 2.000.000 inhabitants, there is a realistic chance that a judge may be a distant family member of any of the parties.

In this connection, it may be interesting to refer to Article 67.1(b) of Chapter III [Exclusion of the Judge from the Case] of the Law on Contested Procedure²³⁶, providing: “[A judge may be excluded from the legal matter], [...] b) if he or she is the spouse, the extramarital partner, a relation by blood in a direct line to any degree or in a collateral line to the fourth degree or a relation by marriage to the second degree to the defendant, or his or her legal representative or authorized representative.” Article 67.1(b) clearly determines the degree of consanguinity to be considered for the exclusion of a judge from a particular case. Article 40.1.2 of the Law on Amendment and Supplementation of the Kosovo Provisional Code of Criminal Procedure No. 2003/26 contains an almost identical provision.²³⁷

The scope of Article 18.1.2 of the Law, in so far as the family relationship is concerned, seems, therefore, to be too wide. When called upon to interpret the provision, the Court may apply the criteria laid down in the Law on Contested Procedure and the Provisional Code of Criminal Procedure, pursuant to Article

²³³ To evaluate the impartiality of a judge, the ECtHR uses a subjective and an objective test, as it did in *Piersack v. Belgium*, where it ruled that “whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6(1) ECHR, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavoring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect” (*Piersack v. Belgium*, Judgment of 1 October 1982, Series A No. 53, para 30).

²³⁴ See *Ibid.*

²³⁵ *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255-A.

²³⁶ Law No. 03/L-006 of 30 June 2008

²³⁷ Law No. 03/L-003 of 6 April 2004

16.2 of the Law on the Constitutional Court, providing: “*In the event of a lack of procedural provisions, the Court shall apply, in a reasonable and analogue manner relevant provisions of other procedural laws, taking into consideration the nature of each matter and procedural specificities of the Constitutional Court.*” Thus, if the exclusion of a judge is requested by a party, the Court could apply the criteria of the Law on Contested Procedure.

Article 18.1.3 concerns again a typical example of the objective impartiality of a judge. It is obvious that in a case, where a person, who is now a judge on the Court, played a role in an official capacity before that case was submitted to the Court, he/she must be excluded from participation in the constitutional review of that case, unless the terms of Article 18.3 providing an exception to this rule (see comments on Article 18.3 hereafter), would apply. In this connection, reference is made to Case No. KI 17/11, where a judge of the Court informed the President that he had been involved in the case in an official capacity, before it was referred to the Court.²³⁸ The Court decided to exclude the judge from the proceedings for the reason invoked by him.

- 2 The English version of the Article does not seem to be clearly drafted, since it is difficult to understand. What the text may be understood to say is that a judge cannot be excluded from participating in a case that is being reviewed by the Court only for the reason that he/she belongs to a certain social or gender group, a profession or political entity that submitted the case to the Court. For instance, if a judge is a woman, while the referral is submitted to the Court by a women’s group, the bias of that judge in the case cannot be presumed, simply because she is a woman. A judge participates in his/her personal capacity and, therefore, does not represent any of such groups or entities.²³⁹

However, if any party would be able to proof personal bias on the part of the judge (lack of subjective impartiality) in the case concerned, the judge should indeed be excluded by the Court. The Article also mentions the adherence of a judge to a “political entity”. Taking into account that the Law explicitly prohibits a judge to be a member of a political party, movement or any other political organization (see comments on Article 5 [Incompatibility of function] of the Law), it is not clear what kind of “political entity” the drafters had in mind, which would not be covered by this prohibition.

Finally, it is unclear from the text of the Article, how “*the outcome of the process in the Constitutional Court*” may affect the interest of such groups, professions or entities, when, at the moment that the Court would need to decide whether or not to exclude the judge concerned, the outcome of the case before the Court cannot be known. It is, therefore, suggested to amend Article 18.2 accordingly.

²³⁸ See Case KI 17/11, Applicant Shetkat Perdibuka and Suhejla Morina, Resolution on Inadmissibility of 12 December 2011.

²³⁹ Article 25.2 of the Albanian Law on the Constitutional Court similarly stipulates: “In his activity, a Constitutional Court judge participates in his personal capacity and does not represent any state authority, social organization, political party or association, or ethnic or social group.”

- 3 Like the text of Article 18.2, also the text of Article 18.3 seems to be somewhat unclear. As to the wording “*participation in legislative procedures*”, it is presumed that the provision refers to the “previous” participation of the judge concerned in such legislative procedures (for instance, as a former member of the Assembly or as a former legal expert consulted by the Assembly), since it is hard to imagine that a judge of the Constitutional Court could participate in legislative procedures, since this would constitute a clear breach by that judge of the principle of the separation of powers.

However, as to “*expressions of a professional or academic opinion on a legal matter which could be important for the process in the Constitutional Court*”, it should not matter, whether such expressions of opinion have been made before or after the author of such expressions was appointed as a judge in the Court, taking into account that a judge of the Court is allowed, pursuant to Article 5 [Incompatibility of function] of the Law, amongst other things, to perform, for instance, as a lecturer of legal sciences in an accredited university, as mentioned above, and, thus, hold professional or academic opinions on legal matters “which could be important for the process in the Constitutional Court”.

In such a situation, a judge cannot be seen as biased, simply because the parties in the case and the public would already know his/her opinion on a specific legal matter which was raised in the proceedings before the Court. Of course, a party could always try to challenge the judge, although the party would have difficulties in proving bias on the part of the judge, simply because the latter holds a professional or academic opinion covered by Article 18.3.

- 4 As one of the principles of due process, a decision of an official body should be reasoned. Moreover, as said above, the exclusion of a judge from participation in a case before the Court, is a serious matter and the judge, the parties and the public are entitled to know the reason for that exclusion. Therefore, such an exclusion, *ex officio* or at the request of a party, must be “well grounded and reasonably founded”, as stipulated by Rule 7.5 of the Rules of Procedure (see hereafter), based on the criteria laid down in Article 18 of the Law.

Whether the decision for exclusion was based on a request of a party or was brought about *ex officio*, does not make any difference for the application of Article 18.4. In both cases a reasoned decision by the Court is mandatory.

- 5 Apart from the *ex officio* exclusion of a judge or a party requesting the exclusion of a judge, that judge is under the obligation to raise the issue of exclusion with the President of the Court and to request his/her exclusion, if he/she feels that his/her impartiality in a certain case is at stake on the basis of one or more of the criteria enumerated in Article 18. In such a case, according to the last sentence of the Article, paragraphs 3 and 4 shall apply as appropriate. The reference to paragraph 4, however, does not seem to make much sense, since it would be more correct to make reference to paragraphs 2 and 3, which both provide exemptions to the criteria for exclusion contained in Article 18.1.

Apart from the obligation for a judge to “inform the President in writing “*that he fulfils one or more conditions for exclusion and to request to be excluded from the*

proceedings “, the Article does not appear to determine what action the Court should take, when the judge in question deliberately fails to inform the President. Such deliberate omission on the part of the judge should lead to more serious consequences which have been discussed above under Rule 6 [Dismissal Procedures] of the Rules of Procedures.

Article 18.5 of the Law is supplemented by Rule 7 [Recusal procedures] of the Rules of Procedure.

Rule 7 [Recusal procedures] of the Rules of Procedure

- 7.1 As soon as a Judge learns of any of the reasons for recusal as foreseen in Article 18 of the Law on Court or if a Judge believes that other circumstances exist that raise a reasonable suspicion as to his or her impartiality, he or she shall inform in writing the President of the Court. A copy of that information shall be delivered to all Judges.**
- 7.2 Any party to the proceedings may file a petition for recusal of a Judge as soon as they learn of a reason for recusal, and in any event not later than one week before the oral hearing, if any, or before a decision being taken by the Court.**
- 7.3 In the information or in the petition, a Judge or party shall set forth the facts and circumstances justifying the recusal. The reasons stated in a previous petition for disqualification that was refused cannot be included in a new petition for recusal. Copies of the petition shall be delivered to all Judges.**
- 7.4 Before rendering a decision on a recusal requested by any party, a statement shall be taken from the Judge whose disqualification is sought and, if need be, other clarifications shall be obtained. The Judge for whom recusal is requested may not participate in the decision making procedure.**
- 7.5 The Court, by majority vote of the Judges, shall decide on the recusal, if it concludes that the recusal is well grounded and reasonably founded.**

- I. Rule 7.1 of the Rules of Procedure not only mentions the criteria for recusal enumerated by Article 18.5 of the Law, but also introduces a new criteria not specified in that Article, namely, the situation in which the judge believes him/herself that “other circumstances” exist that raise the reasonable suspicion as to his or her impartiality. It would have been logical, if this additional criterion had also been mentioned in Article 18.5 of the Law, instead of in Rule 7.1 of the Rules of Procedure.**

In other words, if a judge believes that there is a reasonable chance that his/her impartiality may be called into question, he/she should make this known to the President of the Court in writing (with a copy delivered to all judges). It will then be up to the Court to decide, by a reasoned decision, whether or not the judge was right in raising this issue, and whether or not it would be justified to exclude him/her from the proceedings concerned. When a decision is taken by the Court, it is assumed that the parties will receive a copy of that decision, which, in any case, must be published in the same way as any other decision of the Court.

The question may be raised whether the parties should not be entitled to receive a copy of the information delivered to all judges, so that they would be able to submit their comments on the information, in particular, if they were not aware of the circumstances invoked by the judge, which, if known to the parties beforehand, may have lead them to file themselves a request with the Court, pursuant to Article 18.1 of the Law and Rule 7.2 of the Rules of Procedure. In such case, the parties' comments and/or recusal request could assist the Court in rendering a well-reasoned and balanced decision on the exclusion of the judge in question.

- II. Rule 7.2, supplementing the criteria according to which a party may request the recusal of a judge under Article 18.1 of the Law, seems to be much broader in scope, since it only refers to “a” reason for recusal. This will give a party the opportunity to go beyond the criteria enumerated in Article 18.1 and to mention in the request whatever circumstances, which, in his/her opinion, would compromise the impartiality of the judge. The Court will consider such circumstances and decide whether they are serious enough to justify the recusal of the judge or not, if the claim is “manifestly devoid of merit”.²⁴⁰

Furthermore, the Rule entitles the party to request the recusal of a judge whenever he/she learns about a reason for the recusal, but not later than only one week before the oral hearing, or before the Court has taken a decision on the case. Thus, according to the Rule, a party who only learns about a reason for the recusal of a judge less than one week before the oral hearing would not have a right to submit such a request. In case he/she would do so nevertheless, the Court should have to reject the request as being out of time.

However, as mentioned above in the comments on Article 18, the right of a party to request the recusal of a judge forms part of his/her right to access to an independent and impartial tribunal, as protected by Article 31 of the Constitution and Article 6 ECHR. To restrict this right as defined in Rule 7.2 would risk to be seen as a breach of these Articles.

In case an oral hearing is not held, the requesting party is obliged to submit the request for recusal one week “*before a decision being taken by the Court*”. Thus, in order to be able to do so, the party needs to know the date on which the Court will take its decision. However, this means that the Court must expressly inform the party about that date, a practice which the Court, so far, does not seem to have developed. Moreover, what will happen, if any party learns of a reason for recusal of a judge after the time limit for filing a petition has expired or even after the Court has rendered a decision on the referral? The party could, at least, submit a complaint to the President of the Court, arguing that his right to access to an independent and impartial tribunal under Article 31 of the Constitution and Article 6 ECHR would be breached, if the Court would ignore his plea.

Neither Article 18, nor Rule 7 mentions such a situation which could have serious consequences for a judge, the more so, if he/she has willfully kept silent throughout the proceedings and the party was unaware of it at that time. Such omission by the judge may be considered as a serious neglect of duties and lead to his/her dismissal, pursuant to Article 118 [Dismissal] of the Constitution and

²⁴⁰ Remli v France judgement of 23 April 1996 Reports 1996-II, 559 (1996) 22 EHRR 253, Para. 48.

Article 9 of the Law and the procedure for dismissal of the judge, laid down in Rule 6 [Dismissal Procedures] of the Rules of Procedure, could be initiated (See also comments on Article 18.5 above).

Moreover, such a situation could also lead the Court to annul the decision and adjudicate the case once more, although no express provision to that effect seems to exist.

According to Rule 6(2) of the Rules of Procedure, one or more judges may propose to the President of the Court the dismissal of a judge in a written document setting forth the grounds for dismissal (see comments on Rule 6(2) above, para 1.) or may, “by a 2/3 majority vote, impose sanctions or discipline that is less severe than dismissal if circumstances warrant” (see Rule 6.5).²⁴¹ It is, therefore, suggested to consider the amendment of Article 18 as well as Rule 6.

- III. In the information to be addressed to the President, the judge must indicate the facts and circumstances justifying his/her request for exclusion based on the criteria of Article 18 of the Law or on “other circumstances” mentioned in Rule 7.1. Also any party must substantiate his/her petition filed with the Court and indicate the reason for the exclusion of the judge. It is logical that in a new petition for disqualification a party cannot repeat the same reasons, which the Court had already rejected in an earlier petition. It is assumed that the Secretary General is tasked with the delivery of the petition for disqualification to all judges.
- IV. When a party challenges the impartiality of a judge and requests his/her exclusion from the proceedings, the Court must investigate such a claim, unless the claim is clearly unfounded.²⁴² In such a situation, the principle of equality of arms requires that the judge concerned should be able to defend him/herself. According to the Rule, a statement shall be taken from the judge, but it does not indicate whether the judge will be heard by the Court, before it takes a decision on the judge’s exclusion. The Court may also have recourse to whatever other means it thinks fit, to obtain further clarifications regarding the judge’s possible bias. The requirement that a challenged judge should not be allowed to participate in the issuance of the Court’s decision on his/her exclusion, is similar to the one provided in Article 9 [Prior termination of the mandate], paragraph 2, of the Law, where the judge “whose mandate under consideration” is excluded from the decision of the Court on the termination of his/her mandate.
- V. Unlike the decision under Article 9(2) of the Law, which concerns the dismissal of the judge, and, therefore, requires a 2/3 majority of the judges, the exclusion of a judge from a given case under Article 18 and Rule 7(5) only needs a majority vote of the judges. Only when the Court concludes that the exclusion of the judge from the case is “well grounded and reasonably founded”, will it decide to exclude the

²⁴¹ In these circumstances, without awaiting the outcome of the Court’s decision, the judge concerned may decide to resign, pursuant to Article 9 [Prior termination of the mandate] of the Law and Rule 5 [Resignation of Judges] of the Rules of Procedure.

²⁴² See, *Remli v. France*.

judge, though it is not clear, why the exclusion must be “well-grounded”, but only “reasonably founded”.

ECHR Case Law:

Apart from the conditions laid down in Article 18.1 of the Law, which form the basis for the exclusion of a judge from the proceedings, the assessment of the impartiality of a judge and its impact on the right to a fair and impartial trial should also be considered in accordance with the case law of the ECtHR. In fact, to evaluate the impartiality of a judge, the ECtHR uses a subjective and an objective test²⁴³ (mentioned already above in the comments on Article 18.1), as it did in *Piersack v. Belgium*, where it ruled that, *whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6(1) ECHR, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*²⁴⁴ In the Human Rights Handbook No. 3 [The Right to a Fair Trial], published by the Directorate General of the Council of Europe²⁴⁵, it states in this connection, that *for subjective impartiality to be made out, the ECtHR requires proof of actual bias. Personal impartiality of a duly appointed judge is presumed, until there is evidence to the contrary.*²⁴⁶ *This is a very strong presumption and in practice it is very difficult to prove personal bias.*

As to the objective test, the Handbook refers to the ECtHR’s statement in *Fey v. Austria*²⁴⁷, that *it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important, but not decisive. What is determinant is whether this fear can be held to be objectively justified.* According to the ECtHR in *Piersack v. Belgium*, any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw.

As to the proceedings before the Constitutional Court, this would mean that, through the subjective test, it is assessed whether a judge is really not impartial in the case which is subject of review by the Court, but that, according to the ECtHR case law, the personal impartiality of the judge must always be presumed, until the evidence to the contrary is presented. As the ECtHR held, this test is hardly useful, because it is very difficult for a party to the proceedings to provide the Court with sufficiently strong evidence showing that the judge concerned is not impartial.

²⁴³ *De Cubber v. Belgium*, 26 October 1984, § 26, Series A no. 86.

²⁴⁴ *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53

²⁴⁵ Council of Europe, *The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights*, August 2006, Human rights handbooks, No. 3, available at: <http://www.refworld.org/docid/49f180362.html> [accessed 17 April 2014]

²⁴⁶ *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154

²⁴⁷ *Fey v. Austria*, 24 February 1993, § 30, Series A no. 255-A.

The objective test to determine whether a judge of the Court is not impartial, seems to be easier, since the presence of certain facts or a certain appearance may already raise doubts as to his/her impartiality. Therefore, as determined by the ECtHR, if there is a legitimate reason to fear that a judge lacks impartiality, he/she must withdraw from the proceedings²⁴⁸. This principle is laid down in Rule 7(1) of the Rules of Procedure.

Furthermore, as to the “appearance of bias” of a judge, the ECtHR emphasized, in the *Buscemi* case²⁴⁹, that the press releases of the judge on the issue to be decided by the Court, in response to statements made by the applicant, were actions that raised concern about the impartiality of the judge.” In the ECtHR’s opinion, “judicial authorities should exercise utmost care in relation to cases which they dealt with in order to preserve their image as impartial judges. This caution needed to discourage them to use the press, even if provoked. This obligation is imposed by the higher demand for justice”.

As to the ECtHR’s view that any judge in respect of whom there is a legitimate reason to fear lack of impartiality must withdraw²⁵⁰, this principle was reiterated in the case of *Sigurdsson v. Iceland*²⁵¹, where the husband of one of the judges deciding on the Applicant’s case against a bank had financial links with that bank. These favourable arrangements made the ECtHR conclude that, whilst there was no suggestion of actual bias, the Applicant’s complaints about the lack of objective impartiality were justified and there had, therefore, been a violation of Article 6 ECHR²⁵².

Article 19 [Taking of the decisions]

19.1 The Constitutional Court decides as a court panel consisting of all Constitutional Court judges that are present.

19.2 The Constitutional Court shall have a quorum if seven (7) judges are present.

19.3 The Constitutional Court decides with majority of votes of judges present and voting.

19.4 Each judge is obliged to vote for or against the decision.

1 In principle, the Court exercises its decision-making powers with the full court panel of Constitutional Court judges present, namely, nine (9) judges, pursuant to Article 114.1 of the Constitution²⁵³. However, even if all judges are not present, the Court can still lawfully decide as a panel, if at least a certain minimum number of judges is present, as stipulated by Article 19.2.

2 When the quorum (minimum number) of seven (7) judges is present, the Court can still act as a court panel and take decisions which are legally valid. This means that decisions can be taken by a majority of four (4) judges. The number of judges

²⁴⁸ *De Cubber vs Belgium* - 9186/80 [1984] ECtHR 14 (26 October 1984) Para. 26.

²⁴⁹ *Buscemi v. Italy*, Application 29569/95, ECtHR judgment of 16 September 1999, para 67.

²⁵⁰ *Piersack v. Belgium*, ECtHR judgment of 1 October 1982, para 33.

²⁵¹ *Sigurdsson v. Iceland*, ECtHR judgment of 10 July 2003.

²⁵² Human Rights Handbook No.3, Council of Europe.

²⁵³ Article 114.1 of the Constitution provides: The Constitutional Court shall be composed of nine (9) judges[...].

necessary to take legally valid decisions differs from country to country, for instance, Article 27.1 of the Croatian Act on the Constitutional Court stipulates that: “*The Constitutional Court renders decisions and rulings by a majority vote of all its judges, unless differently provided by the Constitution or this Constitutional Act.*” This means that for a majority vote of all its judges (the Court is composed of a total of nine judges) the votes of 5 judges are needed. So, even with only 5 judges present, the Croatian Constitutional Court could pass decisions or rulings, as long as all 5 judges vote in favor. This minimum number of judges needed for decision-making could, thus, be considered as a quorum, although it is obvious that, with a quorum of 5 judges, decision-making by majority vote of 5 judges is only possible if the vote is unanimous.

Also Article 8 of the Rules of Procedure of the Constitutional Court of Bosnia & Herzegovina provides in a similar manner: “*The plenary Court shall decide by majority of votes of all members of the Court.*” Furthermore, Article 72 [Issuance of decision and publication], paragraph 2, of Chapter VIII [Decisions of the Constitutional Court] of the Albanian Law on the Organization and Operation of the Constitutional Court determines that: “*Decisions of the Constitutional Court are taken by a majority of votes of all its judges. Abstention is not permitted.*” Thus, with a total of 9 judges, decision-making can be done by a majority of 5 judges present.

Article 41 of the Slovenian Constitutional Court Act stipulates in a similar manner: “*The Constitutional Court decides on the merits regarding the matters referred to in Article 21 of this Act by a majority vote of all judges, provided that this Act does not determine otherwise. The Constitutional Court decides on other issues by an order adopted by a majority vote of the judges present. [...]*”²⁵⁴ Also here the Constitutional Court needs only the presence of 5 judges (out of a total of 9 judges) to legally take decisions.

It, thus, appears that the method of having a quorum, as adopted for the Constitutional Court of Kosovo, is not the general rule for a number of neighboring countries which have chosen for a system whereby the constitutional courts decide by majority vote of all their judges.

- 3 As a collegial decision-making institution, the Court is necessarily guided by the principle of collegiality, which implies that in the decision-making process judges have equal status, although not explicitly mentioned by the Article. The fact that the Court is composed of judges who have been selected according to different procedures in order (1) to reflect ethnic representation, pursuant to Article 114 [Composition and Mandate of the Constitutional Court], paragraph 3, of the Constitution; (2) to respect the principle of gender equality by virtue of paragraph 1 of the same Article; as well as (3) to respect the provisional composition of the Constitutional Court in accordance with Article 152 [Temporary Composition of the Constitutional Court] of the Constitution²⁵⁵, does not affect the equal status of the judges. Therefore, from the very beginning of their mandate, judges have equal

²⁵⁴ See for the entire Article 42, Constitutional Court Act, Official Gazette of the Republic of Slovenia, No. 64/07-official consolidated text.

²⁵⁵ See comments on Article 152 of the Constitution.

status and an equal vote in the decision-making process of the Court.²⁵⁶ This is confirmed by Rule 4 [Precedence of Judges] of the Rules of Procedure (see hereafter), which supplements Article 19.3 of the Law.

The majority vote is the essence of the principle of collegiality of the Court. Of course, decisions of the Court could be consensual, but judges as members of the court panel (and like judges of regular courts²⁵⁷) are independent in exercising their functions and may, therefore, not follow the majority in order to reach consensus in a collegial spirit.

It may, however, seem confusing that, according to the text, the Court decides with a majority of judges “present and voting”, since paragraph 4 of the same Article, explicitly provides that “Each judge is obliged to vote for or against the decision”. The terms “...*present and voting*”, in other decision-making bodies, such as parliaments, assemblies, boards, and other similar bodies, where decisions are also taken by majority vote, imply that abstaining from voting is allowed. However, judges of the Constitutional Court and other courts, although collective decision-making bodies,²⁵⁸ are not allowed to abstain from voting, when present. Therefore, it is suggested that the words “*and voting*” be deleted.

- 4 As mentioned above, each judge must vote for or against a decision, since abstention is not allowed. If a judge does not agree with the decision of the majority, his/her dissent to the majority decision cannot put into question the legitimacy of the decision and its binding force, as determined by Article 116 [Legal effect of Decisions], paragraph 1, of the Constitution, providing: “*Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.*” Also Article 20 [Decisions] of the Law clearly establishes the legitimacy of the Court’s decisions, specifying: “*The conclusions reached by the majority of the judges of the Constitutional Court shall determine the decision of the Court* (see comments hereafter).”

Even though the Law is silent, the Courts Rules of Procedure (Rules 58 [Dissenting Opinions] and 59 [Concurring Opinions]) expressly provide for the right of judges to prepare a separate opinion in the form of a dissenting or concurring opinion, as a result of the Court’s determination to regulate the issue. This determination was not only based on the practice of constitutional courts established after the fall of the communist dictatorships in Europe, but also based

²⁵⁶ For more information, see CDL-AD(2005)039 Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005) accessible at: http://www.coe.ba/web2/en/dokumenti/cat_view/202-coe-documents-on-bosnia-and-herzegovina--coe-dokumenti-vezani-za-bih/61-european-commission-for-democracy-through-law-venice-commission--venecijanska-komisija/92-published-in-2005--objavljeno-2005.html, (accessed April 28, 2014).

²⁵⁷ Article 102 [General Principles of the Judicial System] of the Constitution, paragraph 4: “Judges shall be independent and impartial in exercising their functions.”

²⁵⁸ The Constitution places the Constitutional Court outside its Chapter VII [Justice System], by regulating the Court in a separate Chapter VIII [Constitutional Court]. This separation between constitutional control and the judiciary is an important feature of the Constitution, clearly demonstrating that, as to constitutional control, the Kelsenian model similar to the German model, is preferred.

on the opinion of the Venice Commission,²⁵⁹ and the practice of the ECtHR, whose case law, as mentioned above, is being applied by the Constitutional Court to interpret the human rights and freedoms guaranteed by the Constitution, pursuant to Article 53 [Interpretation of Human Rights Provisions] of the Constitution.²⁶⁰

It is widely known, that an important feature of ECtHR decisions are the separate (dissenting and concurring) opinions of judges, which form an integral part of these decisions, and are, as such, published along with the main decision. Due to the high level of collegiality of this important court, separate opinions have never shaken the importance of its decisions and have not hurt its credibility, but have rather contributed to the transparency of its decision-making process.²⁶¹

Today, dissenting and concurring opinions are recognized in, *inter alia*, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Germany, Greece, Hungary, Macedonia, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovenia, Spain, Turkey and Ukraine²⁶², and have contributed to the development of the rule of law principle and the protection and respect for human rights and fundamental freedoms. All countries that have suffered from totalitarianism and dictatorship were referred to, when Justice Douglas of the U.S. Supreme Court dramatically argued with respect to the development of constitutional justice: “...certainty and unanimity in the law are possible both under the fascist and communist systems. They are not only possible; they are indispensable”²⁶³

Separate opinions of judges of the Constitutional Court demonstrate that the decisions of the majority are founded on good reasons and are also of ethical importance both for the judges and the Court itself to convince the parties in the proceedings and the general public that an important part of the decision-making process is the exchange of opinions between judges as well as deliberations based on arguments. The publication of separate opinions is an important feature that ensures that judges of the Court, “perform their functions with conscience and impartiality, to decide with their own free will in compliance with the Constitution”, as specified in Article 10.1 of the Law above.

The importance of separate opinions was also well expressed by Constitutional Law Professor Stack:

²⁵⁹ See one of many opinions of the Venice Commission addressing the issues of dissenting opinion: Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009) accessible at <http://www.venice.coe.int/docs/2009/CDL-AD%282009%29042-e.pdf>, (accessed April 28, 2014).

²⁶⁰ Article 53 of the Constitution provides: Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

²⁶¹ White, Robin CA, and Iris Boussiakou. "Separate opinions in the European court of human rights." *Human Rights Law Review* 9, no. 1 (2009): 37-60.

²⁶² MAVČIČ, Mr Arne Marjan. "THE IMPORTANCE OF DISSENTING AND CONCURRING OPINIONS IN THE DEVELOPMENT OF JUDICIAL REVIEW WITH SPECIAL REFERENCE TO SLOVENIAN PRACTICE", <http://www.venice.coe.int/docs/2010/CDL-JU%282010%29016-e.pdf>, (accessed April 28, 2014).

²⁶³ Sir Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 Constitutional Law and Policy Review 41, 43.

*"The publication of a single opinion could be sufficient to demonstrate that the Court's judgment is based on reasons, but the practice of only delivering a single opinion would not demonstrate that the Court's judgment is the product of a reasoned dialogue among the Justices. The publicity of dissenting opinions and the indication of Justices' individual endorsements of particular opinions reveal that the Justices do confront each other with their disagreements about matters of principle through the exchange of opinions and the conversation that surrounds them, if not also in their formal conferences. In this way, the practice of dissent manifests the exchange of reasons among the Justices that characterizes their process of decision-making; without this practice, those of us outside the Court would have no way to see the Court as embodying a deliberative process of judgment."*²⁶⁴

Separate opinions are indeed important for the development of constitutional justice. As to developments in the US, it can be noticed that the dissenting opinions of the Supreme Court judges, as was the case with Justices Curtis and McLean in *Scott vs. Samford*, have presented solutions to serious errors of constitutional doctrine presented in the majority decision. Their dissenting opinion was a guideline for the correction of majority decisions, when the best days for correction had not yet come.²⁶⁵

Today one cannot deny the pedagogical importance of publishing separate opinions of the Constitutional Court judges and their influence on the development of legal science in general. As a result of the wide usage of internet by all attorneys, lawyers, law students, law professors and other legal practitioners, as well as journalists and other stakeholders, separate opinions assist in evaluating arguments of the majority decision.

Finally, it is important to emphasize that the institutional independence of the Court is hardly separated from the individual independence of judges as members of the Court. The publication of separate opinions publicly demonstrates their independence, enabling each and every one of them to express opinions that differ from the majority decision.

When reflecting on the importance of the publication of dissenting opinions, as argued above, the following Rules 58 and 59 of the Rules of Procedure contain detailed rules for the publication of separate opinions.

Rule 4 [Precedence of Judges] of the Rules of Procedure

- (1) The Court is composed of nine Judges appointed in accordance with Article 114 of the Constitution and Articles 6 and 7 of the Law on the Constitutional Court.**
- (2) Unless otherwise provided in these Rules, the Judges, in the exercise of their responsibilities, are of equal status, regardless of age, priority of appointment, length of service or duration of mandate.**
- (3) When determining the order of voting, Judges shall take precedence according to the date and time on which their mandate began, with the**

²⁶⁴ Stack, Kevin M. "The Practice of Dissent in the Supreme Court." *Yale Law Journal* (1996): 2235-2259.

²⁶⁵ Graber, Mark A. *Dred Scott and the problem of constitutional evil*. Cambridge University Press, 2006.

- most recently appointed voting first. If the Judges have been appointed at the same time, the Judges shall vote in the order of the youngest Judge first.**
- (4) **When determining the assignment or replacement of Judges as Rapporteur and as Presiding Judge of the Review Panel, the precedence of Judges is established by a system of random draw with the President making the resulting appointment.**

II. Unlike Article 19.3, Rule 4.2 expressly stipulates that, when exercising their responsibilities as members of the Court, all judges possess an equal status. Age, priority of appointment, length of service or duration of mandate do not matter, unless otherwise provided in the Rules. For instance, an exception is made in the cases mentioned hereafter in Rule 4.3 (order of voting) and Rule 4.4 (assignment or replacement of the judge rapporteur or the presiding judge of the review panel²⁶⁶).

III. According to Rule 4.3, the order of voting is determined either according to the age of judges or according to the date and time when the mandate of each of the judges began. In Rule 4.3 the Court has chosen for the mandate method, to the effect that the date and time of commencement of the mandate of a judge determines the order of voting, with the most recently appointed judge voting first. Only in case the mandate of the judges commenced at the same time, the order of voting should be determined according to the age, with the youngest judge voting first. However, taking into account that the mandate of a judge commences at his/her taking of the oath in front of the President of the Republic, there can never be question of “[...] *Judges [having] been appointed at the same time, [...]*”, since the time of the oath could never be the same. The order of taking the oath should, thus, be the parameter. Rule 4.3 also underpins the equal status of the judges and the principle of collegiality of the Court as a collective body. The President of the Court has no special position as far as the order of voting is concerned, unlike some other constitutional courts. In Rumania, for example, the President of the Constitutional Court votes last, as determined by the Rumanian Law on the Constitutional Court.²⁶⁷

It is interesting to note that neither the Kosovo Law on the Constitutional Court, nor the Rules of Procedure expressly regulate the possibility of the failure to achieve a majority vote. This may occur, for example, if a panel composed of eight (8) judges decides and the vote ends with a tie.²⁶⁸ One way to overcome the problem is to re-argue the case when the panel is composed with odd number of judges. Another solution to a tied vote on matters involving an alleged violation of the Constitution is the presumption that there has been no constitutional

²⁶⁶ See comments on Article 22.4 and 22.5 of the Law

²⁶⁷ Law no. 47/1992, Article 58 paragraphs 1 and 2 republished, available at <http://www.ccr.ro/en/Legea-nr-471992>, (accessed April 28, 2014).

²⁶⁸ For example, paragraph 1 of Rule 23 of the ECtHR Rules of Procedure sets out that in case of a tie in voting, a fresh vote shall be taken, and if there is still a tie, the President shall have a casting vote, if this Regulation does not provide otherwise.

infringement, as the third paragraph of Article 15 of the Federal Constitutional Court Act prescribes.²⁶⁹

Rule 58 [Dissenting Opinions] of the Rules of Procedure

- 58.1** A Judge of the Court shall have the right to prepare a dissenting opinion to the Judgment of the Court on the merits of a referral. A dissenting opinion may be joined by other Judges and shall state specifically the reasons why the Judge disagrees with the opinion of the majority or plurality of the Court. A dissenting opinion to a Judgment of the Court shall be filed, in so far as it is possible to do so, with the Judgment, become part of the case file, shall be published with the Judgment, and shall be served on the parties at the same time as the Judgment.
- 58.2** A Judge of the Court shall not have the right to prepare a dissenting opinion to a decision of the Court on interim measures. Any Judge shall have the right to indicate in the decision that the Judge voted against the interim measure agreed to by the Court.
- 58.3** A Judge of the Court shall not have the right to prepare a dissenting opinion to a resolution of the Court on the admissibility of a referral. Any Judge shall have the right to indicate in the resolution that the Judge disagreed with the resolution on the admissibility of a referral.

- I. Rule 58.1 clearly defines the right of a judge who disagrees with the decision of the Court, individually or together with other judges, to prepare a dissenting opinion, in which he/she explains the reasons for disagreeing with the majority opinion. The dissenting opinion becomes part of the case file and is published along with the judgment. Together with the judgment, it is served on the parties and published with the judgment of the Court on its webpage and in the Official Gazette of the Republic of Kosovo. Thus, by publishing such opinions together with the Court's judgment on its webpage and in the Official Gazette, the general public has access to dissenting and concurring opinions at the same time as it has access to the majority opinion.

However, the wording "*...in so far as it is possible to do so...*" would enable the Court, for various reasons, not to publish dissenting opinions of judges simultaneously with the majority opinion. For instance, if, for certain reasons, a judgment needs to be published as soon as possible, but the judge(s) concerned needs more time than anticipated to finalize the dissenting opinion or if the Court faces any other obstacle, the Rule allows the Court to communicate dissenting opinions with a certain delay.

However, other constitutional courts may have stricter procedures containing detailed provisions on the preparation and publication of separate opinions, deadlines for their preparation and reference to them in the text of the relevant

²⁶⁹ The third sentence of Article 15.4 of the German Federal Constitutional Court Act prescribes: "If the votes are equal, the Basic Law or other Federal law cannot be declared to have been infringed." "Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht)." <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> (accessed June 4, 2014).

judgment, to which they must be attached, and without which the judgment cannot be announced or published in the publications of these constitutional courts, including electronic publications, Official Gazettes or their Bulletins.²⁷⁰

- II.** One of the exceptions to the general rule for the publication of dissenting opinions is made for decisions on interim measures, because of their specific nature.²⁷¹ According to Article 116 [Legal Effect of Decisions], paragraph 2, of the Constitution, decisions on interim measures are taken by the Court without prejudging its final decision and may temporarily suspend the contested action or law, until the Court renders a final decision, if it “*finds that application of the contested action or law would result in unrecoverable damages.*”²⁷²

The rationale behind the Rule is that, since these decisions need to be taken urgently and do not prejudice the final decision on the case, a judge who disagrees with the majority decision on the interim measure, is not allowed to publish a reasoned dissenting opinion. However, if so requested by a dissenting judge, the decision of the Court on the interim measure could include the simple information that he/she has opposed the decision on interim measures, without any further elaboration. Before the current Rules of Procedure were adopted by the Court, dissenting opinions of judges related to the procedure followed its inappropriate application²⁷³ or regarding the contents of the decision²⁷⁴ have indeed been attached to some early Court decisions on interim measures.

- III.** Rule 58.3 contains a further exception to the general rule on the publication of dissenting opinions, providing that judges are not allowed to attach a dissenting opinion to a resolution of the Court on the admissibility of a referral. Dissenting judges are only entitled to indicate in the resolution that he/she disagrees with the resolution. In practice, the Court decisions, whereby the referral is declared inadmissible, are entitled “Resolutions on Inadmissibility”. It may be regrettable that such resolutions only contain the reasons of the majority for the inadmissibility decision, since the parties to the proceedings and the general public will be deprived of the right to know the reasons of dissenting judges for opposing the majority decision to declare the referral inadmissible. They may only know that a judge disagreed with the Resolution on Inadmissibility, if that judge used his/her

²⁷⁰ See, for instance, Chapter 8 [Separate Opinions, Articles 71 [Type and Purpose], 72 [Time Limit for the Submission of Separate Opinions] and 73 [Serving and Publication] of the Rules of Procedure of the Constitutional Court of Slovenia, Official Gazette of the Republic of Slovenia, No. 86/07, 54/10 and 56/11, available at: <http://www.us-rs.si/media/the.rules.of.procedure-2012.pdf> (accessed April 28, 2014)

²⁷¹ For more information, see the comment related to interim measures.

²⁷² See also the comment related to Article 27 [Interim Measures] of the Law.

²⁷³ ECtHR adopts interim measures only, if the applicant is at the immediate risk of suffering a proven irrevocable damage. Typical for interim measures are claims for exposure to maltreatment in breach of Article 3 ECHR, while the most common example is, when an applicant faces an extradition/deportation to a country, where he would be at risk of such maltreatment or where his life would be truly at risk. See the Communiqué of ECtHR on inappropriate use of interim measures, communicated on 21.12. 2007: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=827272&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (accessed April 28, 2014).

²⁷⁴ See the website of Constitutional Court of Kosovo.

right to indicate this in the Resolution. The same reasoning could be used regarding the above Rule 58.2.

Unlike this Rule, the scope of Article 71 [Type and Purpose], paragraph 1, of the Rules of Procedure of the Constitutional Court of Slovenia seems to be broader, providing that a judge who does not agree with “a decision” (supposedly: every decision) adopted at a session of the Constitutional Court may submit a separate opinion, which may be either a dissenting opinion, if he disagrees with the operative provisions, or a concurring opinion, if he disagrees with the statement of reasons.²⁷⁵ Similar provisions are contained in the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina (Article 41), stipulating that the judge must submit (1) the reasons for his/her separate opinion within fifteen days or (2) a bare statement of dissent.²⁷⁶ Apparently, only a dissenting judge has the right under Article 72.8 of the Albanian Constitutional Court Law “to reason his/her opinion, which is attached to and published together with the decision.” The German Law on the Constitutional Court, defines in its Article 30(2), that “A judge holding a dissenting opinion on the decision or the reasons during deliberations may have it recorded in a separate vote; the separate vote shall be appended to the decision.[...]”²⁷⁷ Concurring opinions are relatively rare because in most cases, if the Justices agree on the outcome, they will find a way to accommodate in the formulation of the merits the different lines of argument which lead to this outcome.

Rule 59 [Concurring Opinions] of the Rules of Procedure

- 59.1 A Judge of the Court shall have the right to prepare a concurring opinion to the Judgment of the Court on the merits of a referral. A concurring opinion agrees with the Court’s Judgment, but disagrees with the reasoning utilized. Thus, a concurring opinion may be written by a Judge who supplies a vote in the majority supporting the Court’s Judgment. A concurring opinion may be joined by other Judges and shall state specifically the reasons why the Judge agrees with the result but disagrees with the reasoning in the opinion of the majority of the Court. A concurring opinion to a Judgment of the Court shall be filed, in so far as it is possible to do so, with the Judgment, become part of the case file, shall be published with the Judgment, and shall be served on the parties at the same time as the Judgment.**
- 59.2 A Judge of the Court shall not have the right to prepare concurring opinions to decisions or resolutions of the Court, but may indicate that the Judge concurs in the decision or resolution.**

²⁷⁵ See for further details the full text of Article 71 of the Rules of Procedure of the Constitutional Court of the Republic of Slovenia.

²⁷⁶ See the full text of Article 41 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, as amended (Official Gazette of Bosnia and Herzegovina, Nos. 26/01, 6/02, 1/04).

²⁷⁷ Bundesverfassungsgesetz, Part II Constitutional Procedure, Section I General Procedural Regulations accessible at: <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> (accessed April 28, 2014).

- I. In addition to the right to attach a dissenting opinion to the Court's judgments on the merits of the referral, judges have the right to prepare separate opinions even if they agree with the outcome of the judgment. As spelled out in the Rule, the so-called "concurring opinions" are prepared, if judges agree with the outcome of the judgment, but believe that the majority has failed to develop the proper reasoning for it or has ignored or rejected relevant arguments, or simply disagree with the statement of reasons. Unlike the dissenting opinion, the concurring opinion uses a more relaxed tone, and the judge or judges preparing it may make an effort to strengthen the judgment through a different and/or better reasoning. At the same time, concurring opinions may provide more information, which, according to the judge or judges who prepared it, will contribute to a better understanding of the decision of the majority. Concurring opinions show to the parties and the general public that there exists a disagreement within the majority of judges about the reasoning of the judgment. As is the case with dissenting opinions, the Court must file the concurring opinions, "*in so far as it is possible to do so*," with the judgment and publish them together. The same comments made above regarding the possibility for the Court to publish dissenting opinions at a later stage, are equally valid for concurring opinions. The Slovenian and Bosnian legal provisions referred to above concern separate opinions, so both dissenting and concurring ones.

- II. Similar to the prohibition of preparing dissenting opinions to resolutions of the Court on the admissibility of a referral, judges are also prohibited to prepare concurring opinions to decisions (on interim measures) and Resolutions on Inadmissibility of the Court. Although the Court is obliged to reason its decisions and resolutions²⁷⁸, parties to the proceedings and the general public do not have any possibility to learn whether judges, who agree with the final decision, had any detailed arguments for disagreeing with the reasoning of the decision or resolution. Judges can, of course, if they wish, indicate that they concur in the decision or resolution. Unlike Rule 58.3, which refers only to resolutions on the admissibility of a referral, Rule 59.2 mentions both decisions and resolutions of the Court in which the judge can indicate that he/she concurs in that decision or resolution. It may have been the intention of the Court, when adopting the Rules of Procedure, to equally grant the right to a judge to indicate in a decision that he/she disagrees with that decision. Similarly, as is the case with dissenting opinions, in Slovenia and Bosnia and Herzegovina the parties and public are able to learn about the arguments of concurring judges, by allowing them to prepare a concurring opinion that supports a decision - not only a judgment - of the Court, but for different reasons. The Albanian and German provisions only mention the possibility of dissenting, not concurring opinions.

²⁷⁸ See, Rule 57(1), providing: Judgments, Resolutions or other Orders of the Constitutional Court shall contain the following minimum details: the names of the Judges of the Court, an introduction, a statement of the legal basis for deciding the matter, a statement containing the reasoning of the Court and the operative provisions.

Article 20 [Decisions]

- 20.1 The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.**
- 20.2 Notwithstanding paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.**
- 20.3 Decisions of the Constitutional Court shall be in writing, justified and shall be signed by the President of the Constitutional Court and the judge reporter. The conclusions reached by the majority of the judges of the Constitutional Court shall determine the decision of the Court. Decisions shall be announced publicly.**
- 20.4 The Decision is sent to each party ex officio and is published in the Official Gazette.**
- 20.5 A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision.**

- 1** This provision unambiguously provides that parties (meaning: the applicant as well as the responding party) are entitled to an oral hearing, unless they waive this right. Only if parties do not do so, it follows that the Court can only decide on a case *“after completion of the oral hearing”*.

But what will happen, if one of the parties does not waive his/her right to an oral hearing? In such a situation, taking into account the equality of arms principle, the solution might be that the right of the party, who did not waive the right to an oral hearing, weighs heavier than the right of the other party to waive that right. In the end, it should be the Court to take the decision whether or not to hold a hearing, carefully weighing the rights of both parties. Otherwise, the proceedings before the Court would run the risk to get easily blocked every time the parties disagree as to the holding of a hearing.

One may not agree with the above interpretation of Article 20.1 that the holding of an oral hearing is the rule when both parties do not waive their right to an oral hearing, the more so since, from a textual point of view, the provision is not ambiguous and, therefore, does not seem to lend itself to a different interpretation. The drafters/legislature may not have meant to unconditionally grant such an important right to the parties, because the holding of an oral hearing as a rule would easily overburden the Court and its administration and lead to the creation of a huge backlog of cases.

However, as long as Article 20.1 is not amended, the Court would need to decide how to solve the issue, in particular, as Article 20.2 seems to be in clear contradiction with Article 20.1, stipulating that it is the Court which may decide “not to hold an oral hearing”. It cannot be that, according to one paragraph of the Article, parties are granted such an important right, while, according to the next paragraph of the same Article, the Court can simply do away with that right “at its discretion”. (See also comments on Rule 3g of the Rules of Procedure).

Article 20.1 is further elaborated by Rule 39 [Right to Hearing and Waiver] of the Rules of Procedure.

- 2 By using the words: “Notwithstanding paragraph 1 of this Article”, Article 20.2 explicitly admits that parties have indeed a right to a hearing under Article 20.1. However, although admitting that parties possess that right, Article 20.2 allows the Court, at the same time, to interfere with this right without being obliged to give any reasons for that. As a result, the Court could simply decide not to hold a hearing and adjudicate the referral on the basis of the case files. In any case, Article 20.2 requires a decision from the Court “not” to hold a hearing. As to the Court’s practice in the matter, so far, no such decision has ever been taken by the Court. Instead, the Court has rather followed the procedure laid down in Rule 39.2 of the Rules of Procedure, stipulating: “The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law.”

Whether the right to an oral hearing is the right of the parties (Articles 20.1) and 20.2 of the Law) or an obligation for the Court before or after the decision on admissibility (Article 22.9 of the Law) or a privilege of the Court (Rule 39.1 and 39.2 of the Rules of Procedure), it cannot be denied that the requirements for an oral hearing must be clear and concise in the interest of transparency, efficiency, legal certainty and due administration of justice. Therefore, the only conclusion to be drawn is that the different legal provisions of the Law and the Rules of Procedure regarding the holding of an oral hearing, which are contradictory and confusing, need to be amended as soon as possible in order to avoid any further confusion for the parties and the Court.

As to the importance of oral hearings, if one looks at the practice of other constitutional courts in Europe²⁷⁹, some countries provide oral hearings (Italy), others written procedures (Hungary, Portugal), and again others for a combination of both oral and written proceedings (Germany, Austria). It is true that oral hearings, generally, have an important impact on the quality of the decision-making process. Oral hearings make it possible for judges to get a more direct impression of facts and views of the parties in a case. Therefore, according to Article 20 of the Law, the legislator in Kosovo has determined that oral hearings should be the principle of the decision-making process in the Constitutional Court, based on transparency as one of the essential democratic values. Oral hearings serve the general public to exercise democratic control over the work of the Constitutional Court.

Simultaneously, oral hearings give the Court an important mechanism to gain public confidence. Through oral hearings, the Constitutional Court is given the opportunity to make it clear to the public that its decisions are taken independently, fairly and impartially. In this regard, oral hearings are particularly important for the Constitutional Court as a new institution of a new country that has suffered

²⁷⁹ See table 1.1.9 which presents the most important constitutional and legal provisions on oral hearings and exceptions in the study approved by the Venice Commission CDL-AD(2010)039rev Study on individual access to constitutional justice - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), available at <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29039rev-e.pdf>, (accessed April 28, 2014).

throughout its history from the lack of the rule of law and from the citizens' perception that decisions are taken in secret and not independently and impartially. Despite the great importance of oral hearings, however, as clearly stated by the Venice Commission, "*Constitutional Courts must remain capable of rendering meaningful decisions within a reasonable time*". Oral hearings can take much time and do not serve in all cases the necessary speed of the procedure.²⁸⁰ It is true that oral hearings may be organized quickly and may take only a short time, thereby risking to become a mere formality, which does not serve its original purpose. That is why many constitutional courts in Europe have opted for a written procedure. The Venice Commission has stated its clear position on this issue, noting that even the written procedure used by constitutional courts is in line with European standards.²⁸¹ For example, the Federal Constitutional Court of Germany rarely organizes oral hearings.

In particular, with regard to referrals submitted by individuals the organization of an oral hearing depends on the importance the Court attaches to the case. Typically, the German Federal Constitutional Court waives an oral hearing, when it expects that the hearing will not lead to any progress in the procedure. Oral hearings are, however, mandatory for disputes between constitutional bodies regarding their rights and obligations stipulated by the Constitution (*Organstreit* cases), the impeachment of the President of Germany as well as for the abstract review of constitutionality, unless the parties that brought the case and are important state organs, waive the holding of an oral hearing.²⁸²

- 3 Written decisions constitute an important means for all public institutions to effectively communicate with parties and the public at large. The courts in general, especially constitutional courts, unlike other public institutions, do not simply publish their decisions. They are under a legal obligation to publish reasoned decisions. Because constitutional courts are collegial institutions, the reasoning of their decisions is achieved through a process of internal deliberations and exchange of opinions between the judges. A decision needs to provide an explanation of how the court has come to it, in particular, it should contain an elaboration of the constitutional analysis of the facts and law and the reasons for the outcome of the case.²⁸³

In the famous publication "Political Liberalism", John Rawls considers the courts, particularly constitutional courts, as forums where the reasons and explanations are not only expected, but should also be provided. In this sense, the power of courts relies greatly on the quality of the judicial reasoning, that is to say, the reasons

²⁸⁰ See the Opinion on the Draft Federal Constitutional Law "On Modifications And Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation" available at <http://www.venice.coe.int/docs/2004/CDL-AD%282004%29035-e.asp>, (accessed April 28, 2014).

²⁸¹ Ibid

²⁸² Donald Kommers, Russell A. Miller, and Ruth Bader Ginsburg. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed., rev. and expanded. Durham [N.C.]: Duke University Press, 2012, p. 27

²⁸³ John Ferejohn and Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Toward an Institutional Theory of Constitutional Justice," in *Constitutional Justice, East and West* (Wojciech Sadurski, ed.), The Hague: Kluwer Law International, 2002, 21 – 36

that link judicial decisions to legal sources, in particular, the fact that courts as institutions lack democratic credentials and also the means to implement their decisions²⁸⁴. The reasoning of decisions is part of the decision-making democracy. Constitutional Court judges must justify the powers vested in them by the Constitution and their obligation to justify decisions should prevent any arbitrariness in decision-making.

Also, the reasoning of constitutional court decisions allows state officials, other judges, attorneys, lawyers and the general public to foresee the implications of such decisions on subsequent cases. In this sense, the reasoning of decisions may increase the efficiency in dealing with similar cases and help others to choose their actions more intelligently, taking into account the consequences which such actions may entail. Thus, in short, the reasoning of decisions helps to enhance the rule of law.

The obligation under Article 20.3 of the Law to justify decisions of the Constitutional Court is based on Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to Fair Trial] ECHR. Only reasoned decisions make it clear both to the parties and the general public that the Court has provided the parties with the right to be heard and to have their arguments dealt with in a fair manner²⁸⁵.

The requirement of Article 20.3, that decisions of the Court shall be signed by the President of the Court and the Judge Reporter, indicates that the other judges of the Court do not sign decisions. The signature of the President is important, because it validates the decision, while the signature of the Judge Rapporteur is important, because it shows the transparency of the Court's decision-making process, which starts with the Preliminary Report of which the Judge Rapporteur is the author. The Preliminary Report contains the facts, allegations of the parties as well as the legal aspects of the concrete case in detail and is, therefore, of great importance during the proceedings before the Court.²⁸⁶

Although the conclusions reached by the majority of judges shall determine the decision of the Court, the decision of the majority is not written by the majority as such, but by the Judge Rapporteur, pursuant to Rule 60 [Final Text of Judgment and Filing] of the Rules of Procedure. Article 20.3 does, however, not mention that judges who dissent to the judgment or concur to it for different reasons than those of the majority, are entitled to join their dissenting or concurring opinion to the judgment. As mentioned above, it appears that the drafters of the Law could not agree on the issue and simply left it out. The Court, though, recognized the importance of such opinions, and, therefore, regulated this entitlement, as mentioned above in Rules 58 [Dissenting Opinions] and 59 [Concurring Opinions] of the Rules of Procedure.

The third sentence of Article 20.3 stipulates that the Court's decisions shall be announced publicly. However, neither the Law, nor the Rules of Procedure provide for any specific procedure for such public announcement. In the practice of the

²⁸⁴ Rawls, John. *Political liberalism*. No. 4. Columbia University Press, 1993. p.237.

²⁸⁵ See comments on Rule 57 of the Rules of Procedure.

²⁸⁶ See, Article 22 of the Law, which contains the detailed procedure before the Court.

Court, decisions are not announced beforehand, but, as defined by Article 20.4, sent to the parties and published in the Official Gazette.

The question may be raised though, whether this way of public announcement of decisions and judgments is in line with the requirements of Article 6 ECHR, which provides that the judgment shall be “publicly pronounced”. Since the ECHR is directly applicable in Kosovo and, pursuant to Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, the human rights and freedoms guaranteed by it have, in the case of conflict, priority over provisions of laws and other acts of public institutions in Kosovo, the consequence would be that the obligation of the “public pronouncement” of a judgment, as required by Article 6 ECHR, shall have priority over the obligation of the “public announcement” of a judgment under Article 20.3 of the Law.

In this connection, reference is made to the case *Moser v. Austria*²⁸⁷, in which the ECtHR stated that it had applied the requirement of the public pronouncement of judgments with some degree of flexibility. Thus, it held that despite the wording which would seem to suggest that the reading out in open court was required, other means of rendering a judgment public may be compatible with Article 6 § 1. In the case of *Sutter v. Switzerland*, the ECtHR found that the publicity requirement was satisfied by the fact that anyone who established an interest could consult or obtain a copy of the full text of the Military Court of Cassation, together with the fact that the court's most important judgments were published in an official collection.

In light of the ECtHR case-law, the question should now be answered whether the manner in which the decisions of the Constitutional Court are made public pursuant to Article 20.4 would satisfy the requirements of Article 6 ECHR.

- 4 No doubt, the way in which the decisions of the Court are made public in Kosovo, namely, by publishing them in the Official Gazette after having been communicated to the parties, is in compliance with the above ECtHR case law on Article 6 ECHR, the more so, since, apart from the publication in the Official Gazette, decisions are also published, immediately after having been signed by the President of the Court and the Judge Rapporteur, on the Court's webpage, pursuant to Rule 22 [Accessibility], paragraph 2, of the Rules of Procedure, providing: *The Secretary General shall publish Judgments and decisions on the Court's webpage immediately following the approval of the final text, and shall ensure regular publication of printed Judgments and decisions.*

The German Constitutional Court follows a different procedure, the President of the Court pronouncing the judgment by reading out a summary of it if oral pleadings have been held.²⁸⁸ In order to make the judgment more accessible to the public, the summary is made easily understandable. The Albanian Constitutional Court announces the dates on which the judgments will become public on a billboard outside the Court, but are, normally, not orally pronounced, although this is required by the Constitutional Court Act.²⁸⁹

²⁸⁷ *Moser v. Austria*, no. 12643/02, § 101, 21 September 2006.

²⁸⁸ See Article 30 (1) of the Constitutional Court Act of Germany.

²⁸⁹ See Article 72.6 of the Constitutional Court Act of Albania.

- 5 Since the publication of the Court's decisions in the Official Gazette may take a certain time, which, from a legal certainty point of view, could be seen by the parties and the public as hampering the effectiveness and speed of the administration of justice, the legislator has entitled the Court, if it deems fit, to deviate from that rule and to specify in its decisions a different date for the entry into force of its decisions. So far, the practice of the Court has been that it determines in its judgments and decisions that they are "effective immediately", instead of "effective on the day of the publication in the Official Gazette" as provided by the Article. With the wording "effective immediately", it is understood that the decision concerned enters into force on the day, on which the Court took the decision, although, due to the complexity of the case or for other reasons, the final text of the decision may take some time to be finalized and signed by the President of the Court and the Judge Rapporteur (or other judge who drafted the judgment or decision).

Comments on the enforcement of decisions of the Court are to be found under Article 26 [Cooperation with other Public Authorities] hereafter.

Given the importance that the Court attaches to the reasoning of decisions, Rules 56 [Types of Decisions] and 57 [Content of Decisions] of the Rules of Procedure define, respectively, the different kinds of decisions and the anatomy of a reasoned decision of the Constitutional Court in more detail.

Rule 39 [Right to Hearing and Waiver] of the Rules of Procedure

39.1 Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by majority vote decides otherwise for good cause shown.

39.2 The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or law.

- I. The title of Rule 39 appears to supplement Article 20.1 of the Law, confirming that parties have the right to a hearing, but can waive their right. However, the text of Rule 39.1 seems to be rather confusing, since the first part of the sentence apparently leaves it to the Court to decide whether or not to grant a hearing, but only in a situation where the referral has been determined admissible. Furthermore, the second part of the sentence seems to suggest that indeed all admissible referrals shall be granted a hearing, "unless the Court by majority vote decides otherwise for good cause shown." So, according to that part of the sentence, the majority of judges cannot simply do away with the parties' right to a hearing, but need to indicate sufficient reasons justifying its decision not to grant a hearing.
- II. Unlike Rule 39.1, which still seems to accept the right of the parties to a hearing, the point of departure of paragraph 2 of the Rule appears to be that the parties have no such right, but that the Court may, at its own initiative, decide to hold a hearing "*if it believes that a hearing is necessary to clarify issues of fact or law*". Thus, Rule 39.2 seems to leave it to the Court to hold a hearing even before the referral

has been declared admissible, only on the condition that it needs to believe that a hearing is necessary.

Furthermore, in order to add to the confusion, Article 20.2 of the Law stipulates that it is only at the discretion of the Court not to hold an oral hearing, but to decide the case on the basis of case files.

The procedural right to order a hearing, which this Rule attributes to the Court, completely deviates from the principle of Articles 20.1 and 20.2 of the Law which explicitly attribute the right to a hearing to the parties. This means that this Rule is apparently not in conformity with the Law and should be amended, unless Articles 20.1 and 20.2 of the Law are amended in the way mentioned above.

In order to further add to this confusion, Article 22.9 of the Law, which will be commented on hereafter, stipulates that, when the case is referred to the Court (if the Review Panel concludes that the claim is admissible or if one or more of the judges not on the Review Panel opposes the draft decision to reject the claim), it will consider “*the admissibility and the grounds for the claim during the oral hearing*”. So, the Article suggests that, when the case is referred to the Court for the reasons indicated, the Court will automatically organize a hearing, where it considers admissibility and merits of the claim and only decides thereon “after the completion of the hearing”, as stipulated by Article 20.1 of the Law. Rule 39.1, however, provides that “*Only referrals determined to be admissible*” may be granted a hearing, meaning that the Court needs first to determine that a referral is admissible, before it may grant a hearing.

Actually, the case law of the Constitutional Court of Kosovo shows that oral hearings are not the rule, but rather the exception. Even in the case, where the Court had to decide on the question whether the President of the Republic of Kosovo had committed a serious violation of the Constitution (Article 113.6 of the Constitution), the procedure was only conducted on the basis of case files.²⁹⁰

However, it must be remarked that the President did not request a leaving himself. In the German context doing impeachment proceedings of the President of Germany public hearing is mandatory, as stipulated by Article 55 (1) of the German Constitutional Court Act.

Rule 56 [Type of Decisions] of the Rules of Procedure

The Court shall adopt the following types of decisions:

- 1. Judgments, when the Court adjudicates the merits of a referral;**
- 2. Resolutions, when the Court adjudicates the admissibility of a referral;**
- 3. Decisions, when the Court adjudicates on requests for interim measures;**
- 4. Administrative Rulings, when the Court decides on administrative matters in administrative sessions of the Court; and**
- 5. Such other Order as from time to time it deems appropriate.**

²⁹⁰ See Point 33 and 34 of KI 47/10 Dissenting Opinion Judge Snezana Botusharova and Judge Almiro Rodrigues, available at: http://www.gjk-ks.org/repository/docs/ki_47_10_mendimi_mospajtues_gjyqtaria_snezhana_botusharova_dhe_gjyqtari_almiro_rodrigues.pdf, (accessed April 28, 2014).

- I. Only after the applicant has fulfilled all procedural requirements for the admissibility of the referral, will the Court declare it admissible and adjudicate the merits of the claim in the form of a judgment. The admissibility criteria are laid down in Rule 36 [Admissibility Criteria] of the Rules of the Procedure.
- II. Most referrals do not pass the admissibility stage, because the applicants have not fulfilled all conditions necessary to enable the Court to consider the merits of the referral. In those cases, the Court will issue a Resolution on Inadmissibility, setting out the reasons for the inadmissibility. When a Referral is declared admissible, the Court, normally, does not issue a separate Resolution on Admissibility, since the decision to declare a referral admissible is incorporated in the judgment.²⁹¹
- III. Rule 55 [Decision on Interim Measures] sets out the details of this procedure to be followed by the Court, when deciding on a request for interim measures. It appears that in some cases²⁹² the Court has dealt with the request for interim measures not in a separate decision, as required by Rule 56.3, but only in the Resolution on the Inadmissibility of the Referral, that means much later than within the period required by Rule 55.
- IV. The Rule must be seen in light of Rule 14 [Administrative Sessions] of the Rules of Procedure. The administrative rulings are decisions taken by majority vote of the judges at administrative sessions where they discuss and decide on matters of policy related to the administration of the Court.
- V. As an example of such other Order, reference is made to Rule 51 [Documents], paragraph 4, where a party may file an application with the Court seeking an Order addressed to the other party to produce a certain document; or Rule 52 [Site or Object Inspection], paragraph 3, according to which a party may apply to the Court for an Order requiring a person, not a party to the proceedings, to grant access to the site or the object to be examined.

Rule 57 [Content of Decisions] of the Rules of Procedure

- 57.1 Judgment, Resolutions or other Orders of the Constitutional Court shall contain the following minimum details; the names of the Judges of the Court, an introduction, a statement of the legal basis for deciding the matter, a statement containing the reasoning of the Court and the operative provisions.**
- 57.2 The statement of the composition of the Constitutional Court which adopted the Judgment, Resolution or other Order shall state the result of**

²⁹¹ See Judgments of the Constitutional Court of Kosovo, available at <http://www.gjk-ks.org/?cid=2,57>, (accessed April 28, 2014).

²⁹² See, for instance, Case KI 124/13, NLB Prishtina (j.s.c.), Constitutional Review of the Judgment of the Supreme Court Rev. No. 335/2013, and request for imposition of interim measure, decision of 11.October.2013, available at http://www.gjk-ks.org/repository/docs/gjkk_ki_124_13_ang.pdf, (accessed April 28, 2014).

the vote, the names of the Constitutional Court judges who submitted separate opinions.

- 57.3 The introduction shall state the names of the parties, their legal representatives or other persons authorized by them, if any, the date of the public hearing, if such was held, and the date of the session at which the decision was adopted.**
- 57.4 The statement containing the reasoning of the Court shall contain a summary of the facts and the allegations of the participants in the proceedings and the reasons for the decision of the Court.**
- 57.5 The operative provisions shall state the manner of the implementation of the Judgment, Resolution or other Order and when the decision shall take effect and on whom the decision shall be served.**

I. The Decisions on interim measures, mentioned in Rule 56.3, have been excluded from Rule 57, meaning that such decisions do not need to meet the requirements laid down therein. As to the “minimum details”, which a Judgment, Resolution or other Orders of the Court shall contain, they are specified in paragraphs 2 to 5 of the Rule. So, details of the “*names of the Judges of the Court*” are set out in Rule 57.2, while details of the “*introduction*” are to be found in Rule 57.3. Furthermore, details of the “*statement containing the reasoning of the Court*” are provided for in Rule 57.4 and those of the “*operative provisions*” in Rule 57.5. There is no special paragraph of the Rule dealing with details of the “*statement of the legal basis for deciding the matter*” which is also mentioned in Rule 57.1.

II. As to the result of the vote, when there is no unanimity amongst the judges, the practice of the Court appears to be that the exact result of the number of judges who voted in favor and the number of judges who voted against is not always indicated, but instead only the word “by majority” is used. So, in those cases, the parties and the public are not informed about the precise number of judges who voted in favor and those who voted against the decision. In any case, the names of the judges who voted in favor or against have, so far, never been mentioned in any of the decisions.

However, only when a judge makes use of his/her right to have his/her name indicated (1) in a decision on an interim measure that he/she voted against the interim measure agreed to by the Court (see Rule 58.2 above), or (2) in the resolution of the Court on the admissibility of a referral (see Rule 58.3 above) that he/she disagrees with the resolution, and (3) in a judgment (if he/she does not want to write a separate opinion), will the parties and the public learn the names of the judges, who voted against the decisions concerned.

III. In practice, Court decisions, in their introduction, contain different headings under which the issues of Rule 57.3 are mentioned. For instance, the name of the applicant and authorized person, if any, are mentioned under “Applicant”, while the responding party appears under “Responding Party”. The date of the public hearing, if such was held, the names of the parties who appeared as well as the date of the deliberations and adoption of the decision, together with other information

about the nomination by the President of the judge rapporteur and members of the review panel as well as information about communications with the parties will appear under the heading “Proceedings before the Court”. In case interested parties, witnesses and experts as well as an *amicus curiae*, if any, are present at the hearing, their names will also be stated under the heading “Proceedings before the Court”.²⁹³

IV. A clear and concise summary of facts and the allegations of the parties is paramount to a good understanding of the referral and the events which have led to the issues raised under the Constitution. They are mentioned under different headings, “Summary of facts” and “Allegations of the Applicant (or Parties where applicable)”, respectively. So, such summaries not only serve the Court in its constitutional adjudication of referrals, but also the public to easily understand the background of the case and the most important arguments presented by the parties. It is equally important that the decision of the Court is well-reasoned in order to ensure the parties and the public that the judges of the Court have performed their functions “with conscience and impartiality”, pursuant to their obligation under Article 10 [Duties of Judges] of the Law (see comments above). If the reasoning lacks clarity and conviction, the Court risks to lose its credibility.

V. As to the operative provisions of a Judgment, Resolution or other Order, those of a Judgment are not the same as those of a Resolution or an Order. In fact, the operative part of Judgments, which have binding force on the parties to the referral, states the manner of their implementation by the party or parties, whereas the operative part of the Resolution or other Order does not call for any specific implementation by a party or parties, but mentions the actions which the Court will undertake itself, by stating, for instance, that it shall notify the parties of the decision and publish it in the Official Gazette.

So far, the Court has apparently not taken any Orders, but rather Decisions, in particular, on the request of a party for interim measures. Such Decisions can indeed contain an Order, as, for instance, in Case KI 56/09, Fadil Hoxha and 59 Others vs. Municipal Assembly of Prizren, where the Court, after having granted the request for interim measures for a duration of no longer than 3 months from the date of the Decision, immediately suspended the execution of the “Decision for Amendment and Supplementation of the Decision of Detailed Urban Plan (UDP) of the Jaglenica Area in Prizren, adopted by the Municipal Assembly of Prizren on 30 April 2009 [...], for the same duration and “ordered” the Municipal Assembly of Prizren to suspend any construction at the above location for the same duration.”²⁹⁴

In the operative part of the decision, the Court also indicates when the Judgment, Resolution or Order will take effect. Pursuant to Article 20.5 of the Law (see comments above), a decision is published in the Official Gazette and is effective immediately, unless the Court decides otherwise.

²⁹³ See, for instance, the Judgment in Case No. KO 01/09, Cemal Kurtisi and the Municipal Assembly of Prizren of 27 January 2010.

²⁹⁴ Decision on the Request of Interim Measures of 25 November 2009.

Apart from serving the decision on the parties, the Court could also decide to notify its decision to participants in the proceedings other than the parties, for instance, to those who had been invited by the Court to participate in an oral hearing with the parties.

In conjunction with the above comments on Article 20 of the Law and Rules 56 and 57 of the Rules of Procedure, it would also be appropriate to comment here on Rule 60 [Final Text of Judgment and Filing] of the Rules of Procedure.

Rule 60 [Final Text of Judgment and Filing] of the Rules of Procedure

- 60.1** The final text of the Decision of the Court shall be prepared by the Judge Rapporteur in accordance with Rule 44.4.²⁹⁵ If the Judge Rapporteur is dissenting from the Judgment or the Presiding Judge of the Review Panel votes against the interim measures, the President shall designate another Judge who voted with the majority to prepare the Judgment or decision of the Court.
- 60.2** The Judge preparing the Judgment, Resolution or Decision of the Court, including a Decision on a request for interim measures, shall finalize the text of the Judgment within a reasonable period of time as determined by the Court from the date of its adoption by the Court. The final text shall be submitted to the Judges for review and each Judge may submit comments within five (5) days. After considering whether to make changes suggested by other Judges, the Judge preparing the Judgment of the Court shall make any necessary changes. The final text shall be submitted to the Judges, who may meet to approve the final version, or may otherwise indicate approval of the final version of the text. Upon final approval by the Judges, the final text shall be submitted to the President for signature and to the Secretary General for filing and service on the parties.
- 60.3** Judges preparing dissenting or concurring opinions must finalize the text of the opinions within ten (10) days from the submission of the final text to the President. Such opinions will be filed, in so far as it is possible to do so, by the Secretary General at the same time as and with the Judgment of the Court and served on the parties with the Judgment.

- I.** The title of the Rule is, apparently, incorrect, since the Rule deals not only with the final text and filing of a judgment, but also with a decision on the request for interim measures. The first sentence of Rule 60.1 deals exclusively with the preparation of the final text of a judgment as confirmed by the reference to Rule 44 (Deliberation and Voting) which regulates the aftermath of an oral hearing and provides, in its paragraph 4, that “*After the vote is taken, if the Judge Rapporteur is among the majority of the Court, the President shall assign to the Judge Rapporteur the task of preparing the final text of the Judgment of the Court.*” So, in this respect Rule 60.1 and Rule 44.4 are similar.

²⁹⁵ Rule 44(4) of the Rules of Procedure provides: (4) After the vote is taken, if the Judge Rapporteur is among the majority of the Court, the President shall assign to the Judge Rapporteur the task of preparing the final text of the Judgment of the Court. If the Judge Rapporteur is not among the majority, the President.

However, if the Judge Rapporteur is not among the majority, the President shall assign any judge among the majority in the Review Panel (which declared the case admissible) to prepare the draft decision, and that, if no member of the Review Panel is among the majority, the President shall assign “*any Judge who is among the majority*” to prepare a draft decision of the Court. Rule 60.1 has a more straightforward solution, by simply providing that if the Judge Rapporteur is dissenting from the Judgment, the President shall assign “*any Judge who is among the majority*” to prepare the Judgment of the Court.

Rule 60.1, however, also mentions the situation in which the Presiding Judge of the Review Panel votes against a request for interim measures. Also in that case, Rule 60.1 provides that the President of the Court shall designate another Judge, who voted with the majority, to prepare the decision of the Court. In this connection, it may need to be explained, what the President of the Review Panel has to do with a request for interim measures. As stipulated in Rule 55 [Decision on Interim Measures], paragraph 2,²⁹⁶ the President shall assign the request for interim measures to the Review Panel in the referral. If the Review Panel recommends to the full Court that the request for interim measures should be granted, either in whole or in part, the resolution of the Review Panel shall state the reasons supporting the recommendation (Rule 55.5, first sentence²⁹⁷) and how the legal standard has been met, and shall state the limited time during which the interim measures will be effective.

Pursuant to Rule 35 [Review Panels], paragraph 5, it is the Presiding Judge of the Review Panel, who shall prepare that draft recommendation to the Court. So, if he/she votes against the interim measures, the President needs to look for an alternative. In that case, the solution of Rule 44.4 is that the President designates any judge among the majority of the Review Panel to prepare a draft decision. It may, however, also happen that no member of the Review Panel is among the majority of the Court. In that case, according to Rule 44.4, the President assigns any Judge who is among the majority of the Court to draft the decision of the Court.

However, Rule 60.1 seems not to be in harmony with Rule 44.4 on this issue, since it only provides that, if the Presiding Judge of the Review Panel votes against the interim measures, the President of the Court designates another judge from the majority of the Court to prepare the decision of the Court. It is suggested that the Rules be brought in line with each other at a future amendment of the Rules.

- II.** Although the Rule does not set a time limit for the preparation of the draft text of a judgment, resolution or decision (since that will greatly depend on the complexity of the case) by the drafting judge, it requires that the Court, as soon as it has adopted the judgment, determines a reasonable period of time in order to allow the

²⁹⁶ Rule 55(2) of the Rules of Procedure stipulates as follows: The President shall assign the request for interim measures to the Review Panel assigned to the referral [...].

²⁹⁷ Rule 55(5), first sentence provides: If the request for interim measures is granted (the Rule should have used the term “recommended” as in the previous sub-paragraph), either in whole or in part, the resolution of the Review Panel shall state the reasons supporting the decision (again the term “recommendation” should have been used) [...].

judge to finalize the text of the judgment. Once that final text has been submitted to the other judges, they have a period of 5 days, within which they may submit comments to it.

The time limit of five (5) days may be considered rather short, in particular, when compared with the one mentioned in Article 22 [Processing Referrals], paragraph 8, of the Law, where, in case of a draft recommendation of the Review Panel,²⁹⁸ the time limit for the judges, who are not members of the Review Panel, to submit comments on the draft recommendation is 10 days from receiving the draft decision. It seems to be unjust to leave to the judges twice as much time to comment on a draft recommendation of the Review Panel as to comment on a draft judgment which may be very complicated and elaborated.

Rule 60.2, third sentence, further tasks the judge preparing the judgment, resolution or decision of the Court to make necessary changes to the draft on the basis of comments by other judges and to submit the draft once more to the judges for approval at a meeting, as is, for instance, the rule for the judges of the German Constitutional Court, who apparently go themselves through the draft text word by word before approving the judgment. The Rule further provides that if no meeting is held to approve the final version, the judges may “otherwise” approve it, supposedly by phone call, email or text message.

The last sentence of the Rule seems to be imprecise, since the approved final text will not only be signed by the President, but, pursuant to the above Article 20.3, also by the judge rapporteur. The text is silent on the question whether, in case another judge is tasked by the President to prepare the judgment, resolution or decision, that judge will sign the final text instead of the original judge rapporteur. However, in that case it would be logical to deviate from that requirement, since otherwise the judge rapporteur would have to sign a judgment he/she did not agree with in the first place.

Moreover, the Secretary General will not only file the signed decision and serve it on the parties as the Rule stipulates, but also put it immediately on the Court’s webpage and submit it to the Official Gazette for official publication.

- III.** Contrary to the recommendations of the Venice Commission mentioned above that separate opinions of constitutional court judges should be published together with the judgment, Rule 60.3 is flexible in that respect in the same way as Rules 58 [Dissenting Opinions] and 59 [Concurring Opinions]. This is shown by the mere fact that the Rule provides that “*such opinions be filed, in so far as it is possible to do so, by the Secretary General at the same time as and with the judgment of the Court and served on the parties with the judgment*”. So, it may occur that separate opinions may not be filed at the same time “*as and with the judgment*” and, therefore, may not be served on the parties with the judgment. This would enable the Court to treat such opinions not as integral parts of judgments and publish them at a later stage. In such cases, separate opinions may not receive the same public attention as they would have received, had they been published together with the

²⁹⁸ Article 22.8 stipulates: If, within a period of ten (10) days from receiving the draft decision, judges who are not members of the Review Panel do not oppose the draft decision, then the President of the Constitutional Court signs and issues the decision rejecting the claim on the basis of inadmissibility.

judgment. To see them in the direct context of the judgment, in particular after having read the judgment's integral text first, may lead to a better understanding of the concurring or dissenting opinion of the judge(s) concerned.

Article 21 [Representation]

During the process in the Constitutional Court, parties are either represented in person or by a person authorized by the party.

The English version of the Article is somewhat unclear. With "the process in the Constitutional Court" is probably meant: "the proceedings before the Constitutional Court". The provision does not oblige parties in the proceedings before the Constitutional Court to be represented by a duly authorized representative, not necessarily a lawyer, since it may be an obstacle for many applicants to pay the costs of a lawyer. On the other hand, obligatory representation by a lawyer may be regarded as a denial of the right of access to a constitutional court, in particular, if a party does not dispose of the necessary funds for such representation. In any case, representation by a lawyer may greatly assist a party before the Court in that the quality of the referral may be enhanced enabling the Court to obtain a better understanding of the case (see also comments on Article 22.1 of the Law hereafter).

Different countries have opted for different solutions.²⁹⁹ For example, in the proceedings before the Federal Constitutional Court in Germany, representation by a lawyer is, in principle, not mandatory.³⁰⁰ However, in special circumstances, such as at an oral hearing, a party is required to be represented by a lawyer or a law professor from an institution of higher education.³⁰¹ The system of the German Federal Constitutional Court may be useful for the procedure before the Kosovo Constitutional Court, especially, since Kosovo appears to be a favorable place for having effective access to justice, based on progressive free legal aid legislation. However, the Law on Free Legal Aid (Law No. 04/L-017 of 2 February 2012) provides in its Article 4 [Extension and Types of Free Legal Aid], paragraph 2, that "*Free legal aid shall be provided in civil, administrative, minor offences and criminal procedure*" and therefore, does not enable prospective applicants to request the free assistance of a lawyer for the submission of a referral to the Court. By amending the Law, free legal aid could be extended in proceedings before the Court, in particular, in complex cases.

²⁹⁹ More on relevant constitutional and legal provisions for legal representation in Constitutional Courts see Study on Individual Access to Constitutional Justice. Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). On the basis of comments by Mr Gagik Harutyunyan (Member, Armenia), Ms Angelika Nussberger (Substitute Member, Germany), Mr Peter Paczolay (Member, Hungary). Published by the Center of the Constitutional Law RA, 2012, p. 268. [http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e) (accessed June 4, 2014).

³⁰⁰ See Article 22 of the German Law on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht). <http://www.iuscomp.org/gla/statutes/BVerfGG.htm> (accessed June 4, 2014).

³⁰¹ Ibid.

Article 22 [Processing Referrals]

- 22.1** The initiation of proceedings before the Constitutional Court is made through a referral to the Court. Referrals are submitted in writing to the Secretariat of the Constitutional Court. The Secretariat immediately registers each referral in the register of the Constitutional Court according to its order of submission. Referrals should be justified and necessary supporting information and documents should be attached.
- 22.2** The Secretariat shall send copies of the referral to the opposing party and other party(ies) or participants in the procedure. The opposing party or participant has forty-five (45) days from the reception of the referral to submit to the Secretariat its reply to the referral together with justification and necessary supporting information and documents.
- 22.3** The Secretary shall send the referral and the reply to the referral to a judge Rapporteur, who prepares the preliminary report concerning facts, admissibility and grounds of the referral. The Judge Rapporteur is appointed by the President of Constitutional Court pursuant to the procedure established under the Rules of Procedure of the Constitutional Court.
- 22.4** If the referral or reply to the referral is not clear or is incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for clarifying or supplementing the respective referral or reply to the claim. The Judge Rapporteur may request additional facts that are required to assess the admissibility or grounds for the claim.
- 22.5** Within thirty (30) days from receiving the referral and the reply to the referral, the Judge Rapporteur submits the preliminary report to the Review Panel. If the reply to the referral was not submitted within the set deadline, or if the nature of a special procedure does not require a reply to the referral, the Judge Rapporteur prepares a preliminary report based only on the referral.
- 22.6** The Review Panel assesses the admissibility of the referral. The Review Panel is composed of three judges appointed by the President of the Constitutional Court according to the procedure established in the Rules of Procedure.
- 22.7** If the Review Panel unanimously concludes that the referral does not meet formal requirements for further proceeding and is therefore inadmissible, the panel sends to all judges a draft decision that rejects the referral due to the lack of admissibility. The Review Panel shall take all necessary measures to ensure that a copy of the draft decision is effectively sent to judges who may not be on the territory of the Republic of Kosovo.
- 22.8** If, within a period of ten (10) days from receiving the draft decision, judges who are not members of Review Panel do not oppose the draft decision, then the President of the Constitutional Court signs and issues the decision rejecting the claim on the basis of inadmissibility.

22.9 If the Review Panel concludes that the claim is admissible, or if one or more of the judges not on the Review Panel opposes the draft decision to reject the claim, the case shall be referred to the Court. The Court during the oral hearing then considers admissibility and the grounds for the claim in its entirety and decides according to the provisions of this law.

Article 22 of the Law implements Article 113 [Jurisdiction and Authorized Parties] of the Constitution, by laying down details about the procedure, on the basis of which the Constitutional Court shall adjudicate matters referred to it in a legal manner by the authorized parties mentioned in Article 113.³⁰² The different paragraphs of the Article are supplemented by the Rules of the Court's Rules of Procedure which will be commented on in detail after the comments on Article 22.9.

- 1 According to the first sentence of Article 22.1, proceedings before the Court can only be initiated through a referral, without it going into details about what is meant by a referral or who can submit it to the Court. The answers to these questions are to be found in Article 113 [Jurisdiction and Authorized Parties], paragraph 1, of the Constitution, stipulating that "The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties." Articles 113.2 to 113.9 of the Constitution further set out who the authorized parties are and which matters they can refer to the Constitutional Court as well as under which circumstances³⁰³. Such authorized parties include, in the order mentioned in Article 113: the Assembly of Kosovo, the President of the Republic of Kosovo, the Government, the Ombudsperson, municipalities, deputies of the Assembly of Kosovo, individuals (and legal persons³⁰⁴), courts and the President of the Assembly of Kosovo.

Some of those authorized parties are also empowered to file a referral with the Court under a different Article of the Constitution, like the President of the Republic of Kosovo, who, under Article 84 [Competencies of the President], paragraph 9, of the Constitution, "*may refer constitutional questions to the Constitutional Court*". Furthermore, the Government of Kosovo has, under Article 93 [Competencies of the Government], paragraph 10, of the Constitution, identical powers as the President under Article 84.9, since it also "*may refer constitutional questions to the Constitutional Court*", as well as the Ombudsperson, who, under Article 135 [Ombudsperson Reporting], paragraph 4, of the Constitution, "*may refer matters to the Constitutional Court in accordance with the provisions of this Constitution*". The additional powers of these authorized parties to submit referrals to the Court under the above Articles of the Constitution are dealt with directly after the comments on Article 54 of the Law, under the Heading: "Further

³⁰² Article 113.1 of the Constitution stipulates: "*The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*"

³⁰³ For further details, see comments on Chapter III [Special Procedures], Articles 29 to 54 of the Law hereafter. See also, **Commentary on the Constitution of Kosovo by Prof. Dr. Enver Hasani and Ivan Cukalovic.**

³⁰⁴ Legal persons are not mentioned in the same Article as authorized parties together with natural persons, but are mentioned in Article 21.4 of the Constitution, providing that: "*Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable.*"

Examples of direct access to the Constitutional Court by public authorities, not mentioned in Chapter III [Special Procedures] of the Law.”

A further authorized party is mentioned in Article 62 [Representation in the Institutions of Local Government] of the Constitution, namely, the Vice-President [for Communities of the Municipal Assembly] who can submit a certain matter directly to the Constitutional Court. Detailed comments are made under the Heading mentioned in the previous alinea.

Thus, the general procedural rules laid down in Article 22 (*lex generalis*) are applicable to all proceedings initiated by “authorized parties” mentioned in Article 113 and elsewhere in the Constitution. Deviations from the general procedural rules are set out in Articles 29 to 54 of Chapter III [Special Procedures] of the Law (*lex specialis*) and will be commented on hereafter.

According to the second sentence of Article 22.1, referrals must be submitted in writing to the Secretariat of the Constitutional Court. However, this does not mean that applicants need to do so at the premises of the Court in Pristina. It follows from Rule 29 [Filing of Referrals and Replies] that applicants are not only allowed to file a referral in person (or through their legal representative) at the Secretariat of the Court, but also by mail or by means of electronic communication (see for details, comments under Rule 29(5) hereafter).

Article 22.1, third sentence, requires the Secretariat to immediately register a referral in the register of the Court according to the order of submission. As mentioned in more detail hereafter, Rule 28 [Initiation of Proceedings] provides similarly that “*Proceedings before the Court shall be the filing of a referral with the Secretariat. When the referral or any other initial documents are filed, the referral shall be assigned a registration number by the Secretariat.*” This is confirmed by Rule 30 [Registration of Referrals and Replies] which stipulates that “*The Secretary General shall register a referral immediately when the referral or any documents are filed, even when all necessary documents are not contained with the referral.*” This means that even a complaint of half a page would be sufficient for the Secretariat to register it as a referral with the Court by opening a case file with a registration number. As seen hereafter, the Secretariat, the Judge Rapporteur, the Review Panel as well as the Court itself can request the applicant to complete the file.

Article 22.1, fourth sentence, implies that, in order to support their constitutional complaints, applicants must give a clear description of the facts, submit the necessary supporting documents and other information, and show that they have satisfied all admissibility requirements (see, in particular, comments on Rule 36 [Admissibility Criteria] hereafter). If an applicant does not comply with these requirements, the Court may declare the referral inadmissible or, even if it finds the referral admissible, may consider that the information submitted is insufficient to be able to find a violation of the Constitution as alleged by the applicant.

Thus, once the admissibility hurdle has been taken, the allegations about a possible violation of the Constitution need to be justified. The better the explanations and supporting evidence are presented, the easier it will be for the Court to understand the facts and decide on the constitutional complaint(s) at issue. If the facts are not clear or incomplete, or are summarized in such a way that it is difficult for the

Court to understand the merits of the case, the chances of success of the referral will be seriously diminished. Facts which are not directly linked to the case, although they may look important to the applicant, should not be mentioned, since they could cause confusion and render the task of the Judge Rapporteur to present a clear Preliminary Report to the Review Panel more difficult.

Furthermore, the supporting documents and information, attached to the referral, should contain all necessary evidence on which the Court should base its finding of a possible breach of the Constitution. For instance, if an individual under Article 113.7 of the Constitution complains that the Supreme Court has allegedly violated one of his/her constitutional rights by rejecting his/her revision against the judgment of the District Court concerned (presently, the Court of Appeals in Pristina), he/she should submit not only the contested ruling of the Supreme Court, but also the previous decisions of the lower instances.

In his/her submissions, such applicant could also refer to similar cases previously dealt with by the Constitutional Court or to the case law of the ECtHR, which he/s may already have invoked before the lower instances during the exhaustion of remedies process. In such a case, the applicant must submit as supporting documents all relevant court decisions. Another example could be a municipality contesting the constitutionality of an act of the Government, which diminishes its revenues, under Article 113.4 of the Constitution. The municipality should not only submit the text of the act of the Government, but also the laws or by-laws on which such act is based, as well as convincing evidence that it is directly affected by the act by showing that its revenues are (will be) indeed diminished.

As to the requirement that referrals should be justified, meaning that the alleged violations of the Constitution should be substantiated by the submissions of applicants, it appears from the case law of the Court that, as to individual constitutional complaints, applicants are not required to indicate the exact article(s) of the Constitution or the European Convention of Human Rights (ECHR) or of other international legal instruments directly applicable in Kosovo (see also comments on Article 48 hereafter). For instance, it will be sufficient to mention the alleged violation of the right to a fair trial in substance without mentioning the pertinent article of the Constitution, and/or the ECHR or other relevant international legal instruments. However, applicants must give details on which grounds, according to them, their rights have been infringed by a concrete act of a public authority.³⁰⁵

Article 22.1 is supplemented by Rule 28 [Initiation of proceedings], 29 [Filing of Referrals and Replies] and Rule 30 [Registration of Referrals and Replies], commented on hereafter.

- 2 The text of Article 22.2, first sentence, specifies that the Secretariat has to send copies of the referral to the opposing party and other party(ies) or participants without mentioning a certain time limit for doing so. For reasons of transparency and consistency, the drafters might have mentioned a period of a week or not more than 15 days in order to ensure that the Secretariat will not cause any unjustified

³⁰⁵ See, for instance, Case No. KI 20/09, Petrit Morina vs. Judgment Ap.Nr.495/2003 of the Supreme Court of Kosovo, dated 7 April 2004, wherein the Applicant alleged that his right to a fair trial had been violated.

delay in communicating the referral to the opposing parties and possible other parties and participants.

Furthermore, as already mentioned above, it may happen, that in some cases there is no opposing party as such, for instance, when the constitutional complaint is directed against a court decision, like a judgment of the Supreme Court, by which the applicant's claim was rejected in last instance. Initially, the Supreme Court, as the author of the contested judgment, was considered as the opposing party in the proceedings before the Constitutional Court and was requested to submit a reply to the referral concerned within the established legal time limit. However, the Supreme Court apparently never submitted a reply to a referral, but only referred to its challenged judgment without adding additional comments to the reasoning contained therein.³⁰⁶

Also in proceedings before the regular courts, it would be difficult to imagine that, for instance, a court of first instance could be obliged by the appeal court to explain to it the reasons for its contested judgment and, at the hearing, to answer questions of the appeal judges. This would certainly go against the principle of "the independence of the judge" and the "secrecy of the deliberations" having lead to the contested judgment.

The same principle should be applied regarding proceedings before the Constitutional Court, so that regular courts whose judgments are the subject of a referral may well be requested by the Court for their comments and/or be invited to appear at a hearing scheduled by the Court, but should be allowed to ignore the invitation and stick to the principle of "the independence of the judge", according to which they don't have to publicly account for their judgments. Thus, in the absence of any comments on the part of the relevant regular courts, it is up to the Court to interpret the contested court decisions on its own motion.

It may be interesting to refer to practices in some other countries, where constitutional courts have a similar or different approach to this issue. For instance, the Constitutional Court of Bosnia & Herzegovina indeed considers regular courts which issued the contested decisions as the opposing party in the proceedings before it.³⁰⁷ However, at a seminar organized by the Venice Commission in Armenia, Prof. Luis Lopez Guerra, Vice-President of the Spanish Constitutional Court, stated that, if a judicial decision is challenged before that Court, the opposing party in the constitutional complaint proceedings is the opposing party in the proceedings in which the challenged individual act was issued.³⁰⁸

As mentioned above, regular courts are under the obligation, by virtue of Article 26 [Cooperation with other Public Authorities] of the Law, "*to support the work of the Constitutional Court and to fully cooperate with the Constitutional Court upon the request of the Constitutional Court*" in the same way as public authorities of the Republic of Kosovo. However, as set out above, this should not be interpreted as obliging regular courts to submit comments and appear at hearings, if invited by the Court to do so.

³⁰⁶ Idem.

³⁰⁷ See Article 15 (1) (b) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

³⁰⁸ Similar to the proceedings before the Constitutional Court of Slovenia (see, Guide of the Constitutional Court of Slovenia, <http://www.us-rs.si/en/>).

It is true that a regular court could accept the invitation of the Court to appear at a hearing. For instance, in Case KI 06/10³⁰⁹, the Court invited the Municipal Court in Prishtina to the hearing of that case. Indeed the Municipal Court accepted the invitation and appeared at the hearing, where it answered questions put by the judges and gave a statement. In these circumstances, it would be more appropriate to consider the regular court as a participant in the proceedings.

In any case, as a matter of transparency, it is certainly appropriate that the Secretariat forwards a copy of the referral to the court, which rendered the contested decision, solely to inform it of the reception of the referral, and/or request it to answer technical/ administrative questions or submit certain documents and confirm certain dates or case numbers. For instance, the court concerned could be asked to confirm the date on which the applicant had signed the receipt of the service of the judgment upon him/her. This date is important for the calculation of the 4-months time limit, within which the applicant should submit the referral to the Court (see for details, comments Article 49 [Deadlines] hereafter).

The Court has also modified its approach by no longer mentioning in the title of the Referral, for instance: “X vs. Decision No. Y of the Supreme Court”, or “X vs. Municipal Court of Podujevo”.³¹⁰ Instead, the title only mentions the challenged decision(s) of the court(s) concerned, for instance: “Applicant X, Constitutional Review of Decision No. Y of the Supreme Court, dated..”³¹¹

There could also be situations where party(ies) or participants other than the opposing party participate in the proceedings before the Court, for instance, at a hearing regarding a constitutional complaint the public authority, involved in the case, could be invited by the Court to participate in the proceedings in order to make submissions and answer questions. For instance, in Case No. KI. 08/09, *The Independent Union of Workers of IMK Steel Factory in Feriza, Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002*, of 17 December 2010,³¹² the Court invited the Privatization Agency of Kosovo (PAK) and the NewCo IMK as well as the Municipal Court in Ferizaj to the hearing. Representatives of both PAK and the NewCo IMK appeared, but not, as could be expected, the Municipal Court.....

It is also possible that the Court would invite a third party to appear in the proceedings in the capacity as “amicus curiae”. Such interventions may support the applicant or the opposing party and provide advice on the issue at stake. Depending on the nature of the case, the Court could even invite a number of “amicus curiae” in order to hear different views on the same matter. Third parties

³⁰⁹ Case KI 06/10, Applicant Valon Bislimi, Judgment of 30 October 2010.

³¹⁰ See, for instance, Case No. KI. 27/09, Rafet Hoxha vs. Decision No. Pn. Nr. 168/2005 of the Supreme Court, Decision of 15 December 2009, Bulletin of Case Law 2009 – 2010, page 30; and Case No. KI. 34/10, Bislimi Kosumi vs. Municipal Court of Podujevo, Resolution on Inadmissibility of 25 February 2011, Bulletin of Case Law 2011, page 32.

³¹¹ See, e.g. Case No. KI 61/09, Adler Com Sh.p.k. from Gjakova, Constitutional Review of order of the President of the Municipality of Gjakova, Resolution on Inadmissibility of 16 December 2010, Bulletin of Case Law 2011, page 400.

³¹² Bulletin of Case Law 2009-2010, page 417; and on the Court’s webpage.

could also request the Court to be invited to the proceedings as *amicus curiae* (see for further details, comments on Rule 53 [Amicus Curiae] hereafter).

Furthermore, the Secretariat may also send copies of the referral for comments to other party(ies) or participants in the procedure other than the respondent party or because the Judge Rapporteur had expressly asked it to do so. It is of utmost importance for a Judge Rapporteur to obtain as many facts, views and information as possible regarding a referral in order to prepare the Preliminary Report to be presented to the Review Panel in the best possible manner.

The communication by the Secretariat of the referral to the opposing party and other party(ies) or participants stems from the “equality of arms principle”, which forms part of the concept of fair trial, guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Fair Trial] ECHR. The opposing party and possibly other parties and participants, whose actions may have given rise to the constitutional complaint before the Court, should be given a fair opportunity to defend their actions which, according to the Applicant, have violated the Constitution.

According to Article 22.2, second sentence, the opposing party or participant should submit the reply together with the justification and all necessary information and documentation in support of the reply within a period of 45 days from the reception of the referral sent by the Secretariat.. The drafters of the Article have been rather generous in this respect, since this period can be extended by the Judge Rapporteur with a further (maximum of) 15 days. The Article is silent on the question whether the opposing party or participant risks any sanction, if the deadline of 45 days is not respected. In any case, the Judge Rapporteur could, for justified reasons, pursuant to Article 22.4, even extend the deadline with a further 15 days (or less)...If that time limit would still not be respected, Article 22.5, second sentence, contains at least a sanction, providing that “*If the reply to the referral was not submitted within the set deadline [...], the Judge Rapporteur prepares a preliminary report*” (see further comments under Article 22.5).

Article 22.2 is supplemented by Rule 29 [Filing of Referrals and Replies] commented on hereafter.

- 3 As to Article 22.3, first sentence, it is assumed that the term “Secretary” stands for “Secretariat”, as in paragraph 2 of Article 22, first and second sentence, or for “Secretary General” (as the Head of the Secretariat of the Court) mentioned in Article 12 above, since the Law does not appear to use this term any further. The Rules of Procedure do not mention this term either, so it seems that it was simply an oversight of the drafters. In order not to create any confusion by using the term “Secretary” here, the term “Secretariat” will continue to be used.

The Article does not provide for any time limit within which the Secretariat should forward the referral to the Judge Rapporteur, appointed by the President of the Court pursuant to Rule 8 of the Rules of Procedure.³¹³ Rule 33 [Appointment of Judge Rapporteur] does not establish any time limit either (see comments hereafter).

³¹³ See comments on Rule 8 hereafter.

Furthermore, although the wording of the Article may give the impression that the Secretariat will send both referral and reply to the Judge Rapporteur at the same time, in practice this appears to be different. As Article 22.2, second sentence, indicates, the opposing party has 45 days from the reception of a copy of the referral to submit a reply to the Secretariat. Thus, in principle, the Judge Rapporteur should be in the possession of the reply, if the opposing party has indeed submitted a reply, at the latest 45 days after having received the referral from the Secretariat. If, for justified reasons, the opposing party and other parties and participants have not been able to submit the reply to the referral within 45 days, they should inform the Judge Rapporteur who could grant an extension of 15 days on the basis of Article 22.4, arguing that the reply was not (yet) clear or complete.

The Article does not mention, however, whether the reply should be submitted to the applicant for comments. It seems to be logical and in accordance with the principle of “equality of arms” that an applicant is entitled to comment on the reply as a matter of right, but the drafters seem to have overlooked this issue. In any case, there is no reason why the Judge Rapporteur, *on his own motion*, would not allow the applicant to do so, since the comments of the applicant may assist him/her considerably in the preparation of the preliminary report. If a hearing is held, this omission would not play any role, since the parties will be invited by the President of the Court to comment on each other’s submissions (see for details, comments on Rule 43 hereafter).

Article 22.3 further provides that, after having received the referral and the reply to the referral, the Judge Rapporteur prepares the preliminary report concerning facts, admissibility and grounds of the referral. Since the preliminary report of the Judge Rapporteur constitutes the basis for the decision of the Court, it is important that the report is prepared with diligence and care along the lines indicated in Rule 34 [Report of the Judge Rapporteur]. In particular, it is of utmost importance that the facts are precise and clear and do not leave any room for different interpretations.

Of course, whether or not a referral is admissible and contains sufficient grounds for the finding of a violation as alleged by the applicant is a matter for the judges. The Review Panel may agree or disagree with the preliminary report, while the Court may agree or disagree with the Review Panel’s recommendation. In any case, a convincing and cuscint preliminary report, including relevant case law, may have a greater chance to be followed by the Review Panel in its recommendation to the Court. If this is the case, it should be an easy task to convert the preliminary report into a final decision of the Court. This explains, why, pursuant to Rule 60 [Final text of Judgment and filing], paragraph1, the Judge Rapporteur is tasked with drafting the Court’s decision (see for details, comments on Rule 60(1) hereafter).

Article 22.3 is supplemented by Rules 8 [Appointment of Judge Rapporteur], 29 Filing of Referrals and Replies], 30 Registration of Referrals and Replies], 33 [Appointment of Judge Rapporteur] and 34 Report of Judge Rapporteur].

- 4 According to Article 22.4, if a referral or reply is not clear or incomplete, the Judge Rapporteur may consider that, in order to be able to draft the preliminary report,

more information is needed from the applicant and/or the opposing party or other participant. For instance, certain issues need to be clarified and additional documents need to be submitted. The deadline – a maximum of 15 days to be set by the Judge Rapporteur – must be understood to begin to run from the date, on which the applicant, opposing party and/or participant(s) have received the request. Article 22.4, second sentence, emphasizes that even if the referral is clear and complete, the Judge Rapporteur may consider that he/she has still insufficient information and supporting documents in order to determine the admissibility and merits of the claim and still needs certain additional information. It is assumed that, although no deadline, within which the additional information should be submitted, is mentioned here, the same deadline of no more than 15 days provided by Article 22.4, first sentence, could be used. Of course, if the Judge Rapporteur considers it necessary, further requests could be addressed to the relevant parties with similar deadlines.

- 5 Article 22.5, first sentence doesn't appear to take into account the possibility that, after having received the referral and the reply thereto, the Judge Rapporteur may feel the need to request any of the parties for additional information in the circumstances described in Article 22.4..

In that case, the relevant parties or participants should be given a deadline of not more than 15 days to submit such additional information which would extend the period of 30 days within which the Judge Rapporteur should submit the Preliminary Report to the Review Panel with a further 15 days.³¹⁴ Apart from that, the additional information needs to be translated in the two other languages, which will certainly take some additional time. It would, therefore, not be unreasonable to interpret the provision in the sense that the time limit of 30 days would start to run only after the Judge Rapporteur has received the requested additional information submitted by the parties or participants and, where applicable, the translated versions.

According to Article 22.5, second sentence, the Rapporteur could prepare the Preliminary Report, *inter alia*, if the reply to the referral was not submitted within the set deadline. However, the Rule is silent on the issue whether the Judge Rapporteur, when the reply is received within the period of 30 days within which he/she should submit the preliminary report to the Review Panel, he could still take the contents of the reply into consideration. This view seems to be reasonable, since, if he/she would not do so, the Preliminary Report would risk to be based on inaccurate facts or lead to the wrong conclusion, for instance, if the Judge Rapporteur would propose to declare the referral admissible, whereas, on the basis of the belated information, the referral would be clearly inadmissible.

Furthermore, according to Article 22.5, second sentence, the Judge Rapporteur can also prepare a Preliminary Report only based on the referral, “if the nature of a special procedure does not require a reply to the referral.” In this respect, reference is made to the provisions on Special Procedures, laid down in Article 113 of the Constitution, Chapter III [Special Procedures] of the Law and Chapter VIII

³¹⁴ The Article does not further elaborate on the Review Panel. Details about the Panel are to be found in Article 22.6 and Rules 8 and 34 of the Rules of Procedure (see hereafter).

[Special Provisions on Certain Procedures under Article 113 of the Constitution] of the Rules of Procedure in order to know whether or not, in case of a referral under the Special Procedures, a reply is always required.

Although, in case of a referral submitted under Article 113.7 of the Constitution (constitutional complaint by individuals) the Secretariat communicates referrals to opposing parties as a rule, it is less clear in case of referrals under the other Special Procedures. In case of doubt, the Secretariat should consult the Judge Rapporteur, in his capacity of “master” of the Preliminary Report, on the question to whom to communicate the referral for comments. So, in the absence of any specific legal provision dealing with this issue, it should be the responsibility of the Judge Rapporteur to decide, whether the special procedure concerned is of such a nature that the referral should be communicated to specific parties or not to any party at all or even to interested parties, whose opinion about the issue at stake would be of interest for the preparation of the Preliminary Report, for instance, in case the Court would be interested to invite an *amicus curiae* to the proceedings (for detailed comments, see Rule 53 [Amicus Curiae] hereafter).

Article 22.5 is supplemented by Rules 34 [Report of Judge Rapporteur] and 35 [Review Panels], commented on hereafter.

- 6 Article 22.6, first sentence, implies that the Review Panel considers first the Preliminary Report, after an introduction by the Judge Rapporteur, before assessing its admissibility. The admissibility criteria are laid down in Rule 36 [Admissibility Criteria].

Except for the composition and appointment of the Review Panel by the President, the Article does not provide any details about its purpose or the manner in which it will assess the admissibility or inadmissibility of a referral. Such details are laid down in Rules 9 [Appointment of Review Panels] and 35 [Review Panels] of the Rules of Procedure, dealt with hereafter.

- 7 According to Article 22.7, only in case of a unanimous conclusion of the Review Panel that the referral is inadmissible on the basis of the admissibility criteria laid down in Rule 36 will a draft resolution will be sent to all judges. This will not be done by the Panel as indicated in the Article, but by the Secretary General, as laid down in Rule 35(4). However, Article 22.7 does not indicate which procedure is applied, if the Review Panel concludes “by majority vote” that the claim is inadmissible. Also Rule 35 [Review Panels] does not seem to cover the issue. However, in practice, there is no difference in procedure, since, as can be seen from the Court’s decisions, in each case the Review Panel, through its Presiding Judge, forwards its recommendation to the full Court, often during the same session.

Although Article 22.7, second sentence, has, thus, lost its significance, it is not clear, why the drafters considered it necessary to task the Review Panel to take all necessary measures to ensure that a copy of the draft decision is effectively sent to judges who may not be on the territory of the Republic of Kosovo. As in the first sentence of the Article, it should be the task of the Secretary General to do so (certainly, at the instruction of the Presiding Judge of the Review Panel) possibly

by electronic means or other effective means of communication (the Article uses the term “effectively”), and to ensure to obtain confirmation, that the judges concerned have received it.

Although not expressly stated, the provision appears to refer, in particular, to the international judges in the Court, when on leave in their country of origin or on mission elsewhere. It may, however, also happen that Kosovar judges are travelling abroad and need to receive a copy of the draft decision (as well as to confirm the receipt thereof) in order to express their opinion thereon within 10 days. If judges cannot be reached when abroad, the only solution would be to discuss the draft decision at a session of the full Court at the earliest possible date after their return.

Article 22.7 is supplemented by Rule 35 [Review Panels], commented on hereafter.

- 8 As to Article 22.8, once the “draft decision”, unanimously adopted by the Review Panel, has been forwarded to the other judges, the latter do not need to expressly oppose it. They can simply let the deadline of 10 days pass, which means that they will be considered to have silently approved it.

However, following the above mentioned practice that the recommendation is passed on to the full Court, mostly at the same session, the judges who are not on the Panel can, thus, express their opinion without delay, instead of doing so within a period of 10 days, as provided by the Article. When the Court unanimously or by majority agrees with the recommendation that the referral is inadmissible, the referral can be processed immediately without delay, although the judges have still 10 days, after having received the draft decision, to agree or disagree with the final wording of the Court decision. Thereafter, pursuant to Article 22.8, the President signs and issues the decision rejecting the claim on the basis of inadmissibility.

Moreover, as to the signing of such “Resolutions on Inadmissibility”, Article 22.8 gives the wrong impression that only the President signs them, whereas Article 20.3 of the Law clearly provides that “*Decisions of the Constitutional Courtshall be signed by the President of the Constitutional Court and the judge reporter.*” The fact that the President and Judge Rapporteur sign decisions, does not necessarily mean that they also agree with them. They may well disagree with a particular decision and have voted against its adoption. The signing of a resolution of inadmissibility is, therefore, a mere formality. This might be different in the case of the drafting and signing of a judgment, when the initial Judge Rapporteur disagrees with the majority of the Court (see comments on Rule 60 [Final Text of Judgment and Filing] hereafter).

Finally, as to the President signing and issuing the decision, the Article does not provide for any specific procedure. Only Article 20 [Decisions], paragraph 4, of the Law, contains some details, providing that “The Decision is sent to the parties ex officio and is published in the Official Gazette.” In fact, it is the Secretary General who performs these tasks on behalf of the President. Moreover, decisions are, in practice, not only published in the Official Gazette, but also on the official web-page of the Court.

Article 22.8 is supplemented by Rule 35 [Review Panels], commented on hereafter.

- 9 Article 22.9 foresees two possibilities for the case to be referred to the full Court: (1) if the Review Panel, “unanimously” or “by majority”, concludes that the claim is admissible; and (2) if the Review Panel unanimously concludes that the claim is inadmissible, but one or more judges who are not on the panel opposes that conclusion. In practice, it does not really matter, since according to the procedure presently followed by the Court, the case is always referred by the Presiding Judge of the Review Panel to the full Court for further adjudication.

As to the second sentence of Article 22.9, it is unclear, why the legislature has not thought of other options than to oblige the Court to hold a hearing as stipulated in the second sentence of the Article, the more so, since Article 20.2 of the Law allows the Court to decide, at its discretion, the claim on the basis of the case file (see for detailed comments on Article 20.2 above)³¹⁵. Whatever the intentions of the drafters may have been when inserting a reference to “the oral hearing” into Article 22.9, the Court has regulated the issue in its Rules of Procedure in line with Article 20.2 (see, Rules 45 to 53, commented on hereafter). The drafters could, therefore, have simply left the issue whether or not to hold hearings to the Court, as they initially may have had in mind, when drafting Article 20.2. In these circumstances, the Court would then have four options:

- (1) the Court declares the claim as inadmissible and does, therefore, not deal with its merits;
- (2) it declares the case admissible and decides on the merits of the claim without a hearing;
- (3) it declares the case admissible and holds a hearing on the merits of the case;
- (4) it decides on the case after a hearing on both admissibility and merits.

Option (4) may be used, when the Court feels that a hearing is necessary to clarify issues of fact or law regarding the admissibility and merits of the claim, for instance, if applicants allege that there are no available remedies to exhaust or that the available remedies are ineffective. Such a situation may arise, for instance, when the applicant is about to be deported or extradited to a country, where he/she would, allegedly, be submitted to torture or inhuman or degrading treatment, contrary to Article 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment] of the Constitution and Article 3 [Prohibition of Torture] of the European Convention of Human Rights³¹⁶ and has not exhausted all remedies under applicable law yet. Normally, in such cases, applicants also ask the Court to impose interim measures on the deporting/extraditing authorities not to deport him/her to the country concerned during the proceedings before the Court (see detailed comments on Article 27 [Interim Measures] of the Law hereafter). The

³¹⁵ Article 20(2), stipulating: “Notwithstanding Paragraph 1 of this Article, the Court may decide, at its own discretion, the case that is subject of constitutional consideration on the basis of case files”, is itself also problematic, because it abolishes the right to a hearing, expressly granted to the parties by Article 20(1), providing: “The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing”. See detailed comments under Article 20 above.

³¹⁶ Article 3 ECHR provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Court may deem it necessary to hold a hearing, in order to deal with the question whether the applicant needs to exhaust the remedies at all, since, according to the applicant they are ineffective and as well as with the merits of the case.

Article 22.9 is supplemented by Rules 45 [Submission of Evidence by Parties] to 53 [Amicus Curiae] which are being dealt with under Article 25 [Evidence].

As mentioned above in the comments on each paragraph of Article 22, Rules 8, 9, 28, 29, 30, 33, 34, 35, 36, 37 and 38, which supplement these paragraphs, will be dealt with at the end of the Article itself. Therefore, the comments on these Rules will follow here together with the comments on Rules 37 [Joinder and Severance of Referrals] and 38 [Pilot Judgments], which, like Article 22, also establish procedures for the processing of referrals, more specifically in cases where the subject matters are related or where the different issues should preferably be considered separately.

Rule 8 [Appointment of Judge Rapporteur] of the Rules of Procedure

- 1. The Judge to be assigned a referral shall be chosen by a system of random draw and appointed by the President.**
 - 2. If replacement of the Judge assigned as Judge Rapporteur is necessary, another Judge shall be assigned to the referral by random draw and appointed by the President.**
 - 3. All Judges shall receive, over time, an equal distribution of assignments as Judge Rapporteur.**
- I. Neither Article 22.3 of the Law, nor Rules 8 and 33 of the Rules of Procedure mention the time frame, within which the President should appoint the Judge Rapporteur after a referral has been registered by the Secretariat. Instead of providing for a time limit, within which the Secretariat should choose the Judge Rapporteur by a system of random draw and present him/her to the President for appointment, the drafters seem to have left it to the discretion of the Secretariat to decide when to do so.

What the Court lacked most in the beginning was a properly applied case management system as a very useful tool regarding the registration, in a timely fashion, of referrals, communication with the parties, details of the proceedings, submitted documents and other issues important for the proper handling of the referrals as well as the appointment of the Judge Rapporteur and Members of the Review Panel. Fortunately, thanks to the activities of the Court's Information Technology and Multimedia Unit (ITMU), which is responsible for the functioning of the Multimedia infrastructure and the provision of IT and Multimedia services developed during 2011 the Case Data Management System (CDMS), in cooperation with donors from the East-West Management Institute (EWMI), and the installation of CDMS into the computers of the Court's judges, legal advisors and staff members, enabling them to follow the case file from the day of registration until its final adjudication by the Court.

II. When replacement of the judge assigned as Judge Rapporteur to a referral is necessary, the judge replacing him/her will also be chosen by random draw, before being appointed by the President. The reasons for such a replacement can be multiple and are to be found in Articles 8 [Termination of mandate], 9 [Prior termination of the mandate] and 18 [Exclusion of a Judge] of the Law and in Rules 5 [Resignation of Judges], 6 [Dismissal Procedures] and 7 [Exclusion Procedures] of the Rules of Procedure supplementing these Articles. In all situations mentioned therein, the replacement of a judge calls, necessarily, also for his/her replacement as Judge Rapporteur and member of the Review Panels concerned, where applicable. Depending on the circumstances, the replacing judge could be a current judge of the Court or the newly appointed judge.

III. Although Rule 8(3) provides that all judges shall receive, over time, an equal distribution of assignments, it is inherent in the use of a system of random draw, that an equal distribution of assignments as Judge Rapporteur to all judges can not be guaranteed. It is, therefore, not easy to see, how an equal distribution of assignments can be achieved “over time”. However, the present system of random draw cannot be easily replaced by another system, since that may be perceived by the public as an attempt to influence the independence of the judges and to affect the unbiased assignment of cases. Keeping the assignment system on an “at random” basis, will furthermore avoid any conflict between the judges..

The German Federal Constitutional Court has chosen a method whereby cases are assigned on the basis of their content, be it the alleged infringement of the Basic Law, or be it the area of (ordinary) law where the case originated.³¹⁷ A system like this will not totally exclude assignment conflicts between judges. However, it will help to assign cases to judges (and legal advisers) specialized in the issue..

Rule 8 is further supplemented by Rule 33 [Appointment of Judge Rapporteur], commented on hereafter.

Rule 9 [Appointment of Review Panels] of the Rules of Procedure

- 1. For each referral registered by the Court a Review Panel of three judges to review the admissibility of the referral shall be chosen by a system of random draw and appointed by the President.**
 - 2. The President shall designate one of the Judges assigned to the Review Panel to serve as Presiding judge of the Review Panel.**
 - 3. All Judges shall receive, over time, an equal distribution of assignments as Judges on Review Panels and as Presiding Judge of Review Panels.**
 - 4. The Judge Rapporteur assigned to prepare a report on the referral to be considered by the Review Panel shall not be a member of the Review Panel.**
- I.** To chose the judges of a Review Panel by random draw is supposedly similar to the one used for the assignment of a judge as Judge Rapporteur for each referral, as set out in Rule 8 [Appointment of Judge Rapporteur]. However, there may be cases, for instance, whereby as a result of the random draw the 3 international

³¹⁷ http://www.bverfg.de/organisation/geschaeftsverteilung_2014.html.

judges would sit in one Review Panel. Many other undesired results, in a similar way as mentioned in connection with the random draw system regarding Judges Rapporteur, could be imagined. In such cases, the Secretariat could, for instance, repeat the random draw, after having consulted the President. However, it would be preferable to improve the random draw system for the appointment of both the Judge Rapporteur and members of the Review Panel through the adoption by the Court of additional Rules which would produce a more balanced result.

Although the Rule is silent on the issue, it seems to be appropriate and in line with the provisions of Article 11.2 of the Law, that, whenever the President of the Court is chosen by the system of random draw as a member of the Review Panel, he is appointed as such by the Deputy-President of the Court.

- II. The Court could have chosen the same system of random draw for the nomination of the Presiding Judge of the Review Panel, but apparently preferred to leave it to the President to appoint the Presiding Judge. However, in the interest of transparency, the Court has apparently decided that the President should designate as Presiding Judge the most senior Judge in age from amongst the three Judges. This, though, will have the result that the two Judges in the Court, who are the youngest in age, will never have the chance to become Presiding Judge of a Review Panel, until such time that younger judges will join the Court. This seems to be in breach of Rule 4 [Precedence of Judges], paragraph 2, of the Rules of Procedure, providing that “[...] the judges are equal, regardless of age, [...]”.³¹⁸
- III. As is the case regarding equal distribution of assignments as Judge Rapporteur, it is not easy, when applying a system of random draw, to arrive at an equal distribution of assignments as Judges on Review Panels and as Presiding Judge. As set out above, additional Rules are necessary in order to avoid that the random draw and seniority system leads to an unequal distribution of such assignments as may presently happen.
- IV. It goes without saying that it would be incompatible with the principle of “the independence of judges”, if a Judge Rapporteur would, at the same time, be a member of the Review Panel dealing with his/her preliminary report based on the referral.
Further details of the procedure before the Review Panel are contained in Rule 35 [Review Panels] of the Rules of Procedure.

Rule 28 [Initiation of proceedings] of the Rules of Procedure

**Proceedings before the Court shall be initiated by the filing of a referral with the Secretariat. When the referral or any initial documents are filed, the referral shall be assigned a registration number by the Secretariat.
(new)**

³¹⁸ The full text of Rule 4.2 reads: “Unless otherwise provided in these Rules, the Judges, in the exercise of their responsibilities, are of equal status, regardless of age, priority of appointment, length of service or duration of mandate”.

The Rule does not add much to Article 22.1. It implies that, even though not all necessary documents have been received, the referral should be assigned a registration number (see also Rule 30.(1)). Thus, if a referral remains incomplete, it will still be considered a pending case before the Court and will still be dealt with by the Court. But the risk is that the Court will reject the case as inadmissible, the applicant not having substantiated the alleged violations of the Constitution.

Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure

- 1. A referral shall be filed in writing in one of the official languages in the Republic of Kosovo. The referral shall be addressed to the Secretary General, shall include the date of filing, and the signature of the person filing the referral.**
- 2. The referral shall also include:**
 - (a) the name and address of the party filing the referral;**
 - (b) the name and address of representative for service, if any;**
 - (c) the power of attorney for representative, if any;**
 - (d) the name and address for service of the opposing party or parties, if known;**
 - (e) a statement of the relief sought;**
 - (f) a succinct description of the facts;**
 - (g) the procedural and substantive justification of the referral; and**
 - (h) the supporting documentation and information.**
- 3. Copies of any relevant documents submitted in support of the referral shall be attached to the referral when filed. If only parts of a document are relevant, only the relevant parts are necessary to be attached.**
- 4. Documents may be submitted in either official language of Kosovo or in one of the languages in official use in Kosovo. When a document is not in one of the official languages or the other languages in official use in Kosovo, the document shall be accompanied by a certified translation into one of the languages in use in Kosovo. The translation may be only of relevant parts of the document, but in such cases, it must be accompanied by an explanation indicating what parts of the document are translated. The Court may require a more extensive or complete translation to be provided by the party.**
- 5. The Secretariat shall develop a procedure to check the authenticity of the translations presented.**
- 6. A referral shall be filed in person at the office of the Secretariat of the Court during regular working hours, or shall be filed by mail or by means of electronic communication.**
- 7. The Court shall establish referral forms to assist parties in submitting referrals and shall publish such forms on the web page.**
- 8. Replies to referrals shall be filed by opposing parties in the same manner as the filing of referrals under this Rule.**

It is clear that Rule 29 is applicable to all authorized parties under Article 113 of the Constitution, although the comments on the Rule may sometimes dwell somewhat more in detail on the filing of referrals by individuals (and legal persons) under Article 113.7 of the Constitution. Thus the following comments on the Rule concern all authorized parties.

In this connection, it is appropriate to refer shortly to the application form (Application Form for bringing a Referral under Article 113.7 of the Constitution of the Republic of Kosovo and Articles 46 to 49 and 56 of the Law on the Constitutional Court of the Republic of Kosovo) and the Guidelines to assist referring parties in submitting a referral to the Constitutional Court of the Republic of Kosovo which have especially been elaborated by the Court for individuals intending to submit a constitutional complaint and can be obtained at the Court's premises and be downloaded from the Court's web page.³¹⁹ Obviously, other authorized parties under Article 113 of the Constitution may also make use of the Application Form when submitting a referral to the Court, as has apparently been the case in most of such referrals. Further details about the referral form are to be found in the comments on Rule 29(6) hereafter.

- I. Rule 29(1) requires that the referral shall be filed in one of the official languages in the Republic of Kosovo. Pursuant to Article 5 [Languages], paragraph 1, of the Constitution, the official languages in the Republic of Kosovo are Albanian and Serbian. However, neither the Law, nor the Rules of Procedure provide that the referral may also be submitted in the Turkish, Bosnian and Roma languages, although, according to Article 5.2 of the Constitution, "*...these languages have the status of official languages at the municipal level or will be in official use at levels as provided by law*". Moreover, Article 24 [Equality before the Law] of the Constitution, in its paragraph 2, provides; "*No one shall be discriminated against on grounds of [...] language [...]*." In these circumstances, the legitimate question could be asked whether a person who submits his/her referral in the Turkish, Bosnian or Roma languages would be discriminated against, if his/her referral was refused by the Secretariat, for the reason that it was not submitted in the Albanian or Serbian language.

Although such a case has apparently not arisen yet, it is not clear how strict the Secretariat would apply Rule 29(1), if it would arise. As discussed hereafter, Rule 29(4), first sentence, makes an exception for the submission of documents in the Turkish, Bosnian or Roma language. If strictly applied, Rule 29(1) would require that the Secretariat requests the prospective applicant to submit a translation of his referral into Albanian or Serbian and would, possibly, consider the referral to be incomplete, as long as the applicant has not submitted the required translation in one of the official languages.

Apart from the discrimination issue mentioned above, the prospective applicant could also maintain that his/her right of access to the Constitutional Court, as part of the right to a fair trial, would be hampered, if obliged to translate the referral from a language "in official use" into one of the "official languages in Kosovo", in particular, if the applicant has insufficient financial means to pay for the costs of

³¹⁹ The web page of the Constitutional Court is: www.gjk-ks.org

such translation. It would be up to the Court to decide how to deal with such a complaint about the Court Rules.

For instance, the Law on Supplementation and Amendment of the Kosovo Provisional Code of Criminal Procedure,³²⁰ provides in its Article 15: *“(1) The languages and scripts which may be used in criminal proceedings shall be Albanian, Serbian and English. Another language or script may also be used if it is prescribed by law for use within the individual territorial jurisdiction of a court,”* while its paragraph 4 stipulates that *“Pleadings, appeals and other submissions may be served on the court in English, Albanian or Serbian or any other language, taking into account the provisions of the Constitutional Framework and any law prescribing additional languages for use within the individual territorial jurisdiction of the court [...]”*.

It is assumed that, since the Constitutional Framework for Provisional Self-Government in Kosovo is no longer in force after the entry into force of the Constitution of the Republic of Kosovo on 15 June 2008, Article 15(1) of the Law on Supplementation and Amendment of the Kosovo Provisional Code of Criminal Procedure³²¹ should be read in the light of Article 5 of the Constitution of the Republic of Kosovo which does not mention English as an official language. However, in accordance with the principle of legal certainty, as long as the Law has not been amended in accordance with Article 5 of the Constitution, a person should be entitled to rely on the provisions of that Law and, thus, may still consider the English language mentioned in its Article 15(1) as an official language in the proceedings before the criminal courts.³²²

As to the Turkish, Bosnian and Roma languages which, pursuant to Article 5.2 of the Constitution, have the status of official languages at the municipal level or are in official use at all levels as provided by law, a person should also be entitled to use these languages in criminal court proceedings, by relying on Article 15(1), second sentence of the above Law providing: *“Another language or script may also be used if it is prescribed by law for use within the individual territorial jurisdiction of a court.”* Thus, at least at the level of the municipal criminal courts, a person should be entitled to use, instead of Albanian or Serbian, the Turkish, Bosnian or Roma language. As to the appeal proceedings before the District Courts and the Supreme Court, the same person could use the Article 24 [Equality before the Law] argument and claim discrimination, if not allowed to continue to use one of these languages he/she was allowed to use in the proceedings before the municipal court.

As to the situation in civil proceedings, Article 6 of Chapter I of Part One [Basic Provisions] of the Law on Contested Procedure³²³ provides: *“6.1 The contentious procedure proceeds in any of the official languages of the court. 6.2: The parties and other participants in the procedure that do not understand or speak the official language of the court, shall have the right to speak his or her language or the language that he or she understands.”* Paragraphs 1 and 2 of Article 96 of Chapter

³²⁰ Law No. 03/L-003 entered into force on 6 April 2004.

³²¹ Law No.03/L-002 of 6 November 2008

³²² The Assembly should bring the Law in conformity with the Constitution.

³²³ See Law No. 03/L-006 of 30 June 2008.

VI [The languages in the Procedure] elaborates the language issue in more detail, provide: “96.1 *The parties and other participants in the procedure shall send claims, appeals and submissions in the official languages of the court.* ” and “96.2 *If the procedure is not conducted in the language of the party or other participants in the procedure, upon their request shall be provided verbal interpretation into their language or languages they understand of all submissions and evidence and of all that is submitted in the court session. [...].*” Moreover, pursuant to Article 98: “*The parties and other participants in the procedure shall send claims, appeals and submissions in the official languages of the court.*”

Although Article 6 of the Law on Contested Procedure apparently entitles a party to speak in whatever language he/she understands and have interpretation, if necessary, it requires the parties to send the submissions” in the official languages of the court”. Articles 96 and 98 set out the same requirements in more detail. Thus, the language issue apparently only arises, when parties and other participants wish to send claims, appeals and submissions to the court. In principle, pursuant to Article 5 of the Constitution, these official languages should mean Albanian and Serbian, but since the Turkish, Bosnian and Roma languages have the status of official languages at the municipal level, parties and other participants should be allowed to send submissions in these languages at least to the municipal courts. As to the civil appeal courts, the same arguments as developed above regarding the use of languages before the criminal courts could be used. However, for the sake of legal certainty and transparency, the legislature should bring more clarity and amend the above laws accordingly.

As to the Rule’s requirement that the referral shall include the date of filing, it is not clear what this really means. Of course, a referral will, normally, contain the date on which the referral was signed by the prospective applicant or representative, but this date is not of great importance. The only important date is, in fact, the date of the registration of the referral by the Secretariat, since, as mentioned above, that date is important for the calculation of the four-months time limit of Article 49 of the Law.

When a referral is sent by mail, it is to be expected that the Secretariat will use the date of the postal stamp as the date of registration of the case with the Court, since the applicant cannot be held responsible for any delay in the postal service. When the prospective applicant or representative files the referral with the Court by hand or by electronic means of communication, the date of the visit to the Court or the date of the sending of the email to the Court’s email address should be the date, on which the referral is assigned a registration number.

As to the signature of the referral³²⁴, it is somewhat surprising that the Rule only requires the signature of the person filing the referral, but does not ask for any proof of the person’s identity by way of a valid identity card, or passport (or a certified copy thereof). Although this is not foreseen in the Law or the Rules of Procedure, the Secretariat should, nevertheless, require the applicant to duly identify him/herself when submitting the referral or, when the referral was sent by mail or electronically, by adding a photocopy or scanned copy of the ID card or passport. In case of the applicant being represented, his/her representative should

³²⁴ As to the signature of a referral filed in electronic form, see comments on Rule 29(5) hereafter.

not only submit an authorization duly signed by the applicant and him/herself, but also submit proof of his identity and, if it is a lawyer, his/her bar membership (see further, Rules 29(2)(b) and 29(2)(c) hereafter). It is suggested to amend the Law and/or Rules of Procedure accordingly.

- II.** By virtue of Rule 29(2), the applicant also needs to indicate his/her name and address. Again, no mention is made of any requirement to submit valid identity papers issued by the competent authorities, which would enable the Secretariat to verify whether the personal data mentioned in the referral, correspond with those indicated in these identity papers. Of course, in case of doubt, the Court could request the applicant to submit corroborating proof of his/her identity at any stage of the proceedings, but it should be the task of the Secretariat, at the moment the referral is received, to verify whether the applicant's name and address are correct. As to prospective applicants residing abroad, they should submit (certified) copies of their identity papers issued by the competent authorities in the country of residence or of origin.

In case the applicant is represented, sub-paragraph (b) only requires that the name and address of the representative is indicated in order for the Secretariat to be able to communicate with him/her "for service" purposes. However, as commented above on Rule 29(1), second sentence, neither the Law, nor the Rules of Procedure seem to require the representative to submit any evidence of his/her identity. It is suggested to amend the Rule accordingly so as to require the applicant's representative to submit proof of his/her identity at the moment the referral is submitted at the Court. As mentioned above, if the representative is an attorney, he/she should also submit evidence of membership of a bar association.

Neither the Law, nor the Rules of Procedure oblige applicants to be represented by a lawyer or other specially qualified legal representative. Although representation by a lawyer is certainly no guarantee for the referral to have a better chance of success before the Court, it may ensure a better preparation and reasoning of the referral and prevent applicants from too easily submitting referrals which are unsubstantiated, or inadmissible on obvious grounds, in particular, on the ground of not having exhausted all legal remedies available under applicable law or for non-compliance with the four-months rule.

Obligatory representation by a lawyer has, however, not been chosen by the drafters of the Law. In particular, as to constitutional complaints under Article 113.7 of the Constitution, such mandatory representation could have been envisaged. Probably, since the European Convention on Human Rights, which, as mentioned earlier, is directly applicable in Kosovo pursuant to Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution, also does not require representation by a lawyer for the filing of an application with the ECtHR, the drafters of the Law may not have opted for such a solution.³²⁵

As to the Strasbourg rules, only when a case has been communicated to the High Contracting Party, the ECtHR³²⁶ requires the applicant to have legal representation

³²⁵ For instance, in France, the submission of a referral to the Constitutional Court has to be done by a lawyer representing the applicant.

³²⁶ See for details Chapter X [Legal Aid], Rules 91, 92 and 93 to 96 of the ECtHR's Rules of Court.

and will enable him/her to apply for free legal aid, if he/she has insufficient means to pay for such representation. It is clear that, otherwise, it would be an infringement of the principle of equality of arms, if in the proceedings before the ECtHR the applicant would have to make his/her case without legal assistance, whereas the High Contracting Party would make use of its most qualified legal experts to oppose the applicant's allegations. If the applicant does not qualify for free legal aid, but has hired a lawyer, the ECtHR may grant a specified sum in respect of the fees he/she has to pay.³²⁷

As to the proceedings before the Court, it may be useful and legitimate on the same grounds to introduce a similar rule as the one applied by the ECtHR, in particular, once the Court has decided to declare the referral admissible and, even more so, to hold a hearing in the case.

If represented by a lawyer or other representative, applicants need to submit a power of attorney, clearly stating that they duly authorize the representative to represent them in the proceedings before the Court. In fact, the power of attorney should contain the signatures and names and addresses of both the applicant(s) and representative(s), including (certified) copies of their identity cards and, in case, of a lawyer, proof of membership of a bar association.

The Rule requires that the prospective applicants also need to indicate the name and address of the opposing party or parties, if known, in order to enable the Secretariat to communicate the referral to that party or those parties for comments. Most of the time, applicants will know, who the opposing party is. However, when an applicant complains of the unfairness of certain court proceedings, he/she could also indicate the name and address of the opposing party(ies) in the proceedings before those court(s). Pursuant to Article 22.2, first sentence, of the Law, it is the Secretariat which shall send copies of the referral to the opposing party and other party(ies) or participants in the procedure.

It would be more logical to put paragraph (e) at the end of Rule 29(2), since the question about the relief sought normally appears at the end of a referral after the allegations and the justification for the referral. As to the Rule itself, it requires that in the referral applicants need to state details of the relief sought. They cannot expect that the Court will figure out on its own motion, what relief applicants might wish to obtain, if the referral would be successful. For instance, in a case, where an individual has complained that his imminent extradition would expose him in the receiving country to inhuman or degrading treatment, which is expressly prohibited by Article 27 [Prohibition of Torture, Cruel, Inhuman or Degrading Treatment]³²⁸ of the Constitution and other international instruments directly applicable in Kosovo (like Article 3 [Prohibition of Inhuman and Degrading Treatment] ECHR), he/she will certainly state that the relief, he is seeking, is not to be extradited or deported. It is most certain that, in this example, the applicant will also request the Court to take interim measures, to the extent that the government, as the opposing party, will not be allowed to extradite the applicant during the proceedings before the Court or while the applicant is in the process of exhausting

³²⁷ Idem.

³²⁸ "No one shall be subject to torture, cruel, inhuman or degrading treatment or punishment"

all remedies available under applicable law (see, for further comments: Article 27 [Interim Measures] of the Law).³²⁹

Another example is, that an individual, who alleges that public authorities have deprived him/her of the right to certain property in violation of Article 46 [Protection of Property] of the Constitution, will state that, if the referral would be successful, he/she would wish the return of that property. In all referrals submitted by other authorized parties under Article 113 of the Constitution, the goal of the referral has normally always been clearly set out. However, there has been cases when the Court had to request the applicant to elaborate on the relief sought.³³⁰

To give a succinct description of the facts is not as easy as it may look. Applicants may think that it is preferable to submit as many details as possible, without clearly distinguishing between what factually happened and their appreciation of the facts. Applicants have to build their case and present the facts in a clear and concise manner and in chronological order, including a copy of their submissions in the relevant administrative, court- and other proceedings, if any. The applicant's allegations need to be supported by the necessary documentation and other relevant information, which would enable the Court to verify the authenticity of the alleged facts and events. In order to facilitate the task of how to formulate the facts in the clearest possible way, the applicant should simply look, as an example, at the text of the Court decisions published on its web page, where the facts ("Summary of facts") are spelled out in the manner required and just follow the example.

The prospective applicant must be able to justify that, in the circumstances of the case, he/she has followed all proper procedures available under Kosovo law (this condition seems to be similar to the exhaustion of remedies requirement laid down in Rule 36 [Admissibility Criteria] of the Rules of Procedure, commented on hereafter). On the other hand, the prospective applicant must justify that the substance of the referral falls within the competence of the Court and that the facts set out in the referral constitute indeed a violation of the Constitution. As mentioned above, although individual applicants may not be required, in accordance with the Court's and ECtHR jurisprudence, to mention the alleged violation of specific Articles of the Constitution in the proceedings before the regular courts and the Constitutional Court, they need, at least, to have invoked the rights and freedoms concerned in substance.

Without supporting documents and other necessary information, a referral can never be successful. They form the foundation of the case and will allow the Court to judge whether or not the applicant has complied with all requirements for the admissibility of the referral (or was not able to do so for justified reasons) and to

³²⁹ See, for instance, a case where the applicants, who were about to be removed from Kosovo, submitted a referral to the Court, together with a request for the imposition of interim measures: Case No. KI 121/10, Sitaram Chaulagai, Krishna Bandur Chamlagai, Chandra Kala Chauhan and Hom Bahadur Battarai, Constitutional Review of the Decisions of the Hight Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 161/2010, dated 22 November 2010, Resolution of Inadmissibility of 14 December 2011, Bulletin of Case Law 2011, page 669; and on the Court's webpage.

³³⁰ See, for instance, Case No. KO 05/12, Applicant Visar Ymeri and 12 other deputies of the Assembly of the Republic of Kosovo, Resolution on Inadmissibility of 19 March 2012 (See, for the full text, the Court's webpage)..

verify whether the facts contained therein support the allegations of the applicant that a violation of the Constitution has taken place. This clearly means that documents and information, which do not support the referral, should not be submitted. As already set out above, applicants, however, may easily think that it would be useful for the Court to have at its disposal whatever document they possess concerning their case, even if many of them are irrelevant. This may render the task of the Judge Rapporteur, who prepares the preliminary report to be submitted to the Review Panel, more difficult, since he/she must first single out all irrelevant documents, before being able to proceed with the preparation of the report on the admissibility of the referral. Of course, a first sight of the documents presented may happen, when a prospective applicant comes to the Court to submit a referral and is received by a staff member, who could indicate to him/her that some of the documents presented are simply irrelevant for the referral. So, the first selection of necessary documents presented may be done by the staff member, although it cannot be avoided that applicants insist that the staff member keeps all documents, including irrelevant ones, or submit superfluous documents at a later stage. Again, it is for the applicant to build the case before the Court and this can only be successfully done with the help of relevant documents and information.

III. The text of Rule 29(3), first and second sentence, is similar to the one which has already been discussed under Article 22.1, fourth sentence.). It only adds that copies of relevant parts of a document should be attached to the referral. In reality, applicants may be easily inclined to attach the whole document instead of the relevant parts thereof, since, in their opinion, it would be important for the Court to read also the other parts of the document in order to obtain a better understanding of the context of the events described in the relevant part of the document.

IV. Unlike Rule 29(1), first sentence, which requires that the referral must be filled out in one of the official languages of the Republic of Kosovo, Rule 29(4), first sentence, allows that supporting documents may be submitted either in one of the official languages or in one of the languages in official use in Kosovo, i.e. the Turkish, Bosnian and Roma languages mentioned in Article 5.2 of the Constitution.³³¹ However, it is not understandable, why only documents can be submitted in the official languages or one of the languages in official use, but that the rest of the referral can only be filed in one of the official languages. As stated above, applicants may consider this as discrimination and an infringement of their right of access to the Court.

Although applicants are allowed to submit a document in another language than the ones mentioned, they must provide the document together with a certified translation into one of the “languages in use in Kosovo”, supposedly meaning, into one of the official languages (Albanian or Serbian) or into one of the languages in official use (Turkish, Bosnian or Roma). If applicants wish to submit only relevant parts of such a document, the translation must be accompanied by an explanation indicating what parts of the document are translated. In practice, applicants may

³³¹ Article 5.2 of the Constitution provides: “*Turkish, Bosnian and Roma languages have the status of official languages at the municipal level or will be in official use at all levels as provided by law*”.

rather submit a translation of the whole document instead of explaining why only certain parts of the document are translated and others not. The more so, as the Court may still require applicants to provide a translation of additional parts of the same document at a later stage.

However, if an applicant is obliged to submit a certified translation of certain documents to the Court in the circumstances described in the Rule, there may be cases, where the applicant has insufficient or no financial resources at all to be able to afford the payment of the translation costs of such documents. So, the applicant's right to access to the Court may be seriously hampered, if he/she is unable to submit supporting documents in one of the languages required. Apparently, this problem has not arisen yet, but, nevertheless, it is an important issue, which may be the subject of further reflection and lead to the amendment of this Rule, in particular, when a referral is *prima facie* admissible.

V. It is not immediately clear, what kind of procedure the Secretariat should develop to check the authenticity of the translations presented. If the translation carries a valid certification, issued by a certified translator or translation company, the authenticity of the translation should be guaranteed, unless there are serious doubts as to the authenticity of the certification itself. It may be equally important for the Secretariat to carefully check, whether the translated document itself is authentic and not falsified.

VI. The strict requirement of Article 22.1, second sentence, of the Law that referrals have to be submitted in writing to the Secretariat of the Court has been watered down by Rule 29(6), since it allows prospective applicants also to file referrals in person at the office of the Secretariat and by means of electronic communication. The practice appears to be that, during the working hours of the Court, a prospective applicant and/or his/her representative will be received by a staff member, who will check the referral on compliance with all requirements mentioned under Rule 29(2) commented on above.

If the Court's referral form has not been completed yet or is incomplete, the staff member will explain (1) how to properly fill in the form (which can be loaded down from the Court's web page³³², (2) which admissibility criteria must be satisfied, (3) that the constitutional complaints must be substantiated and supported by the necessary evidence (decisions of public authorities, court decisions and other documents). The staff member will, however, not give any advice as to how to present the referral to the Court best. After their visit to the Court, prospective applicants may go home to prepare the referral in the way as explained by the staff member and return to the Court as soon as possible with the completed referral form and supporting documents. Others apparently come to the Court with a complete referral and leave it there to be registered as a pending case before the Court.

However, if it becomes clear during the visit that the applicant or representative will be unable to justify the allegations of a violation of constitutional rights and cannot submit necessary information and supporting documents, because all legal

³³² www.gjlkos-gov.net

remedies, which were available to the applicant under applicable law, have clearly not been exhausted (see for further comments on the exhaustion requirement those on Article 47.2 hereafter), the staff member may draw the attention of the applicant and/or representative to the fact that the referral would not stand much chance of being successful and, consequently, would be declared inadmissible by the Court on that ground; in short, that it would not make much sense to register the referral and have the Court deal with the case.

If the claimant agrees and does not insist on having the complaint registered as a referral, because he/she would, for instance, still have the possibility to exhaust the available legal remedies, this may be helpful to the Court, since its caseload may increase less rapidly. Of course, if an applicant or his/her representative insists that the constitutional complaint be registered, for the reason that he/she has the constitutional right to submit a claim to the Court and have it adjudicated, the Secretariat will register the complaint as a referral.

The provision also foresees that an applicant can file a referral by means of electronic communication. Thus, every prospective applicant, who has access to the internet, can fill in the application form electronically, scan all documents in support of the referral and send them to the Court's email address (info@gjk-ks.org). This way of communication with the Secretariat will certainly remain an exception to the rule, since many applicants may not have access to the internet or, simply, prefer to go to the Court to deliver their referral by hand. When a referral is received at the Court by means of electronic communication, the referral will be checked in a similar way as in the situations mentioned above. The applicant will receive an acknowledgment of the receipt of the referral by email, but, at the same time, be asked to submit the duly signed application form and additional documents by registered mail. If necessary, the Secretariat will send the confirmation of the notification containing the registration number both by email and registered mail³³³.

VII. Pursuant to Rule 29(7) and as mentioned above, the Court has developed a referral form³³⁴ as well as guidelines³³⁵ containing detailed instructions for prospective applicants in how to complete the application form (with or without the help of a representative) and submit it to the Court. The referral form contains a number of questions, which are mainly based on Rules 29(2)(a) to (h) above and need to be answered by the prospective applicant, before submitting the referral to the Secretariat. The referral forms and guidelines can both be downloaded from the Court's above web page (www.gjk.kos-gov.net), or can also be obtained from the Secretariat. Together with the documents attached, the application forms

³³³ For instance, Rule 35(2) of the Rules of Procedure of the Slovenian Constitutional Court provides that "Applications that are submitted in electronic form but which do not contain a secure signature based on a qualified certificate are not considered applications that the Constitutional Court receives in the framework of office operations, and thus it is not obliged to respond to them."

³³⁴ Application Form for bringing a Referral under Article 113.7 of the Constitution of the Republic of Kosovo and Articles 46, 47, 48, 49 and 56 of the Law on the Constitutional court of the Republic of Kosovo.

³³⁵ Guidelines to assist referring parties in submitting a referral to the Constitutional Court of the Republic of Kosovo.

constitute the core of the case file which the Department of Case Registration, Statistics and Archives (DCRSA) of the Secretariat will establish for each referral and on the basis of which the Judge Rapporteur will prepare the preliminary report in accordance with Article 22.3 of the Law commented on above.

VIII. According to Rule 29(8), replies to referrals shall be filed in the same manner as the filing of referrals by applicants. Therefore, the comments made above on the submission to the Court of a referral by an applicant under Rule 29 are equally valid *mutatis mutandis* for the filing of any reply by opposing parties (or usually called in the decisions of the Court: “responding parties”).

Rule 30 [Registration of Referrals and replies] of the Rules of Procedure

- 1. The Secretary General shall register a referral immediately when the referral or any documents are filed, even when all necessary documents are not contained with the referral.. The Secretariat shall maintain a checklist of necessary documents and may assist parties by explaining what is missing from a referral.(new text)**
 - 2. If a referral does not contain all necessary documents, the Secretariat shall notify the applicant that the referral should be supplemented with the documents specified in the referral and specify that such documents shall be filed within 30 days.(new text)**
 - 3. The Secretariat shall maintain a register in which all filings of referrals and replies are recorded with the following information:**
 - (a) date and time of filing;**
 - (b) name of the person or persons filing the referral;**
 - (c) registration number assigned to the referral; and**
 - (d) Judge Rapporteur appointed to referral; and**
 - (e) Review Panel appointed to the referral.**
 - 4. The Secretariat shall establish a case file for each registered referral, which shall include all documents and materials related to a referral, a reply, if any, and any other documents and materials produced during the proceedings.**
- I.** The first sentence of Rule 30(1), which is almost identical to the text of Rule 28 [Initiation of proceedings], clearly shows that it is the Court’s policy to facilitate the registration of a referral as much as possible on the condition that the applicant submits all necessary documents as soon as possible. The Court’s policy is presumably based on the assumption that most applicants are not familiar with the procedure for submitting a referral to the Court and, therefore, should be assisted, wherever necessary, by explaining to them what is missing from the referral.. The second sentence Rule 30(1) requires the Secretariat to maintain (for each referral) a checklist of necessary documents, which will be part of the case file and, when dealing with the case, allow the Court to quickly verify their source, nature and date. As further contained in the second sentence, the Secretariat (in practice a legal advisor of the Court by whom a prospective applicant is received at the Court

premises) may assist parties by explaining what is missing from the referral. This issue has already been extensively commented on under Rule 18 [Legal Advisors] above. In short, the legal advisor will assist the prospective applicant in completing the application form, indicate which documents and other information are necessary and point to the requirement that the referral must be admissible and substantiated before the Court can adjudicate the merits of the case. The prospective applicant should submit the lacking documents and other submissions as soon as possible or within the given time limit of 30 days as provided by Rule 30(2).

II. Rule 30(2) requires the Secretariat to notify the Applicant that his/her Referral is incomplete and that he/she has a 30 day time limit to submit the missing documents. The Rule is silent on the question whether the Secretariat can also fix a shorter period like the Judge Rapporteur can do under Article 22.4, first sentence, when he/she considers the referral (or the reply to the referral) to be unclear or incomplete and can fix a time limit of a maximum of 15 days for clarifying or supplementing the referral or reply (see, detailed comments on Article 22.4). In practice, this

III. Rule 30.3 requires the Secretariat to establish and maintain a register in which the necessary information about the referrals and replies, mentioned under Rule 30(3)(a) to (e), are recorded.

However, Rule 30(3)(b) suffers from the same deficiency as Article 22 of the Law and Rule 29(2)(a) to (c) above. As suggested there, not only the name and address of prospective applicants should be registered, but also evidence of their identity, like a copy of a valid identity card or passport, while the Court could order applicants and other participants, at whatever stage of the proceedings, to submit the originals concerned. The same is true for the legal representatives, if any, whose name and address together with the duly signed power of attorney (and if represented by a lawyer, a copy of the membership of a bar association) should also be inserted in the Register. It is, therefore, suggested to amend Article 22 and the Rule accordingly.

As to the Judge Rapporteur and Members of the Review Panel, not only their names, but also the number and date of the respective Order of Appointment by the President of the Court should be recorded in the Register.

IV. Although Rule 30(4) does not provide any details, on how the Secretariat should establish case files, the Secretariat apparently keeps the complete case file in hard copy as well as in electronic form. Aware of the fact that it would be very important for a new Constitutional Court to establish an efficient and modern case management system without delay and that its Secretariat would need the necessary assistance of qualified experts to establish such an easily accessible and user friendly management system for judges and relevant staff of the Court, East West Management has provided IT experts to set up a user friendly electronic case management system to which judges and legal advisers would have access.

The experts had to take into account that the referrals and supporting documents and other information, including those produced at a later stage of the proceedings, should exist in the two official languages as well as in English (certain documents some times also in one of the three languages in official use in Kosovo, see comments on Rule 29.4 above, which would certainly have complicated the establishment of a smoothly functioning case management system considerably. The system is now up and running since a year and constitutes an important asset to the work of the judges and legal advisers.

Not Rule 30, but Rule 33 [Appointment of Judge Rapporteur], paragraph 1, second sentence, sets out, what the Secretariat will do with the registration number, once a referral has been filed and registered.

Rule 33 [Appointment of Judge Rapporteur] of the Rules of Procedure

- 1. When a referral has been registered with the Secretariat, the referral shall be forwarded to the President who shall appoint the Judge Rapporteur in the manner provided in Rule 8. The Secretariat shall notify the person who filed the referral and any opposing party or other interested party of the registration and the registration number.**
- 2. Following appointment of the Judge Rapporteur, the Secretariat shall forward the referral including all attached documents to the Judge Rapporteur. When received by the Secretariat, any reply to the referral shall be forwarded, including all attached documents, to the Judge Rapporteur.**

- I.** Although the headings of both Rules 8 and 33 are identical, the contents are not. Rule 33(1), first sentence, regarding the appointment of the Judge Rapporteur, refers back to Rule 8 and is similar to Article 22.3, second sentence, of the Law. Both provisions have just been commented on above. Therefore, only Rule 33(1), second sentence, will be commented on here.

The text of the Rule does not provide any time limit, within which the Secretariat needs to notify the applicant as well as the opposing party or other interested party of the registration and registration number of the referral concerned. It depends on a proper case management system, like the presently installed CDMS system, whether these time limits will be kept to a minimum.

Although not indicated in the second sentence, it should be understood that, together with the registration and registration number of the referral, the Secretariat should also forward to the opposing party or other interested party the referral itself, including the referral form and other submissions, in order to enable these parties to submit to the Secretariat their “reply to the referral together with a justification and necessary supporting documents” within 45 days from the receipt of the referral (as stipulated by Article 22.2, second sentence of the Law).

The wording “the person who filed the referral” may mean the applicant him/herself or the applicants themselves as well as his/her/their representative (not necessarily a lawyer). As a rule, once a party has nominated a representative, the

Secretariat will only communicate with the latter. Therefore, only the representative will be notified of the registration and the registration number.

The Rule does not provide for any time limit within which the Secretariat should notify the parties concerned of the registration and the registration number. It is assumed that the Secretariat will do so on the day of registration or shortly thereafter and that, when notifying the responding party or other interested party(ies) of the registration and number, the Secretariat will, at the same time, communicate the referral and accompanying documents for information and comments.

- II.** Rule 33(2) does not differ much from Article 22.3, first sentence, and merely repeats that after the appointment by the President of the Court the Judge Rapporteur will receive from the Secretariat the complete case file as submitted by the applicant as well as any reply (including all attached documents) to the referral by the respondent party or other party or participant.

Like Article 22.3, first sentence, of the Law, also Rule 33(2) does not provide for a time limit within which the Secretariat should forward the referral to the Judge Rapporteur assigned to the case. The same is true with regard to the moment the Secretariat will forward any reply to the referral to the Judge Rapporteur. This may be explained by the fact that the Secretariat can never be certain at which moment in time the case file and any reply to the referral, which have to be available to the judges in Albanian, Serbian and English and, therefore, need to be translated into the relevant languages, will come back from the translators. However, the Secretariat, in particular, the legal advisor to the referral, may advise the relevant Judge Rapporteur, for instance in an obviously inadmissible case, not to have the complete file translated, but only the relevant parts thereof in order to save time and money. In any case, the translation issue will continue to cause delays in the proceedings before the Court, in particular, when case files of complex referrals are extensive and difficult to translate.

Rule 34 [Report of Judge Rapporteur] of the Rules of Procedure

- 1. The Report of the Judge Rapporteur shall contain:**
 - (a) description of the facts of the case;**
 - (b) a presentation of facts that are disputed and facts that are undisputed;**
 - (c) an indication of which party bears the burden of proof on disputed facts;**
 - (d) a presentation of the legal arguments presented by all parties;**
 - (e) a tentative assessment of the admissibility of the referral; and**
 - (f) a tentative assessment of the substantive legal aspects of the referral.**
- 2. The 30-day period specified in Article 22.5 of the Law for the Judge Rapporteur to submit the Report does not commence until the Judge Rapporteur has received all documents in the file, including a translation, when necessary, of all documents that are required to be translated.**

- I. An accurate summary of the undisputed facts, extracted from copies of original documents, like administrative acts of public authorities and court judgments, or, if no party to the proceedings is able to provide all facts, stemming from other sources, constitutes the foundation of a referral and of the preliminary report of the Judge Rapporteur. Only in cases where facts are disputed and there are no documents to verify their veracity, will it be necessary for the Judge Rapporteur to indicate which party should bear the burden of proof regarding such disputed facts or whether such proof should be requested from both or even third parties. However, it should be understood that the initial burden of the *prima facie* justification that there is a case to answer, remains with the applicant.

It is also important that all parties present their legal arguments in a clear and concise manner for their better understanding and evaluation by the Judge Rapporteur who has to relate to them in his Preliminary Report.

As to the tentative assessment of the admissibility of the referral, mentioned in paragraph (e), the Judge Rapporteur would need to verify whether the applicant has fulfilled all necessary procedural requirements, before the allegations that a constitutional right has been violated can be examined by the Review Panel and the Court. In fact, admissibility requirements are to be found in different legal instruments: (1) in the Constitution, (2) in the Law as well as (3) in the Rules of Procedure. For instance, paragraphs 1 to 9 of Article 113 of the Constitution [Authorized Parties] mention the “authorized parties” who are entitled to submit a referral as well as the “matters which the authorized parties can refer to the Constitutional Court in a legal manner”.³³⁶

Moreover, Article 113.7 mentions “individuals” as authorized parties and the matters they can complain about (“violations by public authorities of their individual rights and freedoms guaranteed by the Constitution”) and, as an additional formal requirement, that they can refer such matters to the Court only “after exhaustion of all legal remedies provided by law”.

Also Chapter III [Special Procedures] of the Law contains for each category of authorized parties mentioned in Article 113 of the Constitution specific admissibility requirements. For instance, as an additional admissibility criteria, Article 49 [Deadlines] of the Law requires an applicant under Article 113.7 of the Constitution to submit the referral within a period of 4 months from the day upon which the claimant has been served with a court decision. The specific admissibility requirements for each category will not be commented on here, but under the relevant Articles of the Law hereafter.

Furthermore, Rule 36 [Admissibility Criteria] of the Rules of Procedure contains an extensive list of admissibility requirements for referrals which are valid for all categories of referrals and will be discussed immediately hereafter.

As to the tentative assessment of the substantive legal aspects of the referral mentioned in Rule 34(1)(f), the Preliminary Report of the Judge Rapporteur should indicate whether or not the applicant has sufficiently substantiated the

³³⁶ Additional formal requirements, which each of the authorized parties mentioned in Article 113 of the Constitution must fulfill, when submitting a referral with the Court, are provided in Articles 29 to 54 of Chapter III [Special Procedures] of the Law and will be discussed hereafter in more detail.

constitutional complaint on the basis of satisfactory evidence and legal arguments, justifying an examination by the Court of the merits of the case.

- II.** Rule 34(2) clearly refers to the 30-days period, specified in Article 22.5 of the Law, but is more specific in determining that the 30 days start running, when the Judge Rapporteur has received all documents in the file, including a translation, when necessary. Whether “all documents in the file” also cover the replies to additional questions put by the Judge Rapporteur to the parties and/or participants and their replies thereto, is not clear. However, Rule 34(2) would make more sense, if the 30-days period to prepare the preliminary report starts running on the day that the Judge Rapporteur has received not only all documents which were already in the file, but also all additional documents and replies which he/she had requested from the parties, including the necessary translations, the more so, if such additional documents are more important than those contained in the original file. What will happen, if the necessary information does not arrive in time, or not at all, is regulated by Article 22.5, second sentence. (see comments on the Article above).

Rule 35 [Review Panels] of the Rules of Procedure

- 1. The Review Panel in each case shall be chaired by the Presiding Judge assigned under the provisions of Rule 9.**
- 2. The Review Panel may request the party submitting a referral or a party submitting a reply to present additional facts, documents or information, if this is necessary to determine the admissibility of the referral.**
- 3. The Review Panel shall submit its resolution on admissibility within thirty (30) days after receiving the Report of the Judge Rapporteur and the case file. If additional information is requested from the parties, the resolution shall be submitted within thirty (30) days after receiving all the additional information.**
- 4. If the Review Panel concludes that a referral is inadmissible, the Presiding Judge shall prepare a draft resolution stating the reasons for inadmissibility and forward the resolution to the Secretary General. The Secretary General shall forward the draft resolution to all Judges for further consideration in accordance with Article 22 of the Law on the Constitutional Court.**
- 5. If the Review Panel concludes that a referral is admissible, the Presiding Judge shall prepare a draft resolution stating the reasons for admissibility and forward the resolution to the Secretary General. The Secretary General shall forward the recommendation to all Judges.**
- 6. Written dissents by a Judge on the Review Panel to a decision of the Panel concerning admissibility shall not be permitted.**
- 7. A judge who objects to the conclusion of the Review Panel that a referral is inadmissible, shall submit objections to the Secretary General within the time period established in the Law on the Constitutional Court. The Secretary General shall inform all Judges of the objection.**

- I. Rule 35(1) only defines that the assignment of the Presiding Judge, who will chair a Review Panel, will take place in accordance with the provisions of Rules 9(2) commented on above).
- II. Like the Judge Rapporteur, also the Review Panel has the power to request the applicant and/or the respondent party (and, supposedly, also other participants, if any) to submit additional facts, documents (for instance, showing that the applicant has exhausted all legal remedies available under applicable law) and other information, if it considers that the referral does not contain sufficient evidence yet to determine its admissibility. It is noted that the powers of the Judge Rapporteur in this respect are laid down in Article 22.4 of the Law and not in the Rules of Procedure, whereas the powers of the Review Panel are provided in the present Rule and not in the Law.
Since the Rule does not mention any time limit within which the additional information must be submitted, unlike in the case of the Judge Rapporteur, who can set a deadline of not more than 15 days as mentioned in Article 22.4 above, the Review Panel appears to be free in fixing itself the time limit.
- III. When requesting additional information, it is assumed that the Review Panel fixes a deadline for the submission thereof which would be as short as possible in the interest of the proceedings. If the additional information is not submitted within the time limit or is submitted only partly or not at all, it is presumed that in that case the Review Panel will determine the admissibility of the referral only on the basis of the available information, including the Preliminary Report of the Judge Rapporteur and the case file (see, *mutatis mutandis*, Article 22.5, second sentence).
- IV. Unlike Article 22.7 of the Law, Rule 35(4) is silent as to the question whether the conclusion of the Review Panel that the referral is inadmissible was adopted “unanimously” or “by majority vote”. Since the Rule does not make any distinction, it is assumed that the same procedure is followed in both cases to the effect that the Presiding Judge prepares a draft resolution on inadmissibility of the referral and forwards it to the Secretary General for distribution to all judges. Thereupon, all judges will consider the draft resolution of the Review Panel in accordance with Articles 22.8 and 22.9 of the Law.
- V. Rule 35(5) provides that the Presiding Judge of the Review Panel refers every recommendation of the Review Panel to the Secretary General for distribution to all judges for further adjudication. However, in practice, the submission of the Panel’s recommendation to the Court happens orally by the Presiding Judge, so there is no written reasoned draft recommendation of the Review Panel to be forwarded to the Secretary General for distribution to all judges. It is true that reasoned draft resolutions may be useful tool in assisting the judges not on the Review Panel to form an opinion as to the admissibility or inadmissibility of the case, but this procedure apparently saves a lot of time and paperwork, the more so, since the Review Panel deliberates in the presence of the other judges. So, the latter are aware of the discussion amongst the members of the Review Panel which

has lead to the adoption of its recommendation. However, the question remains whether the Rule needs to be amended accordingly.

- VI.** Rule 35(6) seems to be reasonable, since it would not make much sense that a dissenting judge on the Review Panel attaches his/her opinion to the Review Panel's decision on admissibility to the full Court, where the admissibility issue will again be discussed. In fact, it may even be possible, that the dissenting judge on the Review Panel changes his/her opinion during the discussions in the Court and comes to a different opinion than the one held, when he/she was a member of the Review Panel. Dissenting opinions are only allowed under Rule 58 [Dissenting Opinions], which stipulates that a judge shall have the right to prepare a dissenting opinion to the judgment of the Court on the merits of a referral (see hereafter).
- VII.** Rule 35(7) supplements Articles 22.7, first sentence, and 22.8, dealing both with the case that the Review Panel has unanimously concluded that the claim is inadmissible and that judges, who are not members of the Review Panel, can oppose the draft resolution/decision, prepared by the Presiding Judge of the Review Panel, by submitting written objections to the Secretary General within a period of 10 days after having received the draft. Since, in practice, the full Court will discuss the recommendation of the Review Panel immediately after its adoption, the rule that the Secretary General, to whom the objecting judge shall submit objections, must inform all judges of the objection, is not necessary in practice. As said above, this practice saves the Court a lot of precious time. Whether also this Rule should be amended to bring it in line with this practice should be a matter for discussion amongst the judges.

Rule 36 [Admissibility Criteria] of the Rules of Procedure

- 1. The Court may only deal with Referrals if:**
 - (a) All effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or**
 - (b) The Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or**
 - (c) The Referral is not manifestly ill-founded.**
- 2. The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:**
 - (a) the Referral is not prima facie justified, or**
 - (b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or**
 - (c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or**
 - (d) when the Applicant does not sufficiently substantiate his claim.**
- 3. A Referral may also be deemed inadmissible in any of the following cases:**
 - (a) the Court does not have jurisdiction in the matter;**
 - (b) the Referral is made anonymously;**
 - (c) the Referral was lodged by an unauthorized person;**

- (d) the Court considers that the Referral is an abuse of the right of petition;
 - (e) the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;
 - (f) the Referral is incompatible *ratione materiae* with the Constitution;
 - (g) the Referral is incompatible *ratione personae* with the Constitution; or
 - (h) the Referral is incompatible *ratione temporis* with the Constitution.
4. In the event that a Referral to the Court is incomplete or it does not contain the information necessary for the conduct of the proceedings, the Court may request that the Applicant makes the necessary corrections within 30 days. (new text)
 5. If the Applicant fails, without good cause, to make the necessary corrections within the time-limit referred to in paragraph 5 of this Rule, the Referral shall be proceeded with.

The admissibility requirements constitute the first hurdle, which an applicant has to take, before the Court will be able to deal with the merits of his/her constitutional complaint(s). However, many of the referrals fail already at the admissibility stage, because the applicant (and often his/her legal representative) has apparently no sufficient knowledge of the constitutional complaint mechanism. The lack of adequate information, knowledge and understanding of this mechanism may diminish considerably, when the Court continues to execute its recently developed out-reach strategy. In its Strategic Plan 2010-2013 of July 2010³³⁷, the Court has acknowledged the necessity to build a communication strategy and establish an Outreach Program in order to foster a good relationship with the citizens, and to effectively deliver constitutional justice. In the Court's opinion, publicity, transparency and the use of modern technologies are key to fulfill its mandate, while the communication strategy also views the Court's external and internal communication arrangements as intimately linked prerequisites for improved interactions with the public.

The Court has determined actions areas through which it can improve its external and internal communication: communication with the public, participants in Court proceedings and media; internal communication and international relations. For instance, the Court has recently developed an easy-to-understand application form and detailed guidelines how to complete those forms. The Form and Guidelines can be obtained at the Court and be downloaded from the Court's webpage. Thus, the Court, as the highest protector of human rights and freedoms guaranteed by the Constitution, is making a considerable effort to ensure that its rules are known amongst natural and legal persons, public institutions and law practitioners in Kosovo.

As to the grounds for admissibility laid down in Rule 36, most of them correspond with those defined in the Constitution, the Law and Article 35 [Admissibility criteria] ECHR as mentioned hereafter. Taking into account Article 53 [Interpretation of Human Rights Provisions] of the Constitution, providing that "*Human Rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights*", it appears from the Court's case law that in each of its decisions it has not only interpreted the human rights and fundamental freedoms guaranteed by the Constitution consistent with the ECtHR

³³⁷ See the Court's website: www.gjks.com

decisions, but it has also carefully followed the ECtHR's interpretation of the admissibility requirements. Where necessary, examples of case law of both the Court and the ECtHR will be given.

- I. It should be emphasized first, that sub-paragraphs 1(a) to 1(c) of Rule 36 are accumulative requirements, meaning that all three conditions must have been fulfilled, before the Court may deal with the referral. If not, the Court will reject the claim as inadmissible. Sub-paragraphs 1(a), 1(b) and 1(c) should, therefore, contain the word “and” at the end, instead of “or”. It is suggested that the Rule be amended accordingly.

Rule 36(1)(a) supplements Article 47 [Individual Requests], paragraph 2, of the Law, stipulating that “*The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law*”, while Article 47 itself implements Article 113.7 of the Constitution, equally referring to the exhaustion of remedies requirement: “[...] *only after exhaustion of all legal remedies provided by law*”³³⁸. Article 113.7 of the Constitution itself reflects Article 35 [Admissibility Criteria], paragraph 1, ECHR, providing: “*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law [...]*”.

However, unlike Article 113.7 of the Constitution, Article 47.2 of the Law and Article 35.1 ECHR, Rule 36(1)(a) mentions expressly that only “effective” remedies need to be exhausted. The concept of “effective remedies” clearly stems from the ECHR case law, according to which applicants are only required to exhaust remedies that are available and effective and that discretionary or extraordinary remedies need not to be exhausted, for example requesting a court to revise its decision. Where an applicant has tried a remedy that the Court considers inappropriate, the time taken by the applicant to exhaust the ineffective remedy will, in the Kosovo context, not interrupt the running of the four months time limit of Article 49 [Deadlines] of the Law (see comments hereafter).³³⁹

It should be stressed, that the exhaustion rule means two things:

- (1) The applicant must show that he/she has made use of all legal remedies available under applicable law in Kosovo, including an appeal to the highest competent court or instance possible. For instance, when complaining of a violation of constitutional rights by an administrative act taken by an administrative authority, the applicant must not only submit evidence that he/she appealed against that act to the highest possible administrative authority, but also, if that appeal was not successful, to the Administrative Matters Department of the Basic Court and, if that appeal was not successful, further appeals to the Court of Appeals and the Supreme Court, in accordance with the new Law No. 2010/03-L-199 on Courts of 9 August 2010.

³³⁸ Article 113.7 of the Constitution provides: Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law”.

³³⁹ See Case No. KI 41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Resolution of 27 January 2010, Bulletin of Case Law 2009 – 2010, page 50 and on the Court's webpage; see also, *Prystavka, Rezgui v. France*, Application no. 49859/99, ECtHR Judgment of 7 November 2000.

According to the Court's constant case law,³⁴⁰ the rationale for the exhaustion rule, as interpreted by the ECtHR³⁴¹, is to afford the authorities concerned, including the courts, the opportunity to prevent or put right the alleged violation of the Constitution. Furthermore, the Court holds that the rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of constitutional rights, which is an important aspect of the subsidiary character of the Constitution.

(2) The applicant must also show that he/she has raised the constitutional complaint or at least its substance³⁴², which he/she is submitting to the Court, before the relevant authorities or institutions, including the last instance (in the above example, the administrative authorities in last instance, the administrative departments of the Basic Courts, the Court of Appeals and the Supreme Court) in order to give these instances the opportunity to review and repair the constitutional violation, before the applicant submits it to the Constitutional Court³⁴³. Thus, an applicant should, in all appeal proceedings, clearly set out which rights and freedoms, in his/her opinion, have been violated by the relevant authorities and courts. It would be ideal, if he/she would invoke at the same time all articles of the Constitution and international instruments, directly applicable in Kosovo and allegedly violated in the case concerned. However, the Court has already held that it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned, but that the exhaustion rule is satisfied as long as the issue was raised implicitly or in substance.³⁴⁴

The Court apparently applies the exhaustion rule relatively strictly and exempts an applicant only from the application of the rule, if he/she has shown that the remedy was unavailable or not-effective or extraordinary and, therefore, did not need to be exhausted³⁴⁵ (see further comments on the exhaustion requirement under Article 47 [Individual Requests], paragraph 2, of the Law³⁴⁶ hereafter).

The admissibility requirement under Rule 36(1)(b) is less elaborated than the one stipulated by Article 49 [Deadlines] of the Law and simply sets out that the referral must be filed with the Secretariat within a period of four months, which should start to run from the date on which the decision of the last effective remedy was served on (and indeed received by) the applicant. Unlike the exhaustion rules

³⁴⁰ See, for instance, Case No. KI 41/09, AAB-RIINVEST University L.L.C., Pristina vs. Government of the Republic of Kosovo, Resolution of 27 January 2010, Bulletin of Case Law 2009 – 2010, page 50; also on the Court's webpage; see also: *Selmouni v. France*, Application No. 25803/94, ECtHR Judgment of 28 July 1999.

³⁴¹ see, *Prystavka, Rezgui v. France*, Application no. 49859/99, ECtHR Judgment of 7 November 2000.

³⁴² The Court may not consider it strictly necessary for the applicant to have invoked the specific Articles of the Constitution in the proceedings before the relevant authorities.

³⁴³ See, for instance, Case No. KI 17/10, Vesel Tmava and Others vs. The Ministry of Transport and Communications of the Republic of Kosovo, Resolution on Inadmissibility of 15 October 2010, Bulletin of Case Law 2009 – 2010, page 285; *Hudson v. FROM*, Application no. 67128/01, ECtHR Judgment of 24 March 2005.

³⁴⁴ See again the AAB-RIINVEST Case; and, *mutatis mutandis*, *Azianas v. Cyprus*, Application no. 56679/00, ECtHR Judgment of 28 April 2004.

³⁴⁵ *Idem*.

³⁴⁶ Article 47(2) of the Law provides: "The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law."

mentioned in Article 113.7 of the Constitution, Article 49 of the Law or Article 35.1 ECHR, only Rule 36(1)(b) stipulates that the remedy must be effective, an aspect of the exhaustion rule which has already been mentioned in the comments on Rule 36(1)(a) above.

Thus, when on the date, on which the referral was received by the Secretariat, more than four months have lapsed, since the applicant was effectively served with the decision of the last instance court, the Court will have to declare the referral inadmissible for being out of time. Further aspects of the admissibility requirement will be dealt with under Article 49 [Deadlines] of the Law.

If a referral is not manifestly ill-founded, it qualifies for being dealt with by the Court on the merits, however on the condition that all other admissibility requirements have been fulfilled. The situations, in which the Court will reject a referral as manifestly ill-founded are laid down in Rule 36(2)(a) to (d) and will be commented on in detail hereafter.

II. The allegations contained in the referral of the applicant must serve as a beginning (*prima facie*) of proof that the alleged violation of the relevant rights and freedoms guaranteed by the Constitution has indeed taken place. So, without *prima facie* evidence, there is no case to answer and the Court would have to declare the referral inadmissible as manifestly ill-founded³⁴⁷.

Prospective applicants, coming to the Court to submit a referral, will hear from the staff member, receiving them, that they may need, inter alia, to sufficiently substantiate their allegations and clearly show that there is a case to answer. Also the Judge Rapporteur and the Review Panel³⁴⁸ might ask applicants to produce *prima facie* evidence of a possible violation of the rights and freedoms invoked, but the initial effort to build a *prima facie* case remains with the applicant at the time of the referral's submission.

The distinction between Rule 36(2)(b) and the previous sub-paragraph seems to be minimal. While Rule 36(2)(a) provides that the referral should be at least *prima facie* justified, the sub-paragraph (b) requires that the presented facts should at least justify "the allegation" of a violation of a constitutional right. Applicants must, therefore, also indicate what the link is between the alleged violation and the presented facts. In practice, both requirements, if not meet, will come down to the same result, i.e. the Court declaring the referral manifestly ill-founded.³⁴⁹

The applicant must show to have been directly affected by an act or omission of a public authority. However, according to the ECtHR case-law, this criterion cannot be applied in a mechanical and inflexible way³⁵⁰. For instance, applicants may allege that a law violates their rights, although they are not subject of an individual

³⁴⁷ See, for instance, Case No. KI 67/09, Idriz Ratkoceri, Constitutional Review of Judgment of the Municipal Court of Pristina, Resolution on Inadmissibility of 14 December 2010, Bulletin of Case Law 2009 – 2010, page 395; *Vanek v. Slovak Republic*, Application no. 53363/99, ECtHR Decision on Admissibility of 10 July 1991.

³⁴⁸ See Rule 35.2 of the Rules of Procedure, commented on hereafter.

³⁴⁹ See, for instance, Case No. KI 53/09, Avdi Kastrati vs. Decision of the District Court of Prizren Ac.No.540 of 8 June 2009, Resolution of Inadmissibility of 29 July 2010, Bulletin of Case Law 2009 – 2010, page 233 and on the Court's website.

³⁵⁰ See, for instance, *Karner v. Austria*, Application no., ECtHR Judgment of, para. 25.

measure taken under that law, if that law obliges them to either modify their conduct or face prosecution³⁵¹, or if they are members of a class of people who risk being affected by the legislation³⁵². If the applicant cannot build such a case, the Court would consider that the applicant complained about the legislation or act of a public authority in the abstract. Since the Constitution does not provide for an “*actio popularis*”³⁵³, the Court would have to reject the referral as manifestly ill-founded.

This system of “*actio popularis*” implies that every individual is entitled to take action for constitutional review against a normative act after its enforcement, without needing to prove that he/she is currently and directly affected by it. In an Opinion of the Venice Commission³⁵⁴, prepared at the request of the Hungarian authorities, who intended to replace their existing system of *actio popularis* by other means, the Commission held that the availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard. Although the Venice Commission acknowledged that this mechanism has been seen as the broadest guarantee of a comprehensive constitutional review, which allowed eliminating from the legal order quickly unconstitutional laws, a comparative perspective showed that most countries did not choose to introduce this mechanism as a valid means to challenge statutory acts before the constitutional court. According to the Hungarian authorities, the aim of the reform was to avoid the risk of overburdening the constitutional court with an unmanageable amount of petitions as well as the misuse of remedies before it, and to make it possible for the court to concentrate its efforts on petitions where a specific legal interest was present.

Rule 36(2)(c) should not have been placed in the “manifestly ill-founded” category. If the Court finds that an applicant is not a victim of an alleged violation of his/her constitutional rights, it should not declare the referral manifestly ill-founded, but reject it as incompatible with the Constitution *ratione personae*, as laid down in Rule 36(3)(g) (see hereafter), as is also the practice of the ECtHR³⁵⁵.

According to ECtHR case law, also indirect victims, where they have a personal and specific link with the direct victim, can submit a referral³⁵⁶. Since the rights and freedoms of the Constitution shall be interpreted consistent with the decisions of the ECtHR³⁵⁷, the Court should follow the same logic, if confronted with a similar case.

Furthermore, still according to ECtHR practice, also the family of a deceased applicant may pursue the referral, provided that they have a sufficient interest in

³⁵¹ See, for instance, *Norris v. Ireland*, Application no., ECtHR Judgment of, para 66.

³⁵² See for instance, *Burden v. United Kingdom*, Application no., ECtHR Judgement of, para. 34.

³⁵³ See, for instance, Case No. KI 45/09, Teki Bokshi, Constitutional Review of UNMIK Administrative Direction No. 2003/13, Resolution on Inadmissibility of 30 November 2010, Bulletin of Case Law 2011, page 13.

³⁵⁴ CDL-AD (2010) 039 rev., para. 74.

³⁵⁵ ECtHR practice: if the applicant is unable to show that he or she is a victim of the alleged violation, the application will be declared incompatible “*ratione personae*”.

³⁵⁶ See, for instance, *Yasa v. Turkey*, Application no., ECtHR Judgment of.

³⁵⁷ Article 53 [Interpretation of Human Rights Provisions] of the Constitution.

doing so³⁵⁸. Moreover, the ECtHR decided in several cases, where the applicant passed away, that it would be appropriate to continue the examination of the application for the purpose of protecting human rights, for instance, in a case where the application concerned legislation or a legal system or practice in the country concerned³⁵⁹.

Finally, an applicant can lose his/her victim status, if he/she is afforded appropriate and sufficient redress, for instance, if, in the meantime, the violation is appropriately remedied by the relevant public authority through a favorable court decision or adequate redress. In that case, the applicant can no longer claim to be a victim³⁶⁰ and, thus, the Court will have to reject the referral as incompatible *ratione personae* (see Rule 36(3)(g) hereafter). As a consequence, the Court may strike the referral out of the list of cases pending before it³⁶¹.

Rule 36(2)(d) is similar to Rules 36(2)(a) and 36(2)(b). Applicants need to build their case by submitting all necessary evidence showing a possible violation of their constitutional rights and freedoms. So, it cannot be repeated enough that the burden of proof is upon the applicant. In particular, if the allegations are not sufficiently supported by the facts, the applicant risks, that the Court will reject the case as manifestly ill-founded.

Article 48 [Accuracy of the Referral] stipulates in similar terms: “*In his/her referral the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.*” The comments made on the present Rule are equally valid for Article 48 (see hereafter).

It appears from the case law of the Court, that, so far, a great number of referrals has been rejected as inadmissible, for the reason that applicants had not sufficiently substantiated their allegations and had not submitted sufficient evidence, showing that their allegations of a violation of constitutional rights were justified. Applicants and often their lawyers, if they have one, are apparently not sufficiently aware of the importance of this requirement and don’t realize that it is their task to build the case. It is not up to the Court to do the applicant’s homework and try to figure out what the applicant might have meant and which Articles of the Constitution or ECHR might have been violated in the applicant’s case. Of course, if the applicant cannot submit the necessary evidence, because it is in the possession of the respondent party or a third party, he/she should inform the Court, so that the Court could request such parties to submit the evidence concerned (see Rules 45 and 51 of the Rules of Procedure).

As already mentioned above, the Court’s outreach strategy as part of its strategic planning process will certainly lead to a better understanding on the part of prospective applicants (and their representatives) of the constitutional complaint

³⁵⁸ See, for instance, *Raimondo v. Italy*, Application no., ECtHR Judgement of, para. 2.

³⁵⁹ See, for instance, *Karner v. Austria*, Application no., ECtHR Judgment of, paras. 26 and 28.

³⁶⁰ See, for instance, *Eckle v. Germany*, Application no. 8130/78, ECtHR Judgment of 15 July 1982, para 66.

³⁶¹ See, for instance, Case No.KI. 12/09, *Mehdi Krasniqi vs. Ministry of Labour and Social Welfare*, Decision to Strike out the Referral of 24 March 2010; *Gaefgen v. Germany*, Application no., ECtHR Judgment of, para. 116..

mechanism before the Court which is also explained in detail in the Guidelines for submitting a referral to the Court mentioned above.³⁶²

III. The Court has only jurisdiction in cases expressly falling within the scope of the Constitution and the Law. Thus, if applicants submit a referral to the Court, invoking the violation of rights and freedoms not guaranteed by the Constitution (for instance, the right to a driving licence), the Court has no jurisdiction to deal with such matters, but will have to reject the referral as incompatible *ratione materiae*³⁶³ (see also comments under Rule 36(3)(f) hereafter). Also when an applicant alleges that his/her constitutional rights and freedoms have been violated by other institutions or persons for whose behaviour “public authorities” are not responsible, the Court will have no jurisdiction to adjudicate the referral, but will reject it as incompatible *ratione personae*³⁶⁴ (see also comments under Rule 36(3)(g) hereafter).

Furthermore, the Court has no jurisdiction to deal with a referral which concern facts which occurred prior to 15 June 2008, the date of the entry into force of the Constitution, except in cases which constitute a “continuing situation” (see for this and further details, comments under Rule 36(3)(h) hereafter).

The Court will not accept anonymous referrals, since the proceedings before the Court have a public character and names and other data of applicants are required by Rules 29 [Filing of Referrals and Replies]³⁶⁵ and 30 [Registration of Referrals and Replies]³⁶⁶ of the Rules of Procedure. It is a different matter, when applicants request the Court not to divulge their name to the public. But they need to provide sufficient reasons justifying the non-disclosure by the Court of their names and other personal data. If the Court approves the request, the applicant concerned may be indicated as “X”, as has already happened in several referrals before the Court³⁶⁷.

However, if the referral is communicated to the opposing party for comments, the identity of the applicant needs to be divulged, since, otherwise, that party cannot reply to allegations of an anonymous person. Of course, the respondent party needs to be informed about the Court’s approval of the applicant’s request for anonymity in order to avoid that the opposing party may inadvertently use the applicant’s name in a public context.

If a referral is submitted to the Court by an unauthorized person, who does not qualify as authorized party within the meaning of Article 113.2 of the Constitution, the Court will reject the referral as inadmissible. If such an unauthorized person would come to the Court to submit a referral, the staff member receiving the

³⁶² The Guidelines, together with the Referral Form can be downloaded from the Court’s website.

³⁶³ See, for instance, *Maaouia v. France*, Application no. 39652/98, ECtHR Judgment of 5 October 2000, paras. 40-41.

³⁶⁴ See, for instance, *Papon v. France*, Application no. 54210/00, ECtHR Judgment of 15 November 2001.

³⁶⁵ Rule 29(2) provides: “The referral shall also include: (a) the name and address of the Party filing the referral...”

³⁶⁶ Rule 30(2) provides: “The Secretariat shall maintain a register in which all filings of referrals and replies are recorded with the following information: ... (b) name of person or persons filing the referral”.

³⁶⁷ See, for instance, Case No.KI. 06/09, X vs. Supreme Court Judgment Nr.215/2006, District Court Judgment Nr. 741/2005, Municipal Court Judgment Nr. 217/2004, Decision of 17 June 2010.

person should inform him/her that registration of the referral would have no sense, since the Court would have to reject the complaint out-of-hand as inadmissible. Only, if the person would insist on having the complaint registered as a referral, should the Secretariat do so. As to the ECtHR procedure in such cases, the complaint will not be registered as an application, but a committee of 3 judges will reject the complaint by letter³⁶⁸.

So far, the Court has not had the opportunity to develop any criteria for defining the abuse of the right to refer alleged violations of constitutional rights and freedoms to it. No doubt, the Court will certainly consider referrals abusive, if applicants or their representatives submit forged documents, incorrect data and untrue facts or try to mislead the Court in any other way, for instance, by concealing documents or facts, which the Court would have needed to establish a true picture of the alleged violation³⁶⁹. It will certainly also consider a referral an abuse of the right of application, where the applicant, in the correspondence with the Court, uses particularly provocative or insulting language.

By contrast, the ECtHR has developed a rich case-law regarding the issue which is dealt with in Article 35(3)(a) ECHR, providing that: “*the application [...] is an abuse of the right of individual application;*”. For instance, the ECtHR considers frivolous³⁷⁰ complaints and repeated complaints of vexatious³⁷¹ applicants, that are similar to applications that they have lodged in the past and that have already been declared inadmissible, an abuse of the right of petition³⁷². But, when abusive language is used by an applicant, the ECtHR appears to be somewhat flexible, since it will only regard an application as abusive in exceptional circumstances, for instance, when the applicant’s language exceeds “the bounds of normal, civil and legitimate criticism.”³⁷³ The Rules of Court of the ECtHR, in Rule 44D [Inappropriate submissions by a party], contain a specific reference to abusive behavior of the party’s representative. It reads: “*If the representative of a party makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may exclude that representative from the proceedings, refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35, paragraph 3 of the Convention.*” (see also comments on Rule 41 [Participation in Hearings], paragraph 2, of the Rules of Procedure of the Court hereafter).

The Court will reject a new referral as inadmissible, which raises the same issues as the one already dealt with in a previous referral and does not contain sufficient grounds for a new decision.³⁷⁴ Only when a new referral lodged by the same

³⁶⁸ See Rule 52 A of the ECtHR Court Rules.

³⁶⁹ See, for instance, *Varbanov v. Bulgaria*, Application no. 31365/96, ECtHR Judgment of 5 October 2000, para. 36.

³⁷⁰ The claimant cannot present any rational argument based upon the evidence or law in support of that claim.

³⁷¹ Applicants submitting application without reasonable or probable cause.

³⁷² See, for instance, *Philis v. Greece*, Application no. 28970/95, Commission Decision of 17 October 1996.

³⁷³ See, for instance, *Aleksanyan v. Russia*, Application no. 46468/06, ECtHR Judgment of 22 December 2008.

³⁷⁴ See, for instance, Case KI 130/11, Applicants Denic Mladen and Vitkovic-Denic Milorad, Resolution on Inadmissibility of 21 May 2012.

applicant contains relevant new information on the same matter, will the Court consider the new referral. It may also be that applicants provide evidence in their new referral showing that, unlike in their previous referral, they have this time exhausted all remedies available to them under applicable law and submitted the new referral within a period of 4-months after having received the final decision in the case. This may permit the Court to examine the merits of a complaint, previously rejected for non-exhaustion of available remedies.

The ECHR contains a similar rule, providing, in its Article 35.2: “*The Court shall not deal with any application submitted under Article 34 that [...] (b) is substantially the same as a matter that has already been dealt with by the Court*”. According to the ECtHR case law, an application is considered as being “*substantially the same*” where the parties, the complaints and the facts are identical.³⁷⁵

Applicants can only complain about a violation of constitutional rights and freedoms guaranteed by the Constitution and the law. Complaints falling outside the scope of such rights and freedoms, or concerning rights which are not guaranteed by these legal instruments, including the international human rights instruments of Article 22 [Direct Applicability of International Agreements and Instruments] which are directly applicable in Kosovo, will be rejected by the Court as incompatible “*ratione materiae*”.³⁷⁶

As to the ECHR, Article 32.1 [Jurisdiction of the Court], provides: “*The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and its Protocols [...]*”. “For a complaint to be compatible *ratione materiae* with the Convention, the right relied on by the applicant must be protected by the Convention and the Protocols thereto that have entered into force. For instance, applications concerning the right to self-determination³⁷⁷ or the right of foreign nationals to enter and reside in a Contracting State³⁷⁸ are inadmissible, since these rights do not, as such, feature among the rights and freedoms guaranteed by the Convention.”³⁷⁹

As already mentioned under Rule 36(2)(c), if applicants cannot show that they are victims of the alleged violation and are directly affected by the measure or act of a public authority, constituting a violation of their constitutional rights, the Court should not reject the referral as manifestly ill-founded, but as incompatible *ratione personae* under the above Rule 36(3)(g), in accordance with the ECtHR practice. For further details, reference is made to the comments under Rule 36(2)(c) above, which deal with all aspects of the victim requirement.

Apart from the victim issue, a referral is also incompatible “*ratione personae*”, if the alleged violation has not been committed by the public authorities mentioned in

³⁷⁵ See, for instance, *Pauger v. Austria*, Application no. 24872/94, ECtHR Judgment of 9 January 1995. For further information, see ECtHR, Practical Guide on Admissibility Criteria, Council of Europe, December 2010.

³⁷⁶ See for instance Case KI 146/11, Applicant Isak Berisha, Resolution on Inadmissibility of 21 May 2012.

³⁷⁷ See, for instance, *X v. the Netherlands*, Application 7230/75, Commission Decision of 4 October 1976, DR 8.

³⁷⁸ See, for instance, *Penafiel Salgado v. Spain*, Application no. 65964/10, ECtHR Judgement of 16 April 2002.

³⁷⁹ See, for further information, the ECtHR Practical Guide on Admissibility Criteria, December 2010.

Article 113.7 of the Constitution and Article 47.1 of the Law and if the referral is directed against (a) person(s) for whom the public authorities are not responsible. The ECHR contains a similar rule (see, Articles 35.3 and 32.1 and 32.2). But, according to the interpretation of the rule by the ECtHR, States may also be held responsible for acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.³⁸⁰ A State may even be held accountable for violations of the Convention rights of persons who are in the territory of another State but who are found to be under the former State's authority and control through the agents operating – whether lawfully or unlawfully – in the latter State.³⁸¹ The ECtHR also dealt with the question of responsibility of a State for having accepted an international civil administration in its territory³⁸² and ruled that the State's responsibility may be engaged under the Convention as a result of its authorities' acquiescence or connivance in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction.³⁸³

A referral is incompatible *ratione temporis* with the Constitution, when the final court decision taken in the applicant's case (meaning: taken in last instance) dates back to the period before the entry into force of the Constitution, i.e. 15 June 2008. However, if the events, which are at the basis of the constitutional complaint, happened before the entry into force of the Constitution, and the decision of the final instance in the applicant's case was served upon the applicant on 15 June 2008 or on a later date, the Court can examine the referral.

There are exceptions to this rule (derived from the ECtHR case law, see hereafter), namely, in the case of a "continuing situation" which originated before the entry into force of the Constitution, but persists after that date. For instance, the applicant has obtained ownership of a piece of land by court decision in final resort before the entry into force of the Constitution, but he/she has still not been able to enjoy his/her ownership rights, because the court decision, which has become "res judicata" has never been implemented by the competent authorities. As long as the "continuing situation" exists after the entry into force of the Constitution, the Court should be able to examine the claim. The Court considered a similar claim and found that: "The situation of non-implementation of the judgment of 11 January 2002 is, therefore, continuing until to date".³⁸⁴ However, in such a case, the four months, within which the applicant will have to submit his referral to the Court, will start to run only at the moment when the "continuing situation" ceases to exist. As to the ECtHR's case law on the issue, the Court's jurisdiction must be determined in relation to the facts constituting the interference and it is, therefore

³⁸⁰ See, for instance, *Drozd and Janousek v. France and Spain*, Application no. 12747/87, ECtHR Judgment of 26 June 1992, Series A no. 240.

³⁸¹ See, for instance, *Illich Ramirez Sanchez v. France*, Application no. 59450/00, ECtHR Judgment of 27 January 2007.

³⁸² See *Beric and Others v. Bosnia and Herzegovina*, Applications nos. 36357/04 and others, ECHR 2007.

³⁸³ See *Ilascu and Others v. Moldova and Russia*, Application 48787, ECtHR Judgment of 8 July 2004. See, for further information on the issue ³⁸³ See, for further information, the ECtHR Practical Guide on Admissibility Criteria, December 2010.

³⁸⁴ See Case No.KI. 08/09, The Independent Union of Workers of IMK Steel Factory in Ferizaj, Constitutional Review of Decision C No. 340/2001 of Municipal Court of Ferizaj, dated 11 January 2002.

essential to identify, in each specific case, the exact time of the alleged interference. In doing so, the Court has regard to the final judgment which was by itself capable of violating the applicant's rights, despite the existence of subsequent remedies which only resulted in allowing the interference to subsist.³⁸⁵ The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.³⁸⁶

The Strasbourg institutions have accepted the extension of their jurisdiction *ratione temporis* to applications involving a continuing situation which originated before the entry into force of the Convention, but continued after that date. The ECtHR has followed this approach in several cases concerning the right to property.³⁸⁷ For instance, the complaint concerned the continued impossibility for the applicant to regain possession of her property and to receive an adequate level of rent for the lease of her house, stemming from laws which were in force before and after ratification of Protocol 1 by Poland.³⁸⁸

A further admissibility criterion exists, although not mentioned in the Rules of Procedure, where the Court has no jurisdiction *ratione loci* to deal with a referral, meaning that applicants have been unable to show that the matters complained of were "within the jurisdiction" of the Republic of Kosovo at the time of the alleged violation of the Constitution. In other words, where applications are based on events in a territory outside Kosovo and there is no link between those events and any authority within the jurisdiction of Kosovo, the Court will have to dismiss them as incompatible *ratione loci* with the Constitution.³⁸⁹ However, it should be clear that Kosovo will be responsible for acts of its diplomatic and consular representatives abroad and that, therefore, no issue of incompatibility *ratione loci* arises in relation to diplomatic missions³⁹⁰ (or to acts carried out on board of aircraft and vessels registered in, or flying the flag³⁹¹ of Kosovo, whenever applicable).

- IV. The event mentioned in Rule 36(4) may happen in a case, where both the Judge Rapporteur (who may already have asked the applicant for additional information within a time-limit not exceeding 15 days, pursuant to Article 22.4 of the Law) and the Review Panel (which may also have requested the applicant to present additional facts, documents or information if this is necessary to determine the admissibility of the referral, pursuant to Rule 35(2) of the Rules of Procedure) have considered the available information sufficient to come to a recommendation about the referral, but where the Court is not satisfied that the available information is complete or sufficient. In that case the Court shall request the applicant to make the necessary corrections on the basis of additional information, needed by the

³⁸⁵ See, for further information, ECtHR Practical Guide on Admissibility Criteria, December 2010, pages 45 – 51.

³⁸⁶ See, for instance, *Blecic v. Croatia*, Application 59532/00, ECtHR Judgment of 29 July 2004.

³⁸⁷ See for further information ECtHR Practical Guide, page 49 – 51.

³⁸⁸ See *Hutten-Czapska v. Poland*, Application no. 35014/97, ECtHR Judgment of 19 June 2006.

³⁸⁹ *Idem*.

³⁹⁰ See, for instance, *W.M. v. Denmark*, Application no. 17392, Commission Decision of 14 October 1992.

³⁹¹ See, for instance, *Bankovic and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99, ECtHR Judgment of 19 December 2001, para. 73.

Court to come to a final decision on the admissibility and/or the merits of the referral. It may well be, for instance, that the Court agrees with the recommendation of the Review Panel to declare the referral admissible on the basis of the information in the file, but that it finds that, for the adjudication of the referral on the merits, the information is insufficient or corrections to the case are needed. A maximum of 30 days may be granted to the applicant to comply with the Court's request.

- V. If the applicant can justify (with good cause) his/her delay in submitting the necessary corrections within the specified time-limit not exceeding 30 days, the Court may grant an additional delay. The justification may, for instance, be that the applicant cannot submit the corrections, because they are in the possession of the respondent party or a third party and it will take more time to obtain them. But if the applicant can simply not produce them, because they no longer exist or the applicant lost them, the Court will proceed with the case on the basis of the information before it and may reject the referral for being incomplete. Finally, the Rule erroneously makes reference to paragraph 5, instead of paragraph 4 of the Rule. It is, therefore, suggested to amend the Rule accordingly.

Rule 37 [Joinder and Severance of Referrals] of the Rules of Procedure

1. **The Secretariat shall provide notice to the President and the Judge Rapporteur that the referral may be related in subject matter to another referral before the Court and directed against the same act of a public authority. The President, upon recommendation of the Judge Rapporteur, may order the joinder of those separate referrals.**
 2. **If a referral addresses two or more laws or other acts of public authority, the Judge Rapporteur shall notify the Secretariat and the President. Upon the recommendation of the Judge Rapporteur, the President may order a separate consideration of the respective elements of the referral if joint consideration does not favor a fair and expeditious determination of the issues.**
 3. **If a party disagrees with the Court's decision to join or sever referrals, it shall request reconsideration of the decision, together with any factual or legal arguments, within fifteen (15) days of the date of the President's Order to join or sever referrals.**
- I. According to Rule 37(1), the initiative to bring the issue to the attention of the President of the Court and the Judge Rapporteur emanates from the Secretariat. Once the President and Judge Rapporteur have been made aware of the issue, it is the President who, after having received the recommendation of the Judge Rapporteur, might order the joinder of the separate referrals. This competence clearly falls within the ambit of Rule 12 [Functions of the President] of the Rules of Procedure, providing in its paragraph 1(a) that the President shall take all necessary and appropriate measures to ensure the efficient and effective functioning of the Court. In practice, it may be that the President, in the interest of

transparency, could submit the issue to the Court which would then decide on the joinder³⁹². The rationale of the Rule is to facilitate the work of the Judge Rapporteur, the Review Panel and the Court by dealing with the separate referrals in collective proceedings (joint consideration) to be concluded by one decision. Since the joint referrals will apparently not receive a new common referral number, references in these proceedings to individual applicants should mention their individual registration number.

The joinder of cases is also used by regular courts in civil and criminal proceedings. Also the ECtHR has made use of this procedure on several occasions pursuant to Rule 42 of its Court Rules.³⁹³

- II.** As to the severance of referrals, the initiative comes from the Judge Rapporteur who will notify the Secretariat and the President of the issue. As under Rule 37(1), in principle, it is the President who takes the decision to separate the referral concerned³⁹⁴. Moreover, the rationale of the Rule is similar to the previous one, namely, to facilitate the consideration of the referral, since, as the Rule provides, a joint consideration may not favor a fair and expeditious determination of the issues, and may even complicate their consideration.

An applicant may, for instance, submit a referral containing two fully different complaints: one complaint concerning a property right issue involving property laws and relevant actions taken by municipal authorities and administrative appeals, involving a request for interim measures, and another complaint relating to a complicated claim concerning the alleged violation of the right to fair trial in criminal proceedings and relevant court decisions. In particular, if the property issue needs to be decided in an expeditious way, it would be justified to separate it from the criminal issue, which, because of its apparent complexity may take much more time to adjudicate.

The severance of cases is also used by regular courts in civil and criminal cases, for instance, Articles 35 [Territorial Jurisdiction on Joint Proceedings] and 36 [Severance of Proceedings] of the Kosovo Code of Criminal Procedure³⁹⁵. Also the Rules of Court of the ECtHR contain a similar Rule for the joinder of cases. Rule 42 [Joinder and simultaneous examination of applications] provides for the possibility to join two or more applications, either at the request of the parties or of the own motion of the Chamber³⁹⁶. However, the Rules of the Court do not seem to contain any Rule on the severance of an application.

³⁹² See Cases KI 58/09, 59/09, 60/09, 64/09, 66/09, 70/09, 72/09, 75/09, 76/09, 77/09, 79/09, 3/10, 5/10, 13/10, 78/09, Case of Gani Prokshi and 15 Other Former Employees of Kosovo Energy Corporation Against 16 Individual Judgments of the Supreme Court of the Republic of Kosovo, Judgment of 15 October 2010, Ref. No.: AGJ 62/10.

³⁹³ See, for instance, Applications No. 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and others v. the United Kingdom*, of 15 January 2013.

³⁹⁴ Whether, in practice, the Court, instead of the President, would take the decision to sever the referral, in a similar way as under Rule 37.1 is not clear, since, so far, the issue has not arisen yet.

³⁹⁵ See, Law 04/L-123 of 13 December 2012.

³⁹⁶ See, for instance, Application No. 30210/96 [2000] ECHR 510 (26 October 2000).

III. Although Rules 37(1) and 37(2) provide that it is the President who orders the joinder or severance of referrals, it seems to be incorrect to mention in paragraph 3 of the Rule that the joinder and severance are decided by the Court, the more so, as the same paragraph, when the deadline to be observed is mentioned, refers again to the President's Order. It is suggested to amend the Rule accordingly.

Rule 38 [Pilot Judgments] of the Rules of Procedure

- 1. When similar or identical referrals are filed that derive from the same challenged action, the Court by majority vote of the Judges may choose one or more of the referrals for priority consideration.**
- 2. When handling a referral as a pilot Judgment case, the Court may stay examination of all similar or identical cases for a specified period of time. Parties in proceedings that are stayed shall be kept informed of all developments in the pilot Judgment case and the Court may reopen stayed referrals for further examination at any time.**

The pilot judgment procedure has been developed and successfully applied by the ECtHR as a means of dealing with large groups of identical cases that derive from the same underlying problem. In an informative note, issued by the Registrar on 18 March 2011, the ECtHR published the text of a new Rule 61 [Pilot-judgment procedure] which it had inserted into its Rules of Court on 21 February 2011. The Rule sets out in detail the way in which the procedure operates. What follows is a summary of the Informative Note, which may be a useful tool for the Constitutional Court, when dealing with a similar pilot judgment procedure under Rule 38 of its Rules of Procedure.³⁹⁷

The way in which a pilot judgment procedure operates, is that when the ECtHR receives a significant number of referrals deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, the ECtHR will seek to achieve a solution that extends beyond the particular referral or referrals so as to cover all similar cases raising the issue. The resulting judgment will be the pilot judgment. In this judgment the ECtHR will aim:

- to determine whether there has been a violation of the invoked rights in the particular case;
- to identify the dysfunction under national law that is at the root of the violation;
- to give clear indications to the responsible authorities concerned as to how they can eliminate this dysfunction;
- to bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the ECtHR awaiting the pilot judgment), or at least to bring about the settlement of all cases pending before the ECtHR.

The pilot judgment is, therefore, intended to help the national authorities to eliminate the systematic or structural problem highlighted by the ECtHR as giving rise to repetitive cases. An important feature of the procedure is the possibility of adjourning

³⁹⁷ See ECtHR, Rule 61 of the Rule of Court: Pilot-judgment procedure, informative note issued by the Registrar on 18 March 2011.

or “freezing” the examination of all other related cases for a certain period of time [...]. This is an additional means of encouraging the national authorities to take the necessary steps. Such adjournment, which will usually be for a set period of time, may be subject to the condition that the authorities act promptly and effectively on the conclusions drawn in the pilot judgment. Where cases are adjourned in this way, the importance of keeping applicants informed of each development in the procedure is fully recognized by the ECtHR. It should be stressed that the ECtHR may at any time resume its examination of any case that has been adjourned, if this is what the interests of justice require, for example, where the particular circumstances of the applicant make it unfair or unreasonable for them to have to wait much longer for a remedy³⁹⁸. The central idea behind the pilot judgment procedure is that where there are a large number of applications concerning the same problem, applicants will obtain redress more speedily, if an effective remedy is established at national level than if their cases are processed on an individual basis in Strasbourg [...].

It is not every category of repetitive cases that will be suitable for a pilot judgment procedure and not every pilot judgment will lead to an adjournment of cases, especially where the systemic problem touches on the most fundamental rights of a person under the Convention. The first pilot judgment procedure³⁹⁹ was taken to a successful conclusion, since new legislation was introduced and pending cases were settled⁴⁰⁰.

In the pilot judgment (*Broniowski v. Poland*) the ECtHR held, inter alia, “...that there has been a violation of Article 1 of Protocol No. 1, and that the respondent State must, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles of protection of property rights under Article 1 of Protocol No. 1...”.

So far, the Constitutional Court has not made use of this procedure and, when it will do so for the first time, will certainly look closely at the practice developed by the ECtHR, as described in its Information Note mentioned above.

Article 23 [Withdrawal of a party]

The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings.

- 1 Article 23 clearly provides that it is up to the Court to decide whether it will continue the adjudication of a referral, although the authorized party or the opposing party (withdrawal of “a party”) has withdrawn from it. However, whether the authorized party or the opposing party withdraws from the proceedings, may have different implications, namely:

- (1) if the opposing party withdraws from the proceedings, the Court should decide on the referral on the basis of the applicant’s submissions and existing

³⁹⁸ For instance, if the applicant is critically ill and could, therefore, not wait any longer for a remedy.

³⁹⁹ See *Broniowski v. Poland*, Application no. 31443/96, ECtHR Judgment, 2002-X; and *Broniowski v. Poland* (friendly settlement), Application no. 31443/96, ECtHR Judgment 2004-V.

⁴⁰⁰ See *E.G. v. Poland*, no 50425/99, and 175 other Bug River Applications, decision of 23 September 2008.

documents and other information submitted, including earlier presented submissions and documents by the withdrawing party. Even if the withdrawing party would wish to withdraw its submissions and documents submitted at an earlier stage, may the Court refuse the request in the interest of the issue under consideration.

- (2) if an authorized party informs the Court that it wishes to withdraw the referral, the matter is more serious, because the case before the Court may come to an early end⁴⁰¹. However, the Article leaves it to the Court to decide whether or not to continue with the adjudication of the case. For instance, the Court may determine that there are compelling reasons to continue the examination of the referral and decide on the referral. The Court may do so in the interest of the protection of human rights guaranteed by the Constitution. Moreover, the Court should also establish whether or not the applicant has been put under pressure by the authorities or other parties to withdraw the referral (a similar check may be called for, when the opposing party withdraws from the proceedings). The Court should consider this matter with a view to the rules developed by the ECtHR in this respect.

If an applicant does not intend to pursue the application pending before the ECtHR, he/she can do so at any stage of the proceedings⁴⁰². The ECtHR will always consider the motives of the applicant and the circumstances of the case, in particular, whether the authorities have put pressure on the applicant to withdraw the application. If the ECtHR is satisfied that there are no special circumstances regarding respect for human rights defined by the Convention and its Protocols, it decides to strike it out of its list of cases. For instance, in *Elena Mititelu v. Romania*, the applicant complained under Article 1 of Protocol no. 1 to the ECHR about the impossibility to exercise her property rights recognized by final and binding decisions of the domestic courts, as the State had sold her property to third parties. After the ECtHR had communicated the case to the Government, the applicant informed the ECtHR that she wanted to withdraw the application as she had recovered her property through subsequent court proceedings. The ECtHR decided that, in the absence of any special circumstances regarding respect for the rights guaranteed by the Convention or its Protocols, it considered that it was no longer justified to continue the examination of the case and decided to strike it out of its list of cases⁴⁰³.

However, in other cases, the ECtHR decided to continue the examination of the applications, because they raised serious human rights issues under the ECHR, which justified a continuation of their examination in the general interest⁴⁰⁴.

The Article is supplemented by Rule 32 [Withdrawal of Referrals and Remedies] of the Rules of Procedure.

⁴⁰¹ See Case No.KI. 27/09, *Rafet Hoxha vs. Supreme Court* Decision no. Pn.nr. 168/2005, Decision to strike out the Referral of 24 March 2010, Bulletin of Case Law. Page 97.

⁴⁰² Article 37.1 ECHR

⁴⁰³ See *Elena Mititelu v. Romania*, Application 24583/07 of 25 January 2011.

⁴⁰⁴ See, for instance, *Cicek and Oztanelad and 6 others v. Turkey*, Application Nos. 74069/01, 74703/01, 76380/01, 16809/02, 25710/02, 25714/02, 30383/02, Judgment of 3 August 2007.

Rule 32 [Withdrawal of Referrals and Replies] of the Rules of Procedure

- 1. A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.**
 - 2. Notwithstanding a withdrawal of a referral, the Court may determine to decide the referral.**
 - 3. The Court shall decide such a referral without a hearing and solely on the basis of the referral, any replies, and the documents attached to the filings.**
- I. Rule 32(1) does not seem to take into account the possibility that, for instance, both parties, after the hearing of a referral, but before the Court has taken a decision, have come to a settlement. In that case, it would be appropriate for the Court to accept the settlement, and strike the referral out of its list of cases, after having verified (as far as that is possible), whether a party or parties were put under undue pressure to conclude such a settlement. Moreover, it is also not clear, why the Court has not adopted the same rule as the one of the ECtHR, providing that the applicant can withdraw the referral at any stage of the proceedings, meaning also during or after an oral hearing.
- II. Rule 32(2) simply repeats the contents of Article 23 [Withdrawal of a party] of the Law. The comments made on that Article are, therefore, equally valid with respect to the present Rule (see comments on Article 23 of the Law above).
- III. As to Rule 32(3), the only comment to be made is that the words “*without a hearing*” seem to be superfluous, since the Court shall decide the referral solely on the bases of the referral, any replies and the documents attached to the filings. For further comments reference is made to the comments made on Article 23 of the Law.

Article 24 [Oral Hearing]

The President of the Constitutional Court presides over the oral hearing. The procedure of the oral hearing shall be defined in the Rules of Procedure of the Constitutional Court.

The Law does not regulate the procedure of the oral hearing, but leaves it to the Court to define the necessary rules in its Rules of Procedure. In countries in the region, like Albania, Croatia and Slovenia, the main features of the oral hearing are laid down in the respective laws on the constitutional courts. It is difficult to understand for what reasons the legislature has deemed it sufficient to only deal with one aspect of the oral hearing in its Article 17 [Principle of Publicity], namely, that “*Sessions [public hearings], including the issuance of judgments, are open to the public*”. The Article further establishes the conditions for excluding the public from a public hearing. Furthermore, Article 20 [Decisions] deals with the right of the parties to a hearing and

the restriction of that right by the Court. The above Article 24 only adds thereto that the President of the Constitutional Court presides over the hearing.

Oral hearings before the Court must comply with the principle of a fair and impartial trial, laid down in Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a Fair Trial] ECHR. In a case against the Republic Czech Republic⁴⁰⁵, the ECtHR ruled explicitly that Article 6(1) ECHR⁴⁰⁶, dealing with the principle of fair trial, applies also to proceedings before constitutional courts. Furthermore, in *Gast and Popp v. Germany*⁴⁰⁷, the ECtHR observed that a State which established a constitutional-type court was under a duty to ensure that litigants enjoyed in the proceedings before it the fundamental guarantees laid down in Article 6. This can only mean that the legislature would be under the obligation to regulate by normative act all fair trial aspects of the proceedings before the Court, including those of an oral hearing. The question may, therefore, arise whether the legislature may delegate the regulation of the implementation of the principle of fair trial to the Court through the adoption of Rules of Procedure⁴⁰⁸. Matters that are normally regulated by Rules of Procedure, as stipulated by Article 2 [Organization of the Work of the Constitutional Court], paragraph 2, of the Law⁴⁰⁹, are technical, administrative, and operative aspects of court proceedings, including rules for the proper conduct of oral hearings, for which the President is responsible (see comments on Rule 43 [Hearing Procedure], paragraph 1, hereafter). When commenting on other Rules, where other fair trial aspects are regulated, like the procedure for evidence administration and consideration of Article 25, the above remarks are equally valid.

Article 24 is supplemented by Rules 39 [Right to Hearing and Waiver] to 44 [Deliberations and Voting] of Chapter IV [Hearings and Deliberations], of the Rules of Procedure.

Rule 40 [Schedule of Hearings] of the Rules of Procedure

- 1. The Secretary General, in consultation with the President, shall schedule hearings in a prompt manner.**
 - 2. The President may, upon the request of a party demonstrating why a referral should be given priority, and with the approval of a 2/3 majority of all Judges, order that a hearing be scheduled in a priority manner.**
- I.** Rule 40(1) is intended to ensure that, once the Court has decided to hold a hearing, the Secretary General will schedule a hearing, on the date which the President, certainly in consultation with the judges, deems convenient, and make the necessary preparations. When the Court started to function in September 2009, no

⁴⁰⁵ See, *Krcmar & Others v Czech Republic*, Application no. 35376/97, ECtHR Judgment of 3 March 2000.

⁴⁰⁶ The relevant part of Article 6(1) ECHR reads as follows: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”.

⁴⁰⁷ See, *Gast v. Popp v. Germany*, Application no. 29357/95, ECtHR 2000-II.

⁴⁰⁸ The Albanian and Slovenian laws on the constitutional court, for instance, contain all Article 6(1) principles, including the details of the public hearing procedure.

⁴⁰⁹ “The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.”

proper Court room existed in the premises of the Court, but that has not withheld the Court from holding several hearings in the premises of the Law Faculty of the University of Pristina, until the construction and equipment of a Court room (a donation of the Constitutional Court of Turkey) in the Court's premises was finished in May 2010.

- II.** Under Rule 40(2) only when the party's request provides sufficient reasons justifying that the referral should be given priority and with the approval of 2/3 majority of all judges, will the President grant the request and order a priority hearing. Although the text is silent on the issue, it may be assumed that the President will communicate the request to the other party for comments, before submitting the request and a possible reply to all judges for approval.

Rule 41 [Participation in Hearings] of the Rules of Procedure

- 1. All hearings shall be open to the public, except when the Court orders exclusion of the public from a hearing, if such exclusion is required to protect the safety of any of the parties or their representatives or such exclusion is required by considerations of public safety and order.**
 - 2. Any party, representative, witness or other hearing participant whose conduct directed at Judges or the Secretary General is incompatible with the dignity of the Court, or who acts offensively toward another party or that party's representative, may be warned by the President and given an opportunity to present a defense. The President, in consultation with the Judges, may order discipline to be imposed, including the imposition of a fine in accordance with the rates set by the Court or, in exceptional cases, exclusion from the hearing.**
 - 3. If an observer's conduct is incompatible with the dignity of the Court or if an observer disrupts a hearing, the President may order that the observer be excluded from the hearing.**
- I.** As mentioned earlier, besides Rules 39, Rule 41 also supplements Article 17 [Principle Publicity] of the Law and introduces some new reasons for excluding the public from the hearing, which are also not mentioned in Article 17⁴¹⁰, namely, *"to protect the safety of any of the parties or their representatives or such exclusion is required by considerations of public safety..."*. These additional reasons apparently concern the "safety" of the parties and their representatives as well as the safety of the public attending the hearing.⁴¹¹ In other words, the reason for excluding the public from the hearing seems to be the prevention of and protection against certain possible events (for instance, an attack on the Court or

⁴¹⁰ See comments re. Article 17.2 of the Law, providing that: The Constitutional Court may decide to exclude the public, when it deems it necessary to protect: 17.2.1 national secret, public order or morals; 17.2.2 secret information which would be put at risk by public hearing; 17.2.3 private life or business secret of the party to the proceedings.

⁴¹¹ There may well be other cases, which would call for a similar Court decision, for instance, where the safety of "other hearing participants" (see Rule 41.2), like witnesses and experts, is at stake.

hold-up) that could endanger the safety of the judges, parties and their representatives as well as the public and cause significant danger, injury/harm or damage (for instance, in a sensitive case, the Court may have received serious threats versus one of the parties or one, more or all of the judges). In such cases, the Court should request protection to be provided by emergency service organizations such as police, fire brigade, medical emergency services and others. The Rule is silent on the question whether, in case of a safety issue, the public and journalists could be seated in a different room than the court room, where they could follow the hearing on a television screen.

- II.** The issue raised in Rule 41(2) concerns, in fact, what is also called: “contempt of court”. In general, contempt of court occurs, when the committer disrespects the authority and dignity of the court or disobeys a court order, thereby obstructing or interfering with the administration of justice and undermining the authority of the court. By punishing the committer, the court protects its authority and legitimacy. However, the Rule seems to be incomplete, since it only makes mention of offensive behavior of “*any party, representative, witness or other hearing participant*” toward “*another party or that party’s representative*”, but not of offensive behavior toward another witness or other hearing participants (for instance, experts or *amicus curiae*). It also does not mention unacceptable conduct towards other staff members of the Court than the Secretary General, present in the Court Room or members of the public, security personnel or journalists. It is suggested that the Rules is amended accordingly.

If a warning by the President does not have the desired effect, sanctions can be imposed by the President, in consultation with the judges, varying from the payment of a fine to the exclusion from the hearing. As to the latter option, the respect for the rights guaranteed by Article 31 of the Constitution and Article 6(1) ECHR must be seriously weighted against such measure and ensure that the measure of excluding the person from the hearing is not disproportionate to the aim sought to be achieved. For instance, if a party continuously interrupts judges and the other party, even after repeated warnings by the President, he does not need to be excluded from the entire hearing. So, when judges wish to ask him questions, the disrupting party could be brought in again, unless his disruptive behavior would also this make impossible.

As to the Rule allowing the President, in consultation with the judges, to impose a fine on a disrupting party, representative, witness or other hearing participant, the imposition of such fines by virtue of Rules of Procedure should rather have been delegated by normative act as mentioned earlier.

According to the Strasbourg case-law, measures ordered by courts under their rules concerning disorderly conduct in proceedings before it (contempt of court) are considered as falling outside the ambit of Article 6 ECHR, because they are akin to the exercise of disciplinary powers. However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as criminal⁴¹².

⁴¹² See *Kyprianou v. Cyprus*, Application no. 73797/01, ECtHR Judgment of 15 December 2005.

- III.** It is assumed that with “observer” a member of the public or a journalist, who is attending the oral hearing, is meant. The person concerned only risks to be excluded from the hearing without any further sanction being imposed. So far, the President has not made use of this power.

Rule 42 [Notice of Hearing] of the Rules of Procedure

- 1. The parties shall be summoned to the hearing by written notice served by the Secretariat on the parties in a manner provided in Rule 26. The hearing notice shall contain the date, time, and venue of the hearing and shall be served no later than two weeks before the date scheduled for the hearing, unless in cases of urgency the Court sets a lesser period.**
- 2. Upon application by a party, the President may postpone a scheduled hearing if the party shows that it will be prevented from appearing at the hearing for an important reason. Other parties shall be given the opportunity to comment on the request for postponement. The President shall decide whether to order postponement of the hearing and the Secretariat shall serve the decision on the parties. When granting a request for a postponement, the President may order the party requesting postponement to pay any necessary costs of other parties as a result of the postponement.**

- I.** Under Rule 42(1) parties are summoned to the hearing by a letter of the Secretariat, in accordance with the requirements of Rule 26 [Effecting Service of Documents] (see for detailed comments on Rule 26 [Effecting Service of Documents]). The hearing notice, the receipt of which should be duly signed by the party concerned on the day on which it is served on him/her, will be put in the case file. If a party is represented in the referral, the summons to the hearing should be served upon the representative. It may, of course, also happen that a party, who originally had no representative, will be represented at the hearing.

Although the Rules do not mention such a situation, it may be assumed that, in such a case, the party has to officially inform the Secretary General that he/she will be represented at the hearing and submit, at the same time, the necessary information about the representative (copy of identity card, passport, or membership card of bar association). The Secretary General should, after having checked the information received, forward the summons to the representative.

Although in cases of urgency the Court may set a lesser period, it may well be that this may infringe the right of a party to be given sufficient time to properly prepare for the hearing (one of the aspects of the fair trial principle), for instance, when a party is in the process of obtaining additional documents and other information, which it deems necessary for the hearing. Although the text of the Rule is silent on the matter, it may be assumed that parties may complain to the Court about the length of such a lesser period, basing their request on the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 ECHR.

As a consequence, the Court may be willing to schedule the hearing on a date which is more convenient to the party(ies). There may also be cases (for instance,

where the Court is requested by the applicant to impose interim measures⁴¹³), in which the urgency is so pressing, that the Court has no other choice than to set a much earlier date for the hearing than it would normally have done. In such cases the President will certainly consult the other judges.

The ways in which other hearing participants (witnesses and experts) are summoned, are mentioned hereafter in Rules 46 [Summons of Witnesses] and 48 [Expert Report], respectively.

- II.** Under Rule 42(2), the requesting party will have to submit to the President convincing evidence that he/she cannot appear at the scheduled hearing for an important reason and may also claim that, if the President does not grant the request, his/her right to a fair trial will be violated. It is assumed that the death of a close relative or a sudden serious illness may be considered by the President as such an important reason. However, before deciding on the request, it is mandatory that the President gives the opportunity to the other party(ies) to submit comments. In cases of doubt, that is to say, in cases where the reasons submitted to the President do not seem to be entirely convincing, it may well be that the President first consults with the other judges, before taking a decision. It may also be possible that the President consults the judges in all such cases.

Even if the President grants the request, this may not be without consequences, since the President is entitled to order the party requesting postponement to pay any necessary costs of other parties suffered as a result of the postponement. However, if the requesting party submits sufficient evidence showing that the “important reason” was outside his/her power and that it would, therefore, be unreasonable to have him/her pay such costs or that he/she insolvent, under the Rule the President may be allowed to abstain from imposing this “penalty”. The question then remains, who will bear the costs of the other parties in such circumstances.

Rule 43 [Hearing Procedure] of the Rules of Procedure

- 1. The President shall open the hearing and be responsible for the proper conduct of the hearing. The President shall ascertain the attendance of the parties and their representatives, if any.**
- 2. The Court shall ensure that interpretation services are available throughout the hearing for any party or representative requesting interpretation.**
- 3. A represented party may address the Court during a hearing through its representative, unless a Judge asked a party to address a question directly.**
- 4. The Judge Rapporteur shall present an introduction to the referral, including a presentation of the disputed facts. The parties may be given an opportunity to make a brief opening statement, which shall consist of an oral presentation of arguments, confining the presentations to facts and issues relevant to the claim. The President may limit the period of time allocated to each party for opening statements.**

⁴¹³ See also detailed comments on Article 27 of the Law.

5. **During the hearing, the Judges may ask questions of the representatives of the parties or directly to any party.**
6. **After the opening statements, the Court may hear and receive evidence in accordance with Rules 45 – 53.**
7. **After gathering of evidence is completed, the parties shall be given an opportunity to present a closing argument on facts and law relevant to the claim. The President may limit the period of time allocated to each party for closing arguments.**
8. **The President shall adjourn the hearing and additional hearings may be scheduled only if all evidence and submissions could not be presented at one hearing.**
9. **The Secretary General shall ensure that transcripts and minutes of the hearing are prepared and signed by the President.**

I. In the absence of strict rules how to conduct the hearing, the President is relatively free in doing so. Apart from the obligation to open the hearing and to ascertain the attendance of the parties and their representatives, if any, (and, although not mentioned by the provision, other hearing participants, like witnesses and experts as well as *amicus curiae*) the President, as the master of the proceedings, may then explain, how he intends to conduct the hearing in accordance with Rules 43(4), 43(5), 43(7), and 43(8) (see comments hereafter).

II. Although, according to Rule 43(2), it is mandatory for the Court to provide interpretation for any party or representative requesting interpretation, it may be assumed that, for instance, summoned participants like witnesses and experts as well as an *amicus curiae* at the hearing, will also be entitled to request interpretation. As a consequence, the costs of such additional interpretation services will have to be borne by the Court. Any refusal of the Court may cause the party or representative concerned to invoke, where applicable, his/her rights under Article 31 of the Constitution and Article 6 ECHR.

III. Under Rule 43(3), even if a party prefers that his/her representative addresses the Court, a judge may wish to hear details regarding a certain issue directly from the party, the more so, since the representative only knows the case from hear-say, whereas the party has been the person who has experienced the events, which the judge may be interested in.

IV. As announced by the President, the Judge Rapporteur will summarize the facts and main issues of the referral in a clear, concise and concrete manner, so that the parties as well as the public present at the hearing will get to know the disputed facts of the case and other issues which will be at the centre of the hearing. After the Judge Rapporteur's introduction, the President will invite the representative of the applicant or, if not represented, the applicant him or herself, to make a brief opening statement and to present briefly the facts and issues relevant to his or her referral and the alleged violations of the Constitution and, where applicable, the ECHR or other international legal instruments mentioned in

Article 22 of the Constitution. Thereafter, it is the turn of the respondent party or his/her representative to briefly explain, why the applicant's claim should be rejected. In this way, the members of the public, present in the courtroom, will have a second opportunity (after the introduction by the Judge Rapporteur) to familiarize with the referral.

- V. Rule 43(5) does not seem to be much different from Rule 43(3). Judges can put as many questions as they deem necessary to the representatives or the parties themselves. However, as being responsible for the good conduct of the proceedings, the President may request the judges to limit the number of questions. As soon as a judge considers that the answer by a party is sufficient, he/she can interrupt the party and ask a further question or inform the party that he/she has no further questions.
- VI. Rules 45 [Submission of Evidence by the Parties] – 53 [Amicus Curiae] form part of Chapter V. [Evidence] and will be commented on hereafter.
- VII. The President, as the master of the proceedings, will decide, whether the gathering of evidence, as described in Rules 43 – 53, is completed and allocate time to each party for closing statements. Closing arguments may be important, since they enable a party or representative to sum up the main aspects of the case and draw once more the attention to details of fact and law as well as arguments which, in his/her opinion, the other party has not been able to invalidate, for instance, if during the hearing new evidence has come to light, which has strengthened his/her position.
- VIII. So far, this situation has not arisen in the Court, but it is certainly possible that in complex cases with a great number of witnesses and experts, one hearing may not be sufficient and need to be followed by one or more additional hearings.
- IX. The transcript of a hearing is the official written record of all proceedings in a hearing, taken down by the Court reporter and gives the judges the opportunity to review the entire hearing proceedings. Minutes of a hearing are only the record of the court room proceedings, such as the start and recess of a hearing, names of parties, representatives, witnesses, experts and amicus curiae, if any, and rulings of the Court, kept by the Secretary General of the Court. It is not clear, whether, once signed by the President, the Secretary General communicates them to the parties and other hearing participants.

The transcript of the hearing is certainly a very useful tool for the judges in order to refresh their minds on certain issues dealt with at the hearing before participating in the final deliberations on the referral. However, since it will take time to translate the transcript (which initially is presumably only prepared in Albanian) into the different languages used by the judges, it may well be that a judge would like to consult only certain parts of the transcript, dealing with a particular issue, which may then be translated with priority. See also Rule 44(3) hereafter.

Rule 44 [Deliberations and voting] of the Rules of Procedure

1. As soon as may be, following adjournment of the hearing, the Court shall meet for deliberations on the referral. Deliberations of the Court shall not be open to the public and shall remain confidential.
2. Only the Judges may participate in the deliberations of the Court. The Secretary General and the Chief Legal Advisor shall be present at the deliberations, and other staff of the Secretariat or Legal Advisors may be present if required by a Judge and not opposed by any of the other Judges. No persons present at the deliberations, other than the Judges, may participate in the deliberations or speak concerning the referral unless so requested by a Judge.
3. The Secretary General shall prepare the minutes of the deliberations, recording only the title or nature of the subjects discussed, and the results of any vote taken. The minutes shall not provide any record of the details of the discussions or the views expressed, provided that any Judge shall be entitled to insert a statement in the minutes.
4. After the vote is taken, if the Judge Rapporteur is among the majority of the Court, the President shall assign to the Judge Rapporteur the task of preparing the final text of the Judgment of the Court. If the Judge Rapporteur is not among the majority, the President shall assign any Judge among the majority of the Review Panel to prepare a draft of the decision of the Court. If no member of the Review Panel is among the majority, the President shall assign any Judge who is among the majority to prepare a draft of the decision of the Court.

- I. The earlier to deliberate on the referral, following adjournment of the case after the hearing, when the details of the hearing are still fresh in the judges' mind, the better. However, it may well be, that some of the judges would prefer to wait for a copy of the transcript, before participating in the deliberations on the referral. Since, as stated above, the translation of the transcript into the different languages may take time, the selection of an early date for the deliberations would be difficult, unless the expediency of the case is so important, that judges should use their own notes and use urgently translated extracts from the transcript, if requested.

The rule that deliberations shall not be open to the public (“*in camera*”) and remain confidential is nothing unusual and also applies to all ordinary courts. For instance, pursuant to Article 473 [Closed deliberations and voting session] of the Kosovo Code of Criminal Procedure (Law No. 04/L-123 of 13 December 2012), “1. *Deliberation and voting shall be conducted in a secret session.* 2. *Only members of the panel and the recording clerk may be present in the room where the court conducts its deliberation and voting.*” In the secrecy of the court room, the judges can freely express their opinion and discuss the final outcome of the referral. Only their vote (not their name) in favor or against the final decision will be known to the parties and the public, unless one or more of the judges joins to the judgment a concurring or dissenting opinion, wherein his/her name is mentioned.

Furthermore, the Rule is in line with Article 12 [Exceptions from the right of access to documents], paragraph 1, of Chapter III [Refusal of Access to Public Documents] of the Law on Access to Public Documents,⁴¹⁴ providing that “Any applicant shall have the right to access public documents. Limitations of this right shall be exercised proportionally, and only for the purpose of the protection of: [...] 1.11. the deliberations within or between the public institutions concerning the examination of a matter “.

II. According to Rule 44(2), if a judge requires other staff of the Secretariat or legal advisors to be present at the deliberations, another judge can oppose the presence of such persons. This would mean that the opposing judge has a stronger vote than the one asking for the presence of the persons concerned. Taking into account the principle that all judges are equal, it would be more appropriate to have the Court vote on the matter in order to keep the peace in the courtroom. In any case, all persons present at the deliberations, including the judges, will be bound by the confidentiality requirement of Rule 19 [Confidentiality]⁴¹⁵, the scope of which goes farther than the courtroom. However, the Rules are silent on the question, what the consequences will be for the person, who has violated Rule 19. The person concerned presumably risks that, at least, disciplinary or other measures will be taken against him/her.

III. Pursuant to Rule 44(3), the minutes of the deliberations prepared by the Secretary General are the only official written record emanating from the deliberations. This may, however, not mean that the Chief Legal Advisor as well as other staff and Legal Advisors, who are allowed to be present at the deliberations, may not take notes regarding, for instance, specific and complex legal issues discussed by the judges with respect to the referral under consideration and indications how certain parts of the decision should be phrased.

Personal opinions of judges may, however, not be noted in the minutes, unless, as provided by the Rule, a judge wishes to insert a statement in the minutes. The rationale of the rule is that, in this way, a judge is able to inform the public about his/her stand on a certain issue during the deliberations, once the minutes, as part of the case file, will have become accessible to the public (under the above Law on Access to Public Documents) after the Court’s judgment has been published in the Official Gazette, pursuant to Article 20 [Decisions], paragraph 5, of the Law. However, under the Law on the Protection of Personal Data⁴¹⁶, certain case file material, which for any party is of a personal nature or may contain business secrets, will have to be removed from the file, before the public will have access to it.

⁴¹⁴ Law No.03/L-215 of 7 October 2010.

⁴¹⁵ Rule 19 reads: “All judges, the Secretary General and staff of the Secretariat, and the Legal Advisors shall not express in public any comments or opinions on matters related to cases that have or may come before the Court, unless otherwise provided for in these Rules.”

⁴¹⁶ Law No. 03/L-172 of 29 April 2010.

IV. The purpose of Rule 44(4) is to task the Judge Rapporteur as the judge, who prepared the Preliminary Report and, therefore, is most familiar with the case, with the preparation of the final text of the judgment, on the condition, however, that he/she is among the majority of the Court. If that is not the case, it is logical that the Judge Rapporteur cannot be expected to engage in preparing a draft Court decision, which he/she has voted against. The next choice would be a member of the Review Panel who is among the majority of the Court, since Review Panel members have dealt with the referral at an earlier stage within the Review Panel. Erroneously, the Rule refers to any judge among the majority of the Review Panel. Thus, if the majority of the Review Panel was against the decision of the majority of the Court, a judge among the majority of the Review Panel should not be chosen for the drafting of the judgment, but the remaining judge of the Review Panel, who voted with the majority of the Court. The Rule should, therefore, have read: “any judge of the Review Panel among the majority”. This fits in well with the following sentence: “If no member of the Review Panel is among the majority...”. So, if none of the members of the Review Panel was among the majority of the Court, it is up to the President to assign the task of preparing a draft decision to any judge who is among the majority.

Examples of possible impact of oral hearings on the Court’s decision making

It may be interesting to reflect on the question whether oral hearings which the Court has held over the last couple of years have had any visible impact on the Court’s decision-making. However, one should first establish a certain number of parameters of such an exercise. First, it could be examined whether the holding of a hearing could accelerate the case, whereby precious time could be saved. Furthermore, one could consider whether an oral hearing would lead to a better understanding by the judges of the issues at stake. And, finally, whether oral hearings could have an impact on the Court’s decision-making process becoming better known by the public.

Although it is very difficult to measure whether oral hearings may have an impact on the Court’s decision-making, it cannot be denied that such hearings, where the parties to the referral will be able to reply to their respective submissions and where other participants, witnesses, experts and, possibly, *amicus curiae* can be heard by the Court, will certainly enable the judges to better understand the issues at stake within a relatively short period of time. Whatever questions they may have had before the hearing, at the hearing they can ask such questions and any new questions which may arise following the answers given by the parties. Thus, the judges may be better prepared to take a decision than they would have been without a hearing. However, it is difficult to prove that, without a hearing, the judges would have voted differently or that the quality of the judgment would have been less. But, at least, this presumption may be a realistic one.

Furthermore, it cannot be denied that oral hearings accelerate the decision-making process. This may be of a particular advantage in complicated cases with many participants. For instance, in Case No. KO 97/12, *Applicant the Ombudsperson, Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks,*

Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093⁴¹⁷, the participants, besides the Ombudsperson as the Applicant, consisted of the Ministry of Finance, the Ministry of Public Administration, Department of Registration and Liaison with NGOs, the Central Bank, the Assembly Committee of Legislation and the Amicus Curiae invited by the Court. The Referral was registered on 11 October 2012, the hearing took place on 5 March 2013 and the Court took its decision on 14 March 2013. So, it took the Court not more than just over 5 months to adjudicate such a difficult referral. Without an oral hearing, it would certainly not have been possible for the Court to do so (N.B. It should not be forgotten that the imposition of interim measures by the Court may also have contributed to the accelerating effect on the decision-making process).

At the same time, this Case constitutes a very good example of the effect of an oral hearing on a better understanding by the judges of the complex issues at stake, as shown by the concise and clear text of the Judgment.

Finally, it is important that, thanks to the holding of oral hearings, important cases are brought nearer to the public. Not only is the public entitled, under the pertinent provisions of the Law and the Rules of Procedure,⁴¹⁸ to attend oral hearings, but also the presence of the media is indispensable in showing to the public the importance of the Court for the protection of the rule of law.

In the case of an individual applicant against the Radio and Television of Kosovo (RTK) and the Kosovo Energy Corporation (KEK),⁴¹⁹ a hearing (the Court's first one) was held by the Court on the applicant's request to impose interim measures. However, the hearing, where the applicant and the opposing parties were present (KEK never replied to the referral in writing, but made its points for the first time at the hearing), not only dealt with the imposition of an interim measure, but also lead the Court to decide that this individual application did not concern only the personal interest of the applicant, but also the public interest. As a consequence the Court recommended to the Assembly that it reviews the nature of Article 20.1 of the Law on RTK and practices based on those provisions, as discussed during the hearing. No further hearings or exchange of submissions of the parties followed, before the Court (after two extensions of the interim measure) decided to strike out the case. This shows how important the submissions of the parties and their replies to the questions of the judges at the hearing had been and is a clear example of a referral, where the oral hearing had a direct impact on its final outcome.

Of course, there are multiple examples of other cases in which the Court held an oral hearing. It will be left to the interested reader to look them up them on the Court's webpage and read them in light of the above remarks.

⁴¹⁷ Bulletin of Case Law

⁴¹⁸ See, Article 17 [Principle of Publicity] of the Law, Article 31 [Right to Fair and Impartial Trial] of the Constitution and Rules 39 [Right to Hearing and Waiver] and 41 [Participation in Hearings] of the Rules of Procedure..

⁴¹⁹ See, Case No. KI 11/09, Interim Measures, Tome Krasniqi vs RTK et Al, Decision of 16 October 2009..

Article 25 [Evidence]

The procedure for evidence administration and consideration shall be defined in the Rules of Procedure of the Constitutional Court.

As commented above on Article 24 [Oral Hearing], it falls upon the legislature to regulate by normative act, having a general effect, all fair trial aspects of the proceedings before the Court. It could be argued that the legislature is, therefore, not allowed to delegate to the Court the regulation of the aspects of the principle of fair trial, laid down in Article 31 of the Constitution and Article 6 ECHR, except for technical, administrative and organizational procedures and functions of the Court to be regulated by internal court rules, as stipulated by Article 2(2) of the Law⁴²⁰. Rules about evidence consideration may no longer be internal court rules, if they interfere with the legal sphere of the addressee as is the case with acts of parliament.

For instance, all aspects of the right to submit evidence and the manner of admitting evidence, including requests to hear witnesses and experts as well as objections against such requests, are features of the principle of “equality of arms” which itself forms part of the wider right to a fair trial⁴²¹ and must, therefore, be regulated by normative act, having a general effect, adopted by the legislature. Similar issues in civil and criminal procedures are, unlike in court rules, laid down in the Law on Contested Procedure and the Provisional Criminal Procedure Code, respectively. Also in neighboring countries, like Albania and Slovenia, are these principles of fair trial regulated by law⁴²².

Moreover, regarding the issue of the hearing of witnesses, as part of the right to a fair trial, guaranteed by Article 6 [Right to Fair Trial] ECHR, the ECtHR has developed an extensive jurisprudence. According to the ECtHR, the admissibility of evidence is primarily a matter for regulation by national law⁴²³.

As to the right to a fair and impartial trial, guaranteed by Article 31 of the Constitution, it forms part of the fundamental rights and freedoms, laid down in Article 21 [General Principles] of the Constitution, which are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo. It is, therefore, logical that this right and all its aspects, which are equally applicable to the proceedings before the Constitutional Court, should, therefore, not be regulated by way of Rules of Procedure, but by a normative act of the legislature. The comments on the issues of evidence administration and consideration, provided in Rules 45 to 53 of Chapter V. [Evidence] of the Rules of Procedure, which supplement Article 25 of the Law, will have to be read with this consideration in mind.

⁴²⁰ “The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.”

⁴²¹ See *Ekbatani v. Sweden*, Application no. ECtHR judgement of 26 May 1988, Series A no. 134, p.14.

⁴²² See, Law Nr. 8577 on the organization and functioning of the Constitutional Court of the Republic of Albania of 10 February 2000, and the Constitutional Court Act of the Republic of Slovenia of 15 July 2007.

⁴²³ See, for instance, *Albert and LeCompte v. Belgium*, Applications Nos. 7299/75 and 7496/76, ECtHR Judgment of 10 February 1983.

Rule 45 [Submission of Evidence by Parties] of the Rules of Procedure

- 1. Parties may submit the following types of evidence to the Court:**
 - a. the name and address of a witness and a summary of the testimony the witness is expected to provide;**
 - b. a request for an expert witness and a summary that indicates the facts that would be established by the expert report;**
 - c. copies of documents or other physical items that contain information relevant to the referral;**
 - d. a description of a document or other physical item that contains information relevant to the referral, but which is not in that party's possession or control, together with the identification of the person believed to possess or control such evidence and the reasons for such belief; or**
 - e. identification of a site to be visited or an object to be inspected, together with a description of the evidence to be established by such visit or inspection.**
- 2. The collection of evidence relevant to the referral that does not raise significant problems of fact or law may be delegated by decision of the Court to a Judge of the Court. The collection of evidence by a Judge shall proceed in accordance with the provisions of these Rules.**

- I.** Rule 45(1) lays down the principle that both parties have the same right to submit evidence, in accordance with the principle of “equality of arms”, mentioned above. According to the ECtHR’s case law, “equality of arms” implies that each party must be afforded a reasonable opportunity to present his/her case – including the evidence – under conditions that do not place him/her at a substantial disadvantage vis-à-vis the opponent”⁴²⁴. As to the submission of evidence, the parties should, thus, be treated equally by the Court, unless an exception has to be made, which is justified and proportionate in the circumstances.

So, in case of a hearing, parties should make themselves familiar with the above Rule setting out the different types of evidence that they may submit. These rules do not differ much from those regarding hearings before the regular courts (see, Article

Rule 45(1)(a) provides that the parties may submit to the Court the name and address of the witness(es) as well as a summary of the testimony of the witness(es). If parties wish to do so, they will first need to prove or show to the Court that there is sufficient cause for their examination, as Rule 46 [Summons of Witnesses] stipulates (see, comments on Rule 46 hereafter). The above mentioned summary of the testimony of the witness(es) may serve as such a proof.

Rule 45(1)(b) allows the parties to request the Court for an expert witness, but on the condition that, they must submit a summary indicating the facts that would be established by the expert report. It will certainly be more difficult to prepare a summary of such an expert opinion than a summary of a witness testimony.

⁴²⁴ See, for instance, *Dombo Beheer v. the Netherlands*, Application no. 14448/88, ECtHR Judgment of 27 October 1993.

Moreover, an expert report may result in an unwanted outcome, since, unlike a subjective witness testimony, an expert report is based on objective elements which are outside the influence of the party.

Details of the appointment, reporting and hearing of an expert are regulated in Rule 48 [Expert Report] which is commented on hereafter.

Rule 45(1)(c) allows parties to submit to the Court whatever document or other physical item on the only condition that they contain relevant information on the case at issue. Since applicants may consider too quickly that a document or item contains relevant information, the risk is that they will overburden the Court with too many documents or items which are irrelevant to the case. Article 22 and Rules 29, 30 and 36, commented on above, more clearly speak about “necessary” or “supporting” documents.

Rule 45(1)(c) does not mention the language in which the documents need to be submitted. This issue is regulated in detail in Rule 29(3), commented on above.. Details of the use of documents and other physical items in the proceedings before the Court are regulated in Rule 51 [Documents] which is commented on hereafter.

Rule 45(1) (d) requires parties, who wish to submit a document or other physical item which is not in their possession or control, to provide a description thereof as well as the identification of the person believed to possess or control such items and the reasons for such belief. While doing so, the party concerned could request the person believed to possess or control the relevant items to produce them *proprio motu*. This person could be the other party or a third party. If it is the other party, the party concerned can do so under Rule 51(3). However, under Rule 45(1)(d), the party concerned cannot request the Court to ask the other party or a person believed to possess or control such items to produce them, but must do so under Rules 51(4) and 51(5), commented on hereafter.

Rule 45(1)(e) entitles the parties to submit to the Court the identification of a site to be visited or an object to be inspected, together with a description of the evidence to be established by such visit or inspection. However, if the site or object is in the possession of a person who is not a party to the proceedings, the party may apply, pursuant to Rule 52(3), to the Court for an Order requiring the person to grant access to the site or to the object to be examined. As just mentioned, details of the site visit or object inspection are provided for in Rule 52 [Site and Objection Inspection], commented on hereafter.

- II.** The title of Rule 45 is “Submission of Evidence by Parties”. The substance of Rule 45(2) concerns, however, the collection of evidence by a judge of the Court. It would, therefore, be more appropriate to have Rule 45(2) as a separate Rule with the title “Collection of Evidence by the Court”.

The purpose of the Rule is certainly to facilitate the work of the Court and to save its precious time, whenever that is possible, in referrals which do not raise significant questions of fact or law. Since, according to the Rule, it is the Court which apparently needs certain evidence of fact or law, it is assumed that the Rule is applicable to the situation, where the referral has already passed the Review Panel stage and is now pending before the full Court. Thus, in that situation, the Court can delegate the collection of certain evidence to any judge of the Court, for

instance, even to the Judge Rapporteur, who is already most familiar with the case and may have done evidence collection him/herself at the initial stage of the proceedings, when he/she was tasked to prepare a Preliminary Report.

Although the Rule does not provide details about the procedure of evidence collection by a judge, no doubt, the judge concerned will need to report to the Court about the result of his/her evidence collection, but also, when he/she has encountered problems in doing so. Apart from being involved in the collection of additional documents described by the parties, the single judge could, for instance, also check proposed sites and inspect objects and report back to the Court. Finally, for instance, in a case where a witness is unable to attend the hearing because of serious health reasons, the judge (possibly, in the company of the parties in order to respect the equality of arms principle) may be delegated by the Court to hear that witness.

Rule 46 [Summons of Witnesses] of the Rules of Procedure

- 1. The Court shall order the examination at a hearing of a witness proposed by a party, provided that the party shows or proves sufficient cause for the examination of such witness.**
- 2. If the Court orders examination of a witness, the Court shall issue an order stating:**
 - (a) the full name and address of the witness,**
 - (b) an indication of the facts about which the witness is to be examined, and**
 - (c) the date, time and venue of the examination.**
- 3. If the Court determines that the party has shown insufficient proof for the witness to be summoned, the Court shall inform the party in writing with the reasons for the decision.**
- 4. The witness may be summoned conditional upon the party requesting the summons paying a deposit to the Secretariat in a sum sufficient to cover expected expenses incurred by the witness. If the summons is not made conditional upon a deposit, the Secretariat shall advance the sums necessary in connection with the examination of a summoned witness.**
- 5. The Secretariat shall serve the parties and representatives with the orders or decisions on the witnesses.**
- 6. Witnesses properly summoned are required to obey the summons and attend the hearing. If a witness who has been properly summoned fails to appear at the hearing, the Court may impose on the witness a financial penalty not to exceed five hundred (500) Euro and may order another summons to be served on the witness at their expense. If a duly summoned witness refuses to provide evidence or to take the oath or to make a solemn declaration, without a valid reason, the Court may impose on the witness a financial penalty not to exceed five hundred (500) Euro.**
- 7. If the witness subsequently provides a valid excuse for failing to attend the hearing, the financial penalty may be reduced or cancelled by the Court. The witness may request that the financial penalty be reduced by the Court if the penalty is disproportionate to the witness' financial means.**

Apparently, Rule 46 does not touch upon the issue of protection of witnesses. However, it may well be that in certain cases before the Court, witnesses and/or family members of witnesses have received serious threats and fear reprisals, if these witnesses would give evidence. Although this may happen more often in criminal cases before the ordinary courts than in referrals before the Constitutional Court, it should not be excluded. In such cases, the Court will have to decide, how to deal with the issue and may take into account the rules and practices, for instance, followed by criminal courts on the basis of the Law on Witness Protection⁴²⁵.

- I. The Court may develop certain criteria as to “the sufficient cause” which a party has to show or prove, when proposing to the Court to examine a witness. In any case, it should mean that the Court can refuse to call a witness, if the proposing party has not been able to show that the evidence, to be given by the witness, will be relevant to the case. A similar rule is contained in Article 339.2 of the Law on Contested Procedure,⁴²⁶ stipulating that “Only persons who can give information on the evidence can be asked to testify”. If a party proposes a number of witnesses, the Court may order that party to restrict the number, in particular, if he/she is unable to prove sufficient cause for the examination of each of them. In this connection, the Court will have to consider the “equality of arms “ principle, cited under the previous Rule, in order to maintain a reasonable balance between the number of witnesses of each party to be heard.
- II. For each witness to be summoned to be examined, the Court needs to issue an order containing the information mentioned in Rule 46(2)(a) to (c), which the Secretary General will address to that witness and all parties. The Rule is silent on the verification of the identity of the witness at this stage of the proceedings. This issue is regulated in Rule 47(4), which provides that the President shall establish the identity of the witness, when he/she is called to provide testimony at the oral hearing. It would be more appropriate, if the Secretariat would do so at an earlier stage, so that the identification by the President at the hearing will only be a formality.
- III. Pursuant to Rule 46(3), when the Court informs the party of its decision that it will not summon the proposed witness for the reason that the party has not shown sufficient proof to the Court to do so, it seems not unreasonable (although the Rule is silent on this issue), that the party would be allowed to submit additional proof and request the Court to reconsider its position and, if the Court refuses to do so (and rejects the request once more), to be given the opportunity to propose another witness and show this time that there is sufficient cause for the examination of that witness.
However, the Court may again refuse the request for similar reasons. How often a party would be allowed to propose a new witness, depends certainly on the circumstances of the case. Of course, as mentioned above, when dealing with this issue, the Court must take into account the party’s right to a fair trial, in particular,

⁴²⁵ Law No. 04/L-015 of 1 September 2011.

⁴²⁶ Law No. 03/L-006 of 30 June 2008.

the equality of arms principle, if the Court would allow the other party's witness(es) to be heard. The objection by a party against a witness proposed by the other party is dealt with in Rule 49 [Objections against Witnesses or Experts] hereafter.

IV. Rule 46(4) touches upon the general requirement, laid down in Article 28 [Procedural Costs] of the Law that “parties have to cover procedural costs, unless otherwise decided by the Court”. However, it needs to be remarked that applicants under Article 113.7 of the Constitution, who have to pay the costs out of their own pocket, the public institutions pay the costs from their budgets and as the opposing party are normally represented by their own lawyers, while Article 113.7 applicants will have to pay for their representation themselves, which may force them, due to lack of funds, not to be represented by a legal representative.

Also witnesses and experts, proposed by public authorities to participate in the hearing will normally be paid by them. This may create a considerable imbalance in the position of the parties before the Court, which could easily compromise the “equality of arms principle”.

In this respect, Rule 46(4) provide that the Court may summon the witness conditional upon the requesting party paying a deposit to the Secretariat in a sum sufficient to cover expected expenses incurred by the witness. The Rule also stipulates that, if the Court does not make the summons conditional upon a deposit, the Secretariat shall advance the sums necessary in connection with the examination of the summoned witness. Thus, its meaning is apparently that the requesting party still needs to reimburse that advance payment to the Secretariat.

However, Article 28.2 made an exception to the rule that parties should pay their own procedural costs by stipulating that: “The party that has made a referral pursuant to Article 113.7 of the Constitution shall be exempted from the obligation to care procedural costs, if the Constitutional Court decides that such a referral is admissible and grounded.” But if the Court may decide to exempt a party from paying his/her procedural costs. If the Court would reject the request and only be willing to summon the witness if the party pays a deposit (which he/she cannot), this could seriously hamper the party's capability of properly building his/her case before the Court. This may raise an issue under the right to a fair trial (equality of arms principle), guaranteed by Article 31 of the Constitution and Article 6 ECHR, in particular, if the other party as a public institution has no lack of financial means to pay the sums necessary in connection with the examination of witnesses and experts, whom it may have requested to summon. For instance, in a case concerning the payment of court fees,⁴²⁷ the ECtHR held that an issue under Article 6 ECHR may arise, if the sum to be paid poses a problem for the applicant⁴²⁸. The same reasoning could be used for the payment of other procedural costs.

In connection with the general requirement that parties have to bear their own costs, reference is made to the Law on Contested Procedure, which also requires,

⁴²⁷ See *Bakan v. Turkey*, Application no. 50939/99, ECtHR Judgment of 12 June 2007.

⁴²⁸ The responding party in the proceedings before the ECtHR is the respondent State, represented by its Government agents.

in its Article 451, that “Witness, expert, evidence collection and expenses are prepaid by the party that requested them”. Also here, parties may be exempted from the payment of such expenses by virtue of Article 468(1), providing that “The court exempts a party from paying expenses, if it is determined that it is beyond the party’s “financial capability, and the payment of expenses will harm that party or his/her family”, in conjunction with Article 471 reading, that “If the party is exempted from all expenses, then the court will pay for all costs incurred for witnesses, experts, direct examinations, publications of the court acts, as well as for the assigned representative expenses”.

However, Article 452(1) of the Law on Contested Procedure stipulates that “The party that loses the court process has to entirely cover all costs of the winning party, as well as intermediaries costs, if he/she joined the process”. Thus, the question remains, who will bear such costs, if the party that loses the case, has no sufficient funds. Probably, the losing party may apply under the above Article 468.1 of that Law to be exempted from paying these costs.

V. Pursuant to Rule 46(5), in order to allow the parties and their representatives, if any, to properly prepare the case, it is certainly of importance for them to receive a copy of these Court orders in a timely manner in order to know who the witnesses of the other party are. However, the Rule does not provide for a time limit within which the Secretariat (in practice, it is the Secretary General who serves such orders and decisions on the witnesses) has to provide such information.

VI. Before going into the substance of Rule 46(6), the issue may be raised, as mentioned above, whether the Court has the power to impose financial penalties on the basis of its Rules of Procedure. The power to issue subpoenas as well as the procedure of their enforcement are normally regulated by an act of parliament. The question, therefore, arises whether the legislature should have dealt with this issue in the Law itself⁴²⁹ or could have simply delegated by law the power to the Court to impose penalties through its Rules of Procedure. Since the Law is silent on the issue, the Court has defined this power in its Rules of Procedure. By contrast, the Law on Civil Procedure, for instance, regulates similar powers of the civil courts in its Chapter XX [Disrespect of the court]. Therefore, it could be held that the Law should have rather regulated the imposition of financial penalties, without leaving the initiative to the Court in its Rule 46.

As to the substance of the Rule, the reason for the absence of the witness may be, that he has fallen seriously ill or may have died. Whether in such cases the Court might rely on hearsay evidence, will probably depend on the case under consideration. With respect to the witness suffering of poor health, the Court will certainly consider the existence of alternatives to hear him/her. If the properly summoned witness without reason does not turn up at the hearing, the Court may impose a financial penalty not exceeding 500 Euro and issue a new summons. This

⁴²⁹ For instance, Article 34a of the Slovenian Constitutional Court Act foresees the payment of a penalty, reading as follows: “*The Constitutional Court may punish a participant in proceedings or his authorized representative by a fine amounting from 100 to 2,000 Euros, if they abuse the rights enjoyed in accordance with this Act.*”

may not hinder the Court to continue the hearing and hear the parties and other witnesses. It can then adjourn the hearing until a later date in order to hear the witness, who failed to appear. If the unwilling witness again does not turn up, it is assumed that the Court may impose an additional penalty under the same Rule.

Whether the failure to comply with the Court's orders is also punishable as contempt of court, is not clear. The Court also lacks the authority of criminal courts to have the unwilling witness brought before it with the assistance of the police, but it may be possible under Article 16 [General Rule] of the Law, according to which the Court may apply the relevant provisions of other procedural laws, for instance, those providing for the forceful attendance of court proceedings. Moreover, the Rule does not provide for an enforcement mechanism to execute the financial penalty, although, also here, recourse may be had to relevant provisions of other procedural laws.

Although the Rule is silent on the issue, the Court may, with a view to the right of the party who proposed the unwilling witness, allow that party to identify another witness or, if not, propose an alternative way to provide the evidence, which the unwilling witness was supposed to give.

A similar issue as just discussed with respect to a witness unwilling to appear at the hearing, may arise, if the duly summoned witness refuses, without a valid reason⁴³⁰, to provide evidence at the hearing or to take the oath or make a solemn declaration and continues to do so, even after the Court has imposed a financial penalty on him/her. The only measure the Court may be able to take in these circumstances, is to have the witness removed from the court room and to proceed with the hearing in the absence of that witness or to adjourn the hearing (for instance, in complex cases) and request the party who proposed the unwilling witness to propose another witness, or, if not, to provide the evidence, which the unwilling witness was supposed to give, in an alternative way.

However, the witness may indeed have a justification for his/her refusal, for instance he/she may have received threats, which have to be taken seriously⁴³¹, but were simply ignored by the party, proposing the witness. The witness may not even have told the proposing party of the threat. In that case, a solution could be that the unwilling witness may inform the judges *in camera* about the circumstances of his/her refusal. The previous remarks regarding witness protection are equally valid here.

- VII.** Under Rule 46(7), if the witness, for instance, proves on the basis of a medical certificate that he/she has fallen seriously ill, the Court may simply cancel the financial penalty. Furthermore, although the Rule is silent on the issue, it may well be that, if the witness proves that he/she is insolvent, the Court might not just reduce the penalty, but cancel it all together, in a similar way as just mentioned above under Article 468 of the Law on Contested Procedure.

⁴³⁰ The witness may have a valid reason, as mentioned under Rule 47.3 hereafter.

⁴³¹ See, *mutatis mutandis*, *Saidi v. France*, ECtHR Judgment of 20 September 1993, para 44.

Rule 47 [Witness Testimony] of the Rules of Procedure

- 1. The Court may order that witnesses shall be excluded from attending the hearing during any oral presentations by the parties or their representatives or during the examination of other witnesses.**
 - 2. Parties shall have a right to be present during the examination of witnesses.**
 - 3. A witness has the right to refuse to testify concerning the following matters:**
 - (a) anything a witness was told during a conversation protected by a religious privilege;**
 - (b) anything a witness has found out, or advice given by the witness, in the witness' capacity as a lawyer or doctor of medicine or through the performance of an occupation of activity which implies a legally required obligation or confidentiality;**
 - (c) facts or information which may tend to incriminate the witness or the witness' spouse or descendants in a direct line, and in a collateral line to the third degree.**
 - 4. When a witness is called to provide testimony, the President shall first establish the identity of the witness. Then the President shall inform the witness of the right to refuse to give evidence as provided in paragraph 3 and of the criminal consequences of giving false testimony and that the witness may be required to take an oath or solemn declaration that the testimony the witness will give is true.**
 - 5. Before giving testimony, the witness shall take the following oath or solemn declaration: "I, __name__, swear (or solemnly declare) that I will tell the truth, the whole truth and nothing but the truth."**
 - 6. If a witness refuses without justification to give evidence or refuses to take an oath or a solemn declaration, the Court may impose a financial penalty not exceeding five hundred (500) Euro. The Court shall determine what weight, if any, shall be given to the testimony of witnesses.**
 - 7. Before the witness is questioned, the witness shall present an oral account of the witness' knowledge of the facts that are the subject of the examination.**
 - 8. The President and the Judges may ask questions of the witness, followed by any party not requesting the examination, and then the party requesting the examination. Judges may ask questions of the witness at any time during the testimony.**
 - 9. The Secretary General shall ensure that minutes are drafted and reflect accurately the testimony of each witness. The minutes shall then be signed by the President or by the Judge responsible for conducting the examination of the witness.**
- I. Rule 47(1) is similar to the procedural rules followed in civil and criminal proceedings. The intention of the Rule is to avoid that witnesses, who still have to testify at the hearing, may be influenced by the oral presentations by the parties, their representatives or other witnesses. As a result, their testimonies may become un- or less reliable. It will be the President to order the exclusion of witnesses, but**

he/she will certainly consult the other judges, before taking a decision to that effect.

- II.** Also Rule 47(2) is not different from the one in civil and criminal proceedings. It is an aspect of the right to fair trial, in particular, the equality of arms principle, and its purpose is that evidence should be produced in the presence of both parties with a view to adversarial argument, for instance, by enabling the parties to question the witnesses in order to strengthen their own case or proof that the witness of the other party is unreliable. Also the ECtHR recognizes this right to be an important feature of the fair trial principle of its Article 6⁴³².
- III.** Rule 47(3) does not provide for any exceptions. Similar rules exist in civil and criminal proceedings. As to Rule 47(3)(c), it is not clear, for what reason a witness has only the right to refuse to testify with respect to facts or information, which may incriminate the witness' *descendants*, and not his *ascendants*, in a direct line (like parents, grandparents and further ascendants). For instance, under Article 343 of the Law on Contested Procedure, mentions "any generation in a vertical line". It is suggested to amend the Rule accordingly.
- IV.** As mentioned above, in order to avoid any verification problems by the President at the hearing, it is assumed that the Secretariat verifies the identity of the witnesses prior to the hearing by checking the validity of the identity card or passport of the witness and whether it has been issued by the competent authorities. The witnesses will then receive a warning from the President about their right to refuse to give evidence and the criminal consequences of giving false testimony. A further criminal consequence could flow from a witness' refusal to testify under the false pretention of falling under the categories of Rule 47(3). If a witness at the hearing ignores the President's warning and, nevertheless, gives a false testimony or information, the question arises, who will inform the public prosecutor about the alleged criminal act. It is assumed that the Secretary General will do so on behalf of the President of the Court. The President shall also inform the witness that he/she "may" be rejected to take an oath or solemn declaration the the testimony the witness will give is true. However, the term "may" should be replaced by "shall", in view of its provision of Rule 47(5).
- V.** Apart from the obligation of the witness to take the oath or solemn declaration, Rule 47(5) is silent on who will read out the oath or solemn declaration, which the witness has to repeat. It is assumed that the President will do so. The Rule does not mention any sanction, if the witness breaches the oath or solemn declaration. Only Rule 47(6) foresees the imposition of a sanction in the circumstances mentioned therein.

⁴³² See, for instance, *Barbara, Messegue and Jabardo v. Spain*, Application no. 10590/83, ECtHR Judgment of 6 December 1988, para.78.

VI. The first sentence of the Rule is almost identical to the last sentence of Rule 46(6) which has been commented on above. This provision of Rule 47(6) may, therefore, be deleted.

The second sentence of the Rule, dealing with the Court's prerogative to appreciate the testimony of witnesses, does not seem to fit to Rule 47(6), but would need a separate paragraph in order to highlight its importance. However, it may well be that it concerns a textual error and that the testimony of "refusing witnesses" is meant. In that case, it is easy to understand that the Court shall determine what weight, if any, will be given to the testimony of such witnesses.

VII. Under Rule 47(7), the oral account by the witness of his/her knowledge of the facts is important for the Court and parties to determine to what extent the witness is familiar with the case, in particular, with those facts about which the witness is supposed to be examined as indicated in the proposal submitted to the Court by a party requesting this witness to be heard, pursuant to Rule 46(2)(b). Moreover, it may give the Court and parties already a certain idea about the reliability of the witness.

VIII. Rule 47(8) allows all judges to ask questions of the witness at whatever time during the testimony, until the President decides that they can no longer examine the witness. Thereafter the party not requesting the examination, followed by the requesting party can ask questions, as long as the President permits them to do so.

IX. As mentioned earlier, unlike a transcript, minutes are not the appropriate instrument which accurately reflect the testimony of the witnesses. Since the entire court hearing is normally recorded, the testimony of the witness will, therefore, be accurately reflected in the transcript of the hearing. Minutes drafted in connection with the testimony of each witness, may only contain the nature and, possibly, a summary of the testimony and the names of the judges and/or parties who asked questions. Full details should be found in the transcript. It is assumed that the judge responsible for the examination of the witness, as mentioned in the last sentence of the Rule 47.9(,) is the judge delegated by the Court under Rule 45 [Submission of Evidence by Parties] paragraph 2 to conduct the examination of a witness, who, for instance, had not been able to attend the hearing because of poor health, old age or any other valid reason and has, therefore, been examined at home or at any other convenient location⁴³³ in the presence of the parties.

Rule 48 [Experts] of the Rules of Procedure

1. The Court engages experts in the following manner:

(a) Upon application by a party bearing the burden of proof for a particular fact, the Court may appoint an expert who shall prepare an expert report. The order appointing the expert shall define the scope of the expert's work and shall set a time limitation within which the expert shall submit a report to the Court.

⁴³³ Article 346 of the Law on Contested Procedure contains a similar rule.

- (b) Any expert so appointed shall at the first available opportunity disclose to the Court any possible conflict of interest that he/she may have in relation to their evidence.
- 2. A person shall not be appointed as an expert in a referral in which the person:
 - (a) Has previously been involved as a representative or advisor;
 - (b) Has acted at any time for one of the parties in the case;
 - (c) Is related by family or marriage to any of the parties; or
 - (d) Is or was an official, political advisor or contractor of an entity that is a party to the case.
- 3. An appointed expert shall receive a copy of the appointment order and all documents necessary for the work. The expert shall be supervised by the Judge Rapporteur appointed to the referral who may be present during the investigation and who shall be kept informed of the progress of the work.
- 4. The Court may require the party requesting the expert to pay a deposit to the Secretariat in a sum sufficient to cover the costs of the expert report.
- 5. An expert shall give an opinion only on issues and facts which have been expressly referred to the expert.
- 6. An expert shall submit the report to the Court and the Secretariat shall provide copies to all Judges and shall serve a copy of the report on each party.
- 7. The Court may order that the expert be examined at the hearing on the referral, provided that the parties have been provided notice that the expert will testify. All Judges and all parties may ask questions of the expert.
- 8. Before being examined at a hearing or giving testimony, an expert shall take the following oath or solemn declaration before the Court:
“I, name , swear (or solemnly declare) that I have conscientiously and impartially carried out my task; that I have provided to the Court copies of all the evidence on which I have based my opinion; that I believe to be true all the facts on which I have based my opinion; and that I honestly and in good faith hold the opinion which I have stated and will state to the Court.”
- 9. If the expert refuses without justification to give evidence or file a report, or refuses to take an oath or solemn declaration, the Court may impose a financial penalty not exceeding five hundred (500) Euro. The Court shall determine what weight, if any, shall be given to the testimony of experts.

Also the right of each party to have experts appointed is an aspect of the principle of equality of arms, which itself is part of the right to a fair trial. Equality is relevant, for example, where an expert witness appointed at the proposal of one party is not accorded equal treatment as the one appointed at the proposal of the other party. This unequal treatment may amount to a breach of that principle⁴³⁴. Furthermore, the Rule apparently does not provide for the possibility for the Court to appoint experts *ex officio*.

⁴³⁴ See, *mutatis mutandis*, *Bonisch v. Austria*, Application no. 8658/79, ECtHR Judgment of 6 May 1985.

- I. Rule 48(1)(a) does not contain a similar provision as Rule 46 [Summons of Witnesses] which, in its paragraph 3, stipulates that the Court will summon the witness, if it determines that the requesting party has shown “sufficient proof” for the witness to be appointed. It is, therefore, assumed that the Court will only do so, if the application by the proposing party contains sufficient proof for the expert to be appointed. In the Order of the President, appointing the expert, both the scope (proof for a particular fact) and time limit will also be mentioned.
Although Rule 48(1)(b) provides that the expert will disclose to the Court any possible conflict of interest at the first available opportunity “after his/her appointment”, it would be more logical that the first available opportunity for the expert to disclose the existence of a possible conflict of interest is “before his/her appointment” by the Court. In that case, the Court will appoint another expert proposed by the party, instead of first having to undo the original appointment.
- II. Although the Court shall not appoint an expert, who has been or still is in a relationship with one of the parties as listed in Rule 48(2), the list does not seem to be exhaustive. For instance, there may also be a conflict of interest, if the expert is related by family or marriage to any of the witnesses or other experts. It is, therefore, suggested to add a further paragraph to Rule 48(2) with the following wording “*e) Is or was in any other capacity related to any of the parties, participants or other interested party or persons in the proceedings*”.
Furthermore, there may also be a conflict of interest, if the person concerned is not related in any way to any of the parties, participants or other persons involved in the proceedings, but has prepared previously reports in similar cases. If appointed, the conclusion of the expert could, therefore, already be known.
- III. Pursuant to Rule 48(3) it is assumed that the appointment order and accompanying papers will be forwarded by the Secretary General by hand or registered mail. As to the supervision of the expert by the Judge Rapporteur, it should be mentioned that in similar cases of supervision any judge could be mandated. For instance, Rule 45(2) specifies that the collection of certain evidence is delegated by the Court to a judge, while Rule 47(9) refers to the “judge responsible for conducting the examination of the witness” (see comments on Rules 45(2) and 47(9) above). However, Rule 48(3) clearly stipulates that it is the Judge Rapporteur, who will supervise the activities of the expert. It may be a more consistent solution to also task the Judge Rapporteur with the responsibilities mentioned by Rules 45(2) and 47(9).
- IV. While Rule 46(4) above deals with the payment of a deposit by the requesting party of a sum sufficient to cover the expected expenses of a witness appointed by the Court, Rule 48(4) provides for a similar rule for the expert appointed by the Court. The difference between the two Rules is that under Rule 48(4) the party concerned may be required by the Court to pay a deposit to the Secretariat in a sum sufficient to cover the “costs of the expert report”, meaning expenses incurred (as in the case of the witness) as well as expert fees. The costs of the expertise could, thus, be considerable. The Rule does not provide for the Secretariat to advance the

sum sufficient to cover the costs of the expert report as is the case regarding the expenses for the witness under Rule 46(4). Nor does the Rule provide for the possibility that the party requesting the expert may ask the Court to be exempted from paying the costs for the expert opinion in view of his/her financial situation. Of course, in that case the Court could simply refuse to appoint the expert.

However, - in the absence of any other procedural provision - it could also refer to Article 16 of the Law (application of relevant provisions of other procedural laws) and apply Articles 468 and 471 of the Law on Contested Procedure, thereby exempting the insolvent party from all expenses, including the expert costs incurred, and paying itself all costs (of course, assuming that, in the Court's opinion, the application for an expert report is justified). The Court may be more easily inclined to do so, if the other party, in particular, when it is a public institution, has no problems in paying the costs of its experts. Otherwise, if the Court would only appoint the expert paid for by one party and not the expert requested by an insolvent party, a question of equality of arms may arise.

- V.** As mentioned in Rule 48(1)(a) above, the “scope” - which presumably corresponds to “ issues and facts” mentioned in Rule 48(5) - of the expert's work is to be found in the appointment order of the Court, a copy of which the expert should have received together with the necessary documents. The expert is obliged to follow the Order and stay within the boundaries of the mandate laid down therein. What happens, if he/she does not, is not clear. If done intentionally, the Court may decide to sanction the expert, if he/she refuses to correct the report, pursuant to Rule 48(9) or, at least, dismiss him/her.
- VI.** As stipulated in Rule 48(1)(a), the expert will have to submit the report within the time limit specified in the appointment order. However, neither Rule 48(1)(a), nor Rule 48(6) provides what the Court may decide, if the expert does not respect the time limit indicated in the appointment order, causing a delay in the proceedings before the Court. It should be the task of the Judge Rapporteur, supervising the work of the expert, to inform the Court in time of a possible delay in the work of the expert. The Court can then decide to urge the expert to terminate the expertise in time, grant a reasonable extension, if requested or appoint another expert, if need be.
- VII.** Under Rule 48(7), the Court will decide whether or not the expert report will be sufficient for the further conduct of the proceedings, or whether the expert will be summoned to the hearing to testify. In the latter case, not only the judges, but also the parties may ask questions of the expert. This right of the parties stems also from their right to a fair hearing and the equality of arms principle, which equally incorporates the right of parties to have knowledge of and comment on all evidence adduced or observations filed, including expert reports.
- VIII.** Like in the case of the oath or solemn declaration to be taken by a witness, it will probably be the President of the Court who will ask the expert to read out the oath or solemn declaration. The Rule does not mention any sanction, if the expert

breaches the oath or solemn declaration. Only Rule 48(9) foresees the imposition of a sanction in the circumstances mentioned therein.

IX. Rule 48(9) is similar to Rules 46(6) and 47(6) above with regard to a refusing witness. The same comments regarding the imposition of a financial penalty by the Court through its Rules of Procedure instead of being based on an act of parliament, including the comments regarding ECtHR case law, are, *mutatis mutandis*, valid in case of unwilling experts⁴³⁵.

Similarly to the second sentence of Rule 47(6) with regard to the testimony of witnesses, dealing with the Court's prerogative to appreciate the testimony of experts, the second sentence of Rule 48(9) does not seem to fit there, but would need a separate paragraph in order to highlight its importance. However, it may well be that it concerns a textual error and that the testimony of "refusing experts" is meant. In that case, it is easy to understand that the Court shall determine what weight, if any, will be given to the testimony of such experts.

Rule 49 [Objections against Witnesses or Experts] of the Rules of Procedure

- 1. Any party may object, by written application to the Court, to the relevance or the competency of a witness, or an expert. Any objection to a witness or to an expert shall be raised no later than fifteen days after service of the order summoning the witness or appointing the expert. The application of objection shall provide the specific grounds for the objection concerning the relevance or competency of the witness or expert and shall provide evidence and legal arguments in support of the objection.**
 - 2. The Court shall give notice of the objection to the other parties who shall have the right to provide the Court with a written reply to the application. The Court shall make its determination on the application after considering the facts and arguments provided in the application and any replies received from the other parties.**
- I.** According to Rule 49(1), the objection can only concern "the relevance or the competency of the witness or expert". This seems to be too restrictive, since it may well be, that the objecting party has knowledge of other information, which may make an otherwise relevant and competent witness or expert unfit or unreliable to testify⁴³⁶. As to the remaining part of the Rule, it is understandable that an application of objection needs to be justified with evidence and legal arguments in order to avoid that a party too easily objects to a witness or expert proposed by the other party.
- II.** Under Rule 49(2), the "right to reply" respects the equality of arms principle mentioned earlier. The Rule does not mention any time limit within which the

⁴³⁵ Article 36.2 of the Slovenian Constitutional Court Act contains a different approach, providing that: "*The absence of participants and other invited persons does not prevent the Constitutional Court from concluding the proceedings and deciding on the case.*"

⁴³⁶ See also similar comments on Rule 48.2 dealing with unfit witnesses.

written reply by the other party (who, in fact, is the one who proposed the challenged witness or expert) will have to be submitted to the Court. It is suggested that the Court would grant a similar period (i.e. fifteen days) for submitting the reply as the one defined in Rule 49(1).

Rule 50 [Reimbursement of Witnesses and Experts] of the Rules of Procedure

- 1. Witnesses summoned by the Court and experts appointed by the Court shall be entitled to reimbursement of reasonable travel expenses. The Secretariat may make advance payments to witnesses and experts for such expenses.**
- 2. Witnesses summoned by the Court shall be entitled to compensation for loss of earnings. Experts appointed by the Court shall be entitled to be paid reasonable fees for their services. The Secretariat shall pay witnesses and experts compensation or fees after completion of obligations. The rates payable shall be determined by the Court.**

It seems to be adequate to comment on the Rule as a whole and to make a distinction between the payments to which witnesses are entitled and those to which experts are entitled. Starting with witnesses, paragraph 4 of Rule 46 [Summons of Witnesses] (see above) only mentions that the party has to pay a deposit “in a sum sufficient to cover expected expenses incurred by the witness” or, otherwise, that the Secretariat would “advance the sums necessary in connection with the examination of a summoned witness”. Rule 50 seems to be more precise, since it stipulates that “the witness shall be entitled to reimbursement of reasonable travel expenses” and “compensation for loss of earnings”.

Moreover, Rule 50 also provides very clearly that the Secretariat may make advance payments for these travel expenses and shall pay compensation after completion of obligations. The Rule, however, does not mention anything about any payment by the party, who requested the examination of the witness. However, read in conjunction with Rule 46(4), it may be concluded that the party may have to pay the “reasonable travel expenses” and that the Secretariat may not only advance those “reasonable travel expenses”, but also “the sums necessary in connection with the examination of a summoned witness” (probably including the compensation). However, to conclude that these sums, after having been advanced by the Secretariat to the witness, should then be reimbursed by the requesting party to the Secretariat, does not seem to be supported by the text. But, at the same time, it would be hard to believe that all costs of the witness would have to be borne by the Court.

The same is true for the sums to which the expert is entitled. Rule 48(4) provides that “the Court may require the party requesting the expert to pay a deposit to the Secretariat in a sum sufficient to cover the costs of the expert report”. This can only mean that the relevant party may have to pay both the “reasonable travel expenses” and reasonable fees for the expert services, as mentioned in Rule 50. However, Rule 50 clearly stipulates that, although “reasonable travel expenses” may be advanced to the expert by the Secretariat, the reasonable fees for the expert services “shall” be paid by the Secretariat. So, there seems to be a certain contradiction between the two Rules,

since it is not at all clear, whether, in the end, the Secretariat or the requesting party will cover the costs of the expert.

Since the above Rules do not seem to match, one may turn once more, by applying Article 16 of the Law, to the relevant provisions of the Law on Contested Procedure. According to Article 451(1) of the Law on Contested Procedure, “Witness, expert, evidence collection expenses are prepaid by the party that requested them....” and that, pursuant to Article 452(1), “The party that loses the court proceedings has to pay the entire costs of the winning party, as well as intermediaries costs, if he/she joined the proceedings”. So, when applied to the proceedings before the Court, the respondent party, if he loses the case, would have to pay all costs of the applicant. But if the Court would not find a breach of the Constitution, the applicant would, in principle, have to bear his own costs and those of the respondent party, in application of Article 452 of the Law on Contested Procedure. However, similar to Articles 468⁴³⁷ and 471⁴³⁸ of that Law, the applicant might request the Court to be exempted from paying any expenses, because of the lack of the necessary funds, under Article 28 [Procedural Costs] of the Law.

In these circumstances, the confusion presently existing between the different Rules, should be removed by amending them in an appropriate manner, leaving no room for any discrepancies. In that case, the provisions of the Practice Direction, issued by the President of the ECtHR, on Just Satisfaction Claims, Chapter 4, Costs and Expenses, could also serve as a guideline.

Rule 51 [Documents] of the Rules of Procedure

1. A document is admissible in a case if the document is authentic and relevant to the claims made in the case. The probative value of an admissible document will be determined by the Court in its assessment of all of the evidence in the case.
2. A party may offer evidence by producing documents that are in the possession of the party. If the party that bears the burden of proof for a fact has a document in its possession that contains evidence relating to that fact, the party shall submit the document as an attachment to a referral. The Court may order that the original of the document be produced at the hearing.
3. If evidence for a fact is contained in a document that the party bearing the burden of proof for that fact does not have in its possession, the party may make a written request of another party in the case to produce a certified copy of the document, if the requesting party has reason to believe the document is in the other party’s possession. A copy of the request shall be filed with the Court.

⁴³⁷ Article 468 [Exemption from paying court expenses], paragraph 1, of the Law on Contested Procedure provides: “The court exempts a party from paying expenses, if it is determined that it is beyond parties’ financial capability, and when such a thing will harm him/her or their family”.

⁴³⁸ Article 471 provides: “If the party is exempt from all expenses, then the court will pay for all costs incurred witnesses, experts, direct examinations, publications of the court acts, as well as for the assigned representative expenses”.

- 4. If the party who receives the request in paragraph 3 refuses to produce the document or fails to respond to the request within a reasonable time, the requesting party may file an application with the Court seeking an Order of the Court to the other party to produce the document. The Court shall order the other party to produce the document, if the Court is satisfied that the document is within that party's possession and that production is necessary in the interests of justice. If the party directed by the Court to produce the document fails without reasonable cause to produce the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief. The Court may also strike out the whole or part of a Referral or a Reply as it considers appropriate in the circumstances.**
- 5. If the party that bears the burden of proof for a fact has reason to believe that a relevant document concerning that fact is in possession of a person who is not a party to the case, the party may file an application with the Court for an Order directing the non-party to produce the document. The Court shall order the other person to produce the document if the Court is satisfied that the document is within that person's possession and that production is necessary in the interests of justice. If the person directed by the Court to produce the document fails without reasonable cause to produce the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief.**

The provisions of Rule 51 are assumed to be equally valid for “other physical items that contain information relevant to the referral”, mentioned in Rule 45(1)(c) and (d) together with “documents” (see comments on Rule 45 [Submission of Evidence by Parties] above). Furthermore, the provisions of the Rule are not much different from similar rules existing in civil proceedings, as, for instance, those regarding the authenticity and probative value of documents, laid down in Articles 329 to 338 of the Law on Contested Procedure⁴³⁹.

- I. Rule 51(1) makes a clear distinction between the admissibility of a document and its probative value to be established by the Court, when assessing all evidence produced by the parties in the proceedings. In the end, many admissible documents may be found by the Court to have no probative value at all.**
- II. It is a normal human reaction for parties to attach as many (relevant and often irrelevant) documents as possible to the referral in the hope that their chances that the Court will find a violation of their constitutional complaint will increase. Parties may submit certified copies of documents containing evidence relating to a certain fact, but the Court may still have doubts about their authenticity and order the production of the original in order to be able to check itself whether the relevant documents are authentic or not. If the original is not a fraud or otherwise invalid, the Court could return the original to the party and continue to use the copy in the proceedings.**

⁴³⁹ See, pages 100 to 102 of Law No. 03/L-006 on Contested Procedure.

III. Under Rule 51(3), the requesting party only needs to have “reason to believe”, not “sufficient evidence”, that the requested party is in the possession of the relevant document. That means that the requesting party may run the risk to be wrong in that belief, simply because the requested party does not possess that document. On the other hand, if the requested party is indeed in the possession of the document, it may not consider it to be in its interest to produce a certified copy of the requested document, since that might weaken its position in the proceedings before the Court. So, the requested party may fail to respond or deny that it possesses the requested document. In that case, the requesting party can have recourse to Rule 51(4).

IV. Rule 51(4) does not specify what is meant by the requested party failing to respond within a “*reasonable time*”. What for the requesting party may have become an unreasonable time, may still be reasonable for the requested party, in particular, if the document in question needs first to be located (in its archives or elsewhere, even abroad), which can take a considerable period of time. Whatever the views of the parties regarding “reasonable time” are, in the end it is the requesting party which decides, when its patience has come to an end and it will seek an Order of the Court⁴⁴⁰ addressed to the other party to produce the document (N.B. unlike Rule 51(3), paragraph 4 only speaks about the document, not a certified copy of the document).

According to the Rule, the Court will, in that case, not first consider whether the requesting party indeed observed a reasonable time limit before submitting its request to the Court, but order, “*as soon as it is satisfied that the document is within the requested party’s possession and the document is necessary in the interests of justice*”, the requested party to produce the document. However, the Rule is silent on the question in what manner the Court will be satisfied that the document is with the requested party and consider that the latter has failed to produce the document “*without reasonable cause*”. The imposition of a financial penalty or another sanction⁴⁴¹ would certainly require sufficient evidence, showing beyond doubt that the requested party is indeed in the possession of the relevant document.

As commented on Rules 46 [Summons of Witnesses] and 48 [Expert Report], the fine may be considered as a sanction imposed by the Court for “contempt of court” and should rather be regulated by law.

Instead of imposing a penalty or another sanction (or, presumably, in case the requested party indeed pays the fine, but still does not produce the document), the Court may decide to strike out the whole or part of the Referral or the Reply as it considers appropriate in the circumstances. Thus, the Court has three options: (1) strike the Referral of its list of cases (“*strike out the whole Referral*”); (2) decide on the Referral only on the basis of the submissions of the applicant (“*strike out the whole Reply*”); and, (3) decide on the Referral on the basis of the relevant

⁴⁴⁰ Court Orders are Orders agreed upon by the full Court and signed by the President.

⁴⁴¹ Whether the Court has the authority to impose fines on the basis of a Rule instead of a normative act of the Assembly, unless it bases this authority on relevant provisions of other procedural laws, like the Law on Contested Procedure, has already been discussed above under Rules 46 and 48.

documents present in the file, leaving aside the submissions which needed to be completed by the missing document(s) (*“strike out part of a Referral or of a Reply”*).

- V. By virtue of Rule 51(5), the Court can order a person who is not a party to the proceedings to produce a document which is needed by a party bearing the burden of proof for a certain fact, if the Court is satisfied that the document is in the person’s possession and is necessary in the interests of justice. According to the Rule, it is apparently sufficient that the requesting party has only reason to believe that the person possesses the document. So, hard proof does not seem to be necessary. Whether the party’s belief is sufficient for the Court to be satisfied that the document is in the possession of the person does not sound very convincing, although the last word is, of course, with the Court. In any case, the Court should only impose a financial penalty or order other relief, if it disposes of sufficient evidence showing that the person indeed possesses the relevant document, but is simply unwilling to produce it. As to the imposition of a penalty the comments on Rules 46, 48 and 51(4), are equally valid here.

Article 25 of the Croatian Constitutional Court Act contains a more general rule for the presentation of documents and information, providing: *“(1) Everyone is due to present to the Constitutional Court, on its request, documents and information needed for the conduct of proceedings; (2) Exceptionally, in the case when repeated requests of the Constitutional Court in paragraph 1 of this Article have not been complied with, the Constitutional Court may order that the documents shall be seized”*.

Rule 52 [Site or Object Inspection] of the Rules of Procedure

1. **A visit of a site or an inspection of an object may be requested by any party when the fact to be proven cannot be proven through witness examination, expert reports or the presentation of documents.**
 2. **Evidence provided by a site visit or an object inspection may be offered by the party that bears the burden of proof for a fact that may be proven by a visit to the site or an inspection of the object.**
 3. **If the site or the object is in possession of a person not a party to the proceedings, the party bearing the burden of proof may apply to the Court for an Order requiring the person to grant access to the site or to the object to be examined. The Court shall grant the Order if the site visit or object inspection is necessary in the interests of justice. If the person directed by the Court to comply fails without reasonable cause to allow access to the site or the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief.**
- I. It is assumed that the requesting party submits the request to the Court and produces compelling reasons that such a visit or inspection is the only way to prove the relevant fact. If not, the request risks to be turned down by the Court. If granted, the Court will first need to decide whether it should delegate the task to an

expert or to one or more judges of the Court, pursuant to Rule 45(2), who will have to report back to the full Court. Certainly the visit or inspection should take place in the presence of the other party and/or representative in order to comply with the “equality of arms” principle. The Rule is silent on the question, whether or not the Court may decide to visit a site or inspect an object on its own motion (*ex officio*). Presumably, minutes of the site visit or object inspection are to be taken by a legal advisor or a staff member of the Secretariat.

II. Rule 52(2) does not seem to be sufficiently clear. According to the previous paragraph, a visit of a site or an inspection of an object may be requested by any party when the fact to be proven cannot be proven through other means. Thus, it is not clear why that same party may now “offer” to the Court the same evidence which the Court collected itself during the visit or inspection. What the Rule probably means to say is that the party bearing the burden of proof for a specific fact offers to the Court the evidence, which the Court would, otherwise, have obtained by a site visit or an object inspection.

III. The purpose of Rule 52(3) appears to be that the party bearing the burden of proof wants to seek the assistance of the Court in order to obtain access to the relevant site or object, since he/she fears to be refused (or indeed has already been refused) access by a person who is in the possession of that site or object, but who is not a party to the proceedings. However, as provided by the Rule, before granting the Order, the Court will first need to assess, whether the site visit or object inspection is necessary in the interests of justice. If the Order is granted, but the person concerned fails without reasonable cause to allow access, thereby ignoring the Order (amounting to “contempt of Court”), the Court may impose a financial penalty not exceeding 500 Euro or order other relief (what is meant with “other relief”, mentioned by the Rule, is unclear, but may mean: to obtain access to the site or object by force, although it may be questionable whether the Court has such powers).

As to the imposition of a financial penalty by the Court under this Rule on the person, unwilling to allow access to the site or object in his/her possession (the Rule erroneously mentions the “document” instead of the “object”), reference is made to the comments on Rules 46, 48, 51(4) and 51(5), which are equally valid here.

Rule 53 [Amicus Curiae] of the Rules of Procedure

The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court.⁴⁴²

⁴⁴² See for details about the definition, origin and role of an amicus curiae: Laura van den Eynde, “An Empirical Look at the Amicus Curiae Practice of Human Rights NGO’s before the European Court of Human Rights,” Dissertation at Stanford Law School,

The reason for inviting an organization (like social groups, minority associations, professional associations, trade unions, specialized institutions and other interest groups) or person as *amicus curiae* to the proceedings before the Court, is that the *amicus* may possess specialized knowledge of specific issues which could assist the Court in a better understanding of all or part of the features of the case at issue. Also the expert, nominated by the Court under Rule 49⁴⁴³, assists the Court, but is only appointed at the request of a party and the scope of his/her work is strictly determined by the Court.

Moreover, the organizations and institutions, mentioned above, may, at their own discretion, request the Court to be granted leave to submit written comments or take part in a hearing for the same or other reasons, as when the Court might have invited them. When the Court invites a certain association or professional institution as *amicus curiae* to the proceedings, it could do so with a view to establishing a certain communication with the people, whose voice could be heard through the *amicus curiae* concerned. Depending on the referral, the Court could see this as part of the implementation of its outreach efforts⁴⁴⁴, meant to make the public aware of the purpose and powers of the Court. After having been invited, the *amicus curiae* can intervene in the way it deems fit on any issue specified by the Court and can even attempt to influence the Court's opinion held in previous cases.

Rule 44 [Third-party intervention] of the Court Rules of the ECtHR contains a similar rule⁴⁴⁵, providing: [...] *the President of the Chamber may, in the interest of the proper administration of justice, as provided in Article 36.2 of the Convention, invite, or grant leave to [...] or any person concerned who is not the applicant, to submit comments or, in exceptional cases, to take part in a hearing.*⁴⁴⁶ Thus, the invitation or acceptance to provide information by a third party is at the discretion of the President of the Court.

In the Kosovo context, a good example of an institution, well-placed to take on the role of *amicus curiae*, is the institution of the Ombudsperson, which, pursuant to paragraph 1 of Article 132 [Role and Competencies of the Ombudsperson] of the Constitution, *“monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities”*⁴⁴⁷. The Ombudsperson certainly has expertise in specific human rights issues, which may be relevant to a referral, in which he/she wishes to intervene. Such interventions would certainly enhance the role of the Institution of the Ombudsperson and be seen by the public as a solid support of the work of the Court. It would be interesting to see, when invited by the Court as *amicus curiae*, what influence the Ombudsperson may have on the adjudication of the case.

Rule 53 does not mention the possibility that one of the parties may request the Court to invite or grant leave to an *amicus curiae* to appear before the Court, but, in practice,

www.globalgovernancewatch.org/docLib/20140115_on_Amicus_Curiae_Practice_of_NGOs_at_ECHR.pdf
 Netherlands Quarterly of Human Rights, Vol.31/3, 271-313, 2013.

⁴⁴³ See comments on Rule 49 above.

⁴⁴⁴ See the Court's Strategic Plan 2000 – 2013.

⁴⁴⁵ See World Organisation against Torture (OMCT), Article 3 ECHR, A Practitioners Handbook, Part I., Overview of the Council of Europe, the Court, and its Proceedings, Chapter 1.12 [Third Party Interventions (*Amicus Curiae*)], Page 67; www.omct.org/files/2006/11/3633/handbook1_eng_01_part1.pdf

⁴⁴⁶ ECtHR Rules of Court, July 2009, Registry of the Court, Strasbourg.

⁴⁴⁷ See, Articles 132 to 135 of Chapter XII [Independent Institutions] of the Constitution.

this may not be excluded, if the party's request to the Court contains sufficient reasons showing the expertise of the amicus in the case at issue and the manner in which the amicus could contribute to a better understanding of the specificities of the case. So far, the Court has granted leave to an organization or person to intervene in the proceedings as amicus curiae, for instance, in Case KO 97/12, *Applicant Ombudsperson*, Judgment of 12 April 2013⁴⁴⁸, where the Court, pursuant to Rule 53, sent an invitation to Pallaska & Associates LLC, to file a written Amicus Curiae brief with the Court containing the legal stance to the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093.

Examples of similar provisions on the amicus curiae issue can be found in, for instance, the German Federal Constitutional Court Act, in its Article 27a, providing: *"The Federal Constitutional Court may invite expert third parties to give an opinion."* Also Article 47 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, reading: *"The participants in the proceedings shall be invited to the public hearing. If necessary, the Court shall also invite to the public hearing the persons who may submit expert opinions and statements relevant to the adoption of a decision"*, could be interpreted as enabling the Constitutional Court to invite – apart from experts – also amicus curiae to a public hearing. However, third parties who would like to be granted leave to submit information or make statements at the hearing are not mentioned. The same is true for Article 51 [The calling of Public hearings], paragraph 4, of the Rules of Procedure of the Constitutional Court of Slovenia, providing: *"In addition to the participants in proceedings, the Constitutional Court may also decide to summon other persons to attend public hearings if they might contribute to the resolution of a matter which is the subject of the proceedings. In such case, the judge rapporteur also decides which parts of the case file are to be sent to these persons with the summons"*. The term *"other persons"* seems to cover both experts and amicus curiae.

However, as mentioned above, even if the Rules do not provide for the possibility that a third party submits a request to the Court to be granted leave to take part in the hearing, the Court may do so, if it considers that it is in the interest of the proper administration of justice in the case before it.

Rule 53, however, is silent on the issue, whether a request for leave by a third party should comply with any specific requirements. In this situation, recourse may be had to Rule 44.2(b) of the ECtHR Rules of Court, stipulating: *"Requests for leave [...] must be duly reasoned [...]"*.⁴⁴⁹

Article 26 [Cooperation with other Public Authorities]

All courts and public authorities of the Republic of Kosovo are obliged to support the work of the Constitutional Court and to fully cooperate with the Constitutional Court upon request of the Constitutional Court.

⁴⁴⁸ See, Bulletin of Case Law 2013; and on the Court's webpage.

⁴⁴⁹ ECtHR Rules of Court, July 2009, Registry of the Court, Strasbourg.

Apart from the unnecessary reference to courts which are also public authorities, the title of the Article does not properly reflect the contents of the Article and should better read: “Cooperation with the Constitutional Court”.

The support of the work of the Court and cooperation with the Court have many features and do not always concern the decision-making powers of the Court under Article 116 of the Constitution, for instance, the allocation to the Court of the necessary financial means by the Assembly, based on a budgetary proposal established by the Court, as laid down in Article 112 [General Principles] of the Constitution⁴⁵⁰ and Articles 2 [Organization of the Work of the Constitutional Court](1) and 14 [Budget] of the Law (see comments on Articles 2 and 14 above). By virtue of these provisions, the Court shall enjoy organizational, administrative and financial independence and be funded from the budget of the Republic of Kosovo, as adopted by the Assembly. It also means the obligation of the competent authorities to put at the disposal of the Court the necessary court premises and other necessary infrastructure, if not covered by the Court’s budget.

Another example of the obligation of public authorities to support the work of the Court and to fully cooperate with the Court at its request, is laid down in Article 116 [Legal Effect of Decisions], paragraph 2, of the Constitution, authorizing the Court to impose interim measures. Article 116 is implemented by Article 27 [Interim Measures] of the Law as well as by Rules 54 [Request for Interim Measures] and 55 [Decision on Interim Measures]) of Chapter VI. [Interim Measures] and Rule 64 [Interim Measures] of Chapter VIII [Special Provisions on Certain Procedures under Article 113 of the Constitution] of the Rules of Procedure. These provisions clearly imply that the cooperation of the institutions with the Court is mandatory (see comments on these provisions hereafter) and necessary for the implementation of the Court’s order of interim measures.

The obligation of all state bodies to observe the Constitution and the constitutional order is strengthened in a democratic state under the rule of law by what is known as institutional loyalty between constitutional bodies. The Federal Constitutional Court defines such loyalty by stating that supreme constitutional bodies are constitutionally obliged to exercise mutual consideration⁴⁵¹. From this it follows that already due to the institutional loyalty between constitutional bodies, every supreme state body (and accordingly, all state institutions which are subsequent in rank) has to comply with the constitutional court’s decisions. This is not a particularity of the relation of the supreme state bodies to the constitutional court, but rather something that goes without saying in a democratic state under the rule of law⁴⁵².

There can be no doubt that the implementation of decisions of the Constitutional Court by all courts and public authorities must also be considered to fall within the scope of Article 26, in particular, when, as explicitly stated in the Court’s judgments, their full

⁴⁵⁰ Article 112 [General Principles], paragraph 2, “The Constitutional Court is fully independent in the performance of its responsibilities.”

⁴⁵¹ BVerfGG 35, 193(199).

⁴⁵² See Report “Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany” by Mr. Siegfried Bross, Judge of the German Constitutional Court, at the Conference on “Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice”, Baku, Azerbaijan, 14-15 July 2008.

cooperation to implement the Court's judgments is explicitly requested. It is not clear for what reason the legislature did not deal with this issue under Article 20 [Decisions] of the Law, since that Article regulates the contents, publicity and entry into force of Court decisions, but does not deal with the binding effect of the Court's decisions, as laid down in Article 116 [Legal Effect of Decisions] of the Constitution: "*1. Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo*". No other Article of the Law deals with the binding effect of the Court's decisions either.

But even in the absence of implementing legislation on the binding effect and efficient execution of the Court's decisions, all institutions and authorities are bound to implement them under Article 116.1 of the Constitution. Moreover, in a truly democratic state where trust between authorities exists, decisions of the Constitutional Court are respected, not only as to their interpretation, but also by executing them efficiently and without delay. Implementation of decisions depends to a great extent on the Court's image in society, its authority and respect demonstrated by other institutions and authorities. The more the society knows about the Court, the more it follows the Court's decisions and will not tolerate the inactivity of the executive in the implementation of such decisions⁴⁵³.

In fact, not the Law, but the Rules of Procedure deal with the implementation of Court decisions, for instance, Rule 57 [Content of decisions], paragraph 5, as well as Rules 63 [Enforcement of decisions], 65 [Judgment], 66 [Legal Effects of Judgment], 70 [Judgment], 74 [Judgment] and 77 [Judgment] of Chapter VIII. [Special Provisions on Certain Procedures under Article 113 of the Constitution]. These Rules will be commented on hereafter.

Rule 57 [Content of decisions], paragraph 5, of the Rules of Procedure

The operative provisions [of the decision] shall state the manner of the implementation of the Judgment, Resolution or other Order and when the decision shall take effect and whom the decision shall be served. (new text)

When adopting Rule 57 (5), the Court may have intended to define that the operative provisions of its decisions should clearly state the manner of implementation and date of their entry into force as well as the parties on whom the decisions should be served. But Rule 57(5) does not clearly state that the Court also needs to indicate the authority which should implement the judgment. It is true that, normally, the authorities on whom the decision will be served are also the implementing authorities, but, in order to avoid any misunderstanding or confusion to that effect, one could have expected that the Rule would also have instructed the Court to expressly mention the authorities responsible for the execution of the judgment.

As to the manner in which the Court decisions must be implemented, Rule 57(5) is clear: "*the operative provisions shall state the manner of the implementation of the*

⁴⁵³ See Report "Authority of the Constitutional Court as the precondition of execution of the Decisions" by Mr. Gunars Kutris, President of the Constitutional Court of Latvia, Conference on "Execution of the Decisions of Constitutional Courts, Venice Commission, Baku, Azerbaijan, 14-15 July 2008, CDL-JU(2008)028..

Judgment, Resolution or Order [...]’. Thus, according to the Rule, the manner of implementation needs to (“shall”) be stated, though it is certainly up to the Court to decide how precise it would like to be in doing so. In most of the cases, the operative provisions of the Court’s judgments are self-explanatory, but if, in the opinion of the responding or implementing party, the manner in which the judgment needs to be implemented is not precise enough, it may request the Court for a clarification.

So far, there have been several cases, where the responding party apparently ignored to implement the judgment and, instead, requested the Court to reply to a number of questions regarding the interpretation of the operative provisions of its judgment. For instance, in Case KI 08/09, The Independent Union of Workers of IMK Steel Factory in Ferizaj Clarification of Judgment of 12 May 2011⁴⁵⁴, the Court issued a clarification of its judgment of 17 December 2010⁴⁵⁵, in which it had ruled in the operative part: *“III. Holds that the final and binding decision of the Municipal Court of Ferizaj must be executed by the competent authorities, in particular, the Government and the Privatization Agency of Kosovo, as the legal successor of KTA”*. One month later, the Court received a request for clarification from the Privatization Agency of Kosovo, containing two questions in respect of the Court’s Judgment. In its clarification, the Court set out the legal limits for assessing such requests by stating that: *“The answers to the above questions are given by the Court taking into account the legal basis above mentioned, together with the legitimacy, the pertinence and relevance of the requests and the limits of the subject matter of the petition, which is at the basis of the judgment taken in the case. Therefore, bearing in mind that the Court is bound by the limits of its judgment and is not legally authorized to go beyond those limits, the questions are clarified as follows hereafter”*.

So, if the Court, in the operative provisions (enacting clause), has not clearly mentioned the manner in which the judgment has to be implemented, the Clarification cannot go beyond the limits of the judgment.

A further example of a clarification of a Court’s judgment is Case No. KO 29/11, Sabriti Hamiti and other Deputies, Clarification of Judgment of 1 April 2011⁴⁵⁶, where the Court replied to three questions submitted by the President of the Assembly, the President of the Republic of Kosovo and the Government concerning the implementation of the Court’s Judgment in the case of 30 March 2011⁴⁵⁷.

However, it is not clear how Resolutions can be implemented, since, pursuant to Rule 56 [Types of Decisions], they only concern the inadmissibility of a referral. However, in a Resolution on Inadmissibility, the Court may use the opportunity to indicate to the responding party that, despite the inadmissibility of the referral, it could act in a specific manner, as happened in Case No. KI 14/09, Heirs of Ymer Loxha and Sehit Loxha, Resolution on Inadmissibility of 15 October 2010, Bulletin of Case Law 2009-2010, page 276, where the Court reminded the authorities of the Republic of Kosovo: “to establish an independent mechanism to formulate the policy, legislative and institutional framework for addressing property restitution issues, as required by Annex VII, Article 6(1) of the Comprehensive Proposal for the Kosovo Status

⁴⁵⁴ See for details: Bulletin of Case Law 2011, page 214; and on the Court’s webpage.

⁴⁵⁵ See for details: Bulletin of Case Law 2009-2010, page 417; and on the Court’s webpage.

⁴⁵⁶ See for details: Bulletin of Case Law 2011, page 174; and on the Court’s webpage.

⁴⁵⁷ See for details: Bulletin of Case Law 2011, page 128; and on the Court’s webpage.

Settlement, and the Assembly to adopt a Law on Restitution, pursuant to Article 143 of the Constitution in conjunction with Article 2(1)3 of Annex XII [Legislative Agenda] of the Comprehensive Proposal for Kosovo”

Rule 63 [Enforcement of Decisions] of the Rules of Procedure

- 1. The decisions of the Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.**
- 2. All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.**
- 3. All physical and legal persons are obligated to respect and to comply with the decisions of the Court.**
- 4. The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.**
- 5. The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.**
- 6. In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette.**
- 7. The State Prosecutor shall be informed of all decisions of the Court that have not been enforced.**
- 8. The Secretariat, under the supervision of the Judge who in accordance with Rule 44 drafted the decision, shall follow up the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken.**

Before commenting on the Rule, it is necessary to say a word about its location on page 30 of the Rules of Procedure, where it erroneously forms part of Chapter VIII [Special Provisions on Certain Procedures under 113 of the Constitution]. However, the Rule clearly falls under Chapter VII [Decisions] and should have appeared on page 30 as Rule 62. The present Rule 62 [Request for Review] dealing with the filing of a referral as specified in Article 113.2(1) and (2) of the Constitution clearly belongs to Chapter VIII mentioned above, where it supplements Article 29 [Accuracy of the Referral], and should appear as Rule 63. In order to rectify the error, it is suggested that the present Articles 62 and 63 would be swapped at the next amendment of the Rules of Procedure. In the following comments, the present order is being maintained.

In this connection and as commented above in a similar manner regarding other Rules, it is important to mention that the contents of Rule 63 which create obligations for “*the judiciary and all persons and institutions of the Republic of Kosovo*” rather belong in a normative act adopted by the Assembly instead of a Rule of the Court. This remark is equally valid for the other paragraphs of Rule 63.

- I. The text of Rule 63(1) is identical to the one of Article 116.1 of the Constitution⁴⁵⁸. In the absence of a similar provision in the Law, the Court must have intended to repair this lacuna by inserting a text identical to the one of Article 116.1 of the Constitution into the Rules of Procedure. Although neither the Constitution, nor the Rule explicitly provides that the Court's decisions are also final, it is clear that the principle of almost all European states that decisions rendered by their constitutional courts are final, is equally valid for the Court's decisions. As an exception, for instance, findings of unconstitutionality made by the Portuguese Constitutional Tribunal may be defeated in certain conditions⁴⁵⁹.

Thus, provisions similar to Article 116.1 of the Constitution and Rule 63(1) of the Rules of Procedure can be found in the constitutions of most other countries with a constitutional court. Under the rule of law in a democratic state, the assumption is that all state bodies act in accordance with the Constitution under their own responsibility and that, when the constitutional court is called upon to exercise an ultimate control in exceptional cases, they are obliged to follow its decisions.

As mentioned in the comments on Article 26 [Cooperation with other Public Authorities], the obligation of all state bodies to observe the Constitution and the constitutional order is strengthened in a democratic state under the rule of law by what is known, as mentioned above, as institutional loyalty between constitutional bodies which as a consequence have to comply with constitutional court decisions. Therefore, the non-execution of constitutional court decisions will only arise in exceptional cases, because each state body must regard itself as a guardian of the Constitution.

Thus, if constitutional courts decide in exceptional cases, the binding force of its decisions will be of utmost importance, since their effect may not just be restricted to the parties involved in the proceedings, but could have far-reaching consequences for the legal order and society as well. The fact that constitutional court decisions are ordered to have a binding effect on the constitutional bodies of a state as well as on courts and authorities, which gives such decisions the same force and effect as a statute adopted by parliament, would not make sense, if the constitutional court was regarded only as a court like the regular courts⁴⁶⁰. The

⁴⁵⁸ Article 116.1 of the Constitution provides: "*Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo*".

⁴⁵⁹ Where an act has been found unconstitutional, the President of the Republic, who has a mandatory suspensive veto, must return it to Parliament. However, his veto can be overridden, if Parliament approves it again by a two-third majority of the Members present, where that majority is larger than the absolute majority of the Members entitled to vote. Depending on the case, the act may end up again at the President, and he shall promulgate the law or sign the international treaty – or refuse to do so (Articles 279-2 and – of the Constitution of Portugal). In that case, the law or the international treaty cannot be enacted and applied (See Venice Commission publication, III. Enforcement of the Constitutional Court decisions, Puskas Valentin Zoltan, Judge and Benke Karoly, Assistant Magistrate in Chief, p.250), constcourt.ge/files/journal_2012_eng.pdf.

⁴⁶⁰ See Report "Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany" by Mr. Siegfried Bross, Judge of the German Constitutional Court, at the Conference on "Execution of the Decisions of Constitutional Courts: a Cornerstone of the Process of Implementation of Constitutional Justice", Baku, Azerbaijan, 14-15 July 2008.

execution of constitutional court decisions can, therefore, not be compared to that of decisions of such courts.

It is further remarked that the text of Rule 63(1) does not define the day on which the binding force of the Court decisions takes effect. This is regulated by paragraph 5 of Article 20 [Decisions] of the Law⁴⁶¹, providing: “A *Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision* “. Article 20.5 implements Article 116.3 of the Constitution, stipulating: “*If not otherwise provided by the Constitutional Court decision, the repeal of the law or other act or action is effective on the day of the publication of the Court decision* “.

Thus, on the day on which they are published in the Official Gazette, the Court decisions must be executed (unless the Court has decided otherwise), meaning that the duties which are contained in the Court decisions must be enforced by the implementing authorities. However, no legal mechanism exists in the Kosovo legal order for the actual execution of the Court’s judgments. The text of Article 116.1 of the Constitution and Article 20.5 of the Law providing that Court decisions are binding on everybody (courts, persons and institutions) may, therefore, lead to a difference of opinion between, for instance, constitutional law experts, regular court judges and judges of the Constitutional Court.

Moreover, the legitimate question may arise whether enforceable decisions of the Court are binding in every case and for everybody (*erga omnes*) or also in other comparable cases? Or are they binding for everybody, but only in the specific case decided by the Court or only for the parties to the dispute?⁴⁶²

In this respect, one may interpret the above Articles 116.1 and 20.5 restrictively by holding, on the one hand, that the only Court judgments which are generally binding in the full sense are those which annul laws and other general acts, and, on the other hand, that Court decisions annulling individual decisions like court judgments must only be respected by the constitutionally concerned third parties, the parties and the institutions related to the case.

Or, one may interpret the above Articles more extensively by holding that Court decisions are generally binding even in cases in which judgments of regular courts are annulled and that everybody is obliged to respect the Court decisions both in the relevant case and in any comparable dispute before the regular courts.

Another interpretation issue which arises concerns the question which part of the Court decision annulling a regular court judgment is binding. Is it just the operative part of the Court’s judgment which is binding, or is the statement, containing the legal reasoning, also binding? And in addition, is that statement, containing the legal reasoning, binding in any comparable legal dispute?

Restrictive interpreters will argue that the Court’s legal reasoning is not binding at all, certainly not in future cases, since the Constitution does not support such an

⁴⁶¹ See, comments of Article 20.5 above.

⁴⁶² These and the suggestions, which follow, are based on the Report of Mr Vojen Guettler, Judge in the Constitutional Court of the Czech Republic, entitled: “Execution of Judgments of the Constitutional Court of the Czech Republic, and presented at the Seminar on “The efficiency of Constitutional Justice in a Society in Transition, held in Yerevan, Armenia, 6-7 October 2000, organized by the Venice Commission in cooperation with the Constitutional Court of Armenia (CDL-JU(2000)040).

interpretation. Only the operative provisions of the judgment are enforceable and binding on the parties. However, the constitutional doctrine is commonly to be found not in the ruling, but in the legal reasoning, especially in the *ratio decidendi*, elaborated by the Constitutional Court. In consequence, the Court's arguments are considerably more important than the decision itself to the understanding of the real contents of one judgment.⁴⁶³

On the other hand, more extensive interpreters may hold that, since the statement containing the legal reasoning is part of the binding Court decision, it is equally binding.⁴⁶⁴ In that case, the legal reasoning is not only binding in the specific case decided by the Court, but also in other comparable legal disputes. If a regular court does not respect this principle, the Court may be requested to annul a new judgment of that regular court, which is almost identical to the one the Court already annulled. Such a situation causes a waste of energy and time and will have a negative effect on the citizens, who cannot understand why regular courts do not respect the Court's legal reasoning.

Furthermore, the question needs to be answered whether the Court judgments which annul general acts are valid from the day of the publication of those judgments (*ex nunc*) or retroactively from the day of the adoption of such general acts (*ex tunc*) or even for the future (*pro futuro*), if so decided by the Court. As can be seen from the Court's judgments, they are mostly valid with immediate effect, meaning that they enter into force on the date of the judgment.⁴⁶⁵ In this respect, reference is made to Articles 116.3 and (4) of the Constitution. So far, the Court has not given retroactive or future effect to any of its judgments..

And, finally, how can regular courts be forced to execute the Court's judgments annulling their decisions, if, as mentioned above, no legal enforcement mechanism exists in the Kosovo legal order to force them to do so. One could argue that, if the regular courts would not do so, such a refusal would be considered as a denial of justice, which might lead to disciplinary proceedings under the Law on Courts and, possibly, claims for compensation instituted against the individual judges by the party whose constitutional complaint had been granted by the Court. The winning party may also return to the Court requesting it to issue a statement, by virtue of Article 116.1 of the Constitution, that the resisting court has not executed the Court's judgment, contrary to Rules 63(1) and (2). However, so far, courts have systematically executed the Court's judgments.

A similar issue may arise, if regular courts do not respect the legal reasoning of the Court's judgments, but only the operative provisions or misinterpret the Court's judgment. In such cases, the applicant concerned should be able to seize the Court regarding the issue and request it to issue a clarification of its judgment to the court

⁴⁶³ See Workshop on "principles of Constitutional Control, Techniques of Constitutional and Statutory Interpretation, Kyiv, 5-6 June 1998, organized by the Constitutional Court of Ukraine, ARD/CHECCHI and the Venice Commission, Techniques of constitutional interpretation by the European Constitutional Courts by Prof. Alejandro Saiz Arnaiz, University of the Basque Country (Spain), CDL-JU(98)24, [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(1998\)024-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(1998)024-e).

⁴⁶⁴ Idem

⁴⁶⁵ See, for instance, Case No. KI 11/09, mentioned above and Judgment of 30 October 2010 in Case No. KI 06/10, Valon Bislimi vs Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice, Bulletin of Case Law 2009-2010, p. 344..

concerned. Moreover, if the regular court itself is of the opinion that the Court's judgement is not clear enough or leaves room for different interpretations, it should be able to request the Court for such a clarification.

II. Rule 63(2) rather elaborates the consequences of the binding effect of decisions of the Court mentioned in the previous paragraph. The notion of "constitutional organs" is certainly meant to embrace all state bodies defined in the Constitution, while "courts and authorities" apparently stands for all other courts and public authorities in Kosovo.

For instance, as to the Assembly of Kosovo as a constitutional organ, its Rules of Procedure regulate the manner in which it has to respect, comply and enforce the Court's decision that a law, in whole or in part, is unconstitutional. To that effect Article 35 [Enforcement of Decisions of the Constitutional Court] of the Rules of Procedure of the Assembly provides that: "*1. The President of the Assembly shall inform Members of the Assembly and the Government of the decision of the Constitutional Court. 2. The President of the Assembly shall seek from the sponsor of the act and bodies of the Assembly to start the preparation of the Act as a whole or parts of it in compliance with the content of the decision of the Constitutional Court*".

The respect, compliance and enforcement of the decisions of the Court by all institutions mentioned is essential in order for them to show respect for the Constitution, the constitutional order of Kosovo and the rule of law. Thus, as already mentioned earlier, the implementation of the Court's decisions depends also on good cooperation and communication as well as mutual understanding and respect between the Court and all institutions in Kosovo.

For instance, using again the example of the Assembly, when the Court has declared one or more legal provisions or law unconstitutional, it could simply delete the provision(s) or law and leave it to the legislature to implement its decision pursuant to Article 35 of the Assembly Rules of Procedure. However, the immediate deletion of the provision(s) or law may leave a legal vacuum and, therefore, create a difficult situation, taking into account that the legislature will need time to adopt (a) new provision(s) or a new law. So, the Court may delay⁴⁶⁶ the date of the invalidity of the provision(s) or the law (and, possibly, indicate whether or not the unconstitutional provision(s) or law should be applied in the meantime differently or at all) and, at the same time, make sure that the legislature will adopt such new provision(s) or law within the time limit set by the Court.⁴⁶⁷

However, the implementation of decisions is not the task of the Court, but it will, although not expressly mentioned in Article 116 of the Constitution, at least monitor their execution as defined in Rule 63(6) and (7) (see comments hereafter).

III. Rule 63(3) does not just refer to "all persons" as does Rule 63(1), but refers more precisely to "*all physical persons*" (Article 113.7 of the Constitution uses the term

⁴⁶⁶ The Court may do so under Article 20.5 of the Law, providing: "A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision".

⁴⁶⁷ See the above Report of Dr Siegfried Bross, Venice Commission Conference in Azerbaijan.

“individuals”) and “all legal persons” (as mentioned in Article 21.4 of the Constitution⁴⁶⁸). The Rule is silent on the issue, what the consequences would be for those persons, who disrespect the Court’s decision and do not comply with it. It would be a good thing, if such disrespect would entail legal sanctions as provided for by Article 81 [Enforcement of Decisions] of the Albanian Constitutional Court Act, stipulating in its paragraph 4 that: “Persons who fail to enforce the decisions of the Constitutional Court, or obstruct their enforcement, if their actions do not constitute a criminal offence, shall be fined up to 100.000 Lek by the President of the Constitutional Court, whose decision shall be final and shall constitute an executive title.”

- IV. Neither the Constitution nor Rule 63(4) clearly defines that, in its decision, the Court may determine which institution will be tasked to execute it. Only Rule 63(5) refers to “The body under the obligation to enforce the decision of the Constitutional Court”, but this reference does not explicitly state that the body concerned was expressly mentioned in the Court’s judgment. For instance, Section 35 of the German Federal Court Act provides that the Federal Constitutional Court may state in its decision by whom the decision is to be executed. Also the Constitutional Court Act of Slovenia is more specific by expressly stipulating in its Article 40(2) that, “if necessary, the Constitutional Court determines which authority must implement the decision and in what manner [...].”

However, even if no explicit reference to such power of the Court exists, there does not seem to be any impediment for the Court to interpret its powers under Rule 63(4) in this manner.

In fact, the case-law of the Court already contains several examples of cases, where, in its judgment, the Court specified both the manner and time-limit for its implementation as well as the institution(s) which were obligated to enforce the decision. For instance, in Case KO 01/09, Judgment of 18 March 2010⁴⁶⁹, Cemalij Kurtise and the Municipal Assembly of Prizren, referred to the Court by the Deputy Chairperson of the Municipal Assembly for Communities of the Municipality of Prizren⁴⁷⁰, the latter challenged Article 7 of the Municipal Statute on the Municipal Emblem, regulating that the municipal emblem consists of the house of the League of Prizren, the year 1878 and the inscription “Prizren”. He alleged thereby that proceedings foreseen under the law had not been respected, that requests and remarks of communities related to the emblem had not been taken into account, and that this emblem did not reflect the multi-ethnicity of the Municipality. He further claimed that constitutional rights of other non-majority communities in the Municipality were violated, in particular, the right to equality before the law and to protection, preservation and development of their identity, and that there was violation of the Law on Local Self-Government, and of the Law on Protection of Community Rights.

⁴⁶⁸ Article 21.4 of the Constitution provides: “Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”.

⁴⁶⁹ Published in Bulletin of Case Law 2009-2011, page 73 and on the Court’s webpage.

⁴⁷⁰ The Applicant was authorized to submit the Referral directly to the Constitutional Court on the basis of Article 62 [Representation in the Institutions of Self-Government], paragraph 4 of the Constitution.

The Court decided that Article 7 of the Municipal Statute was incompatible with Articles 3 [Equality before the Law], 7.1 [Values], 58 [Responsibilities of the State] and 59 [Rights of Communities and their Members] and ordered the Municipality of Prizren to amend its Statute within a period of three months from the delivery of the judgment in order to bring it into conformity with the Constitution and to not exclude the non-majority Communities.

A further example is Case No. KI 08/09⁴⁷¹, submitted to the Court by the Independent Union of Workers of IMK Steel Factory in Ferizaj, requesting the constitutional review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001, dated 11 January 2002, alleging violation of the principle *res judicata* by the failure to execute a final judgment of the Municipal Court in Ferizaj, which had approved the request for compensation of unpaid salaries to the former employees of this enterprise, for the reason that they had been illegally dismissed from work. The Applicant alleged that, by the non-execution of the final court decision, their right to work and exercise a profession as well as their right to a fair and impartial trial had been violated. The Court held that there had been a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution in conjunction with Articles 6 [Right to a Fair Trial] and 13 [Right to an Effective Remedy] ECHR and that the final and binding decision of the Municipal Court in Ferizaj must be executed by the competent authorities, in particular, the Government and the Privatization Agency of Kosovo, as the legal successor of the Kosovo Privatization Agency. The Court also ruled that the Government and the Privatization Agency of Kosovo should submit, in a six months period, information about the measures taken to enforce the judgment.

Thus, the above judgments clearly show that the Court understands the Rule in a much broader sense, including the power to expressly state the institutions obligated to execute the judgments in a certain manner and within a certain period. To what extent the Court would be prepared to set out in the operative provisions of its judgment the details of the manner in which the Assembly would need to amend legal provisions which the Court has found to be unconstitutional, is uncertain⁴⁷². In view of the principle of the separation of powers, the Court does not correct mistakes made by the legislature. It only identifies the compliance or non-compliance of a legal provision or an entire law with the Constitution and, in case it has found that the provision or law is unconstitutional, the legislature is obligated to correct the mistake. However, due to the above principle, the Court may be hesitant to be too much outspoken when defining the manner in which its decision should be executed in order to avoid to be considered as wishing to sit on the chair of the legislature or the executive as a positive legislature.

Certainly, as mentioned in the comments on Rule 63(1), the Court should indicate whether the unconstitutional provision or law will be (1) null and void from the day of its adoption (*ex tunc*), (2) be abrogated on the date of the publication of the

⁴⁷¹ Also referred to in connection with the clarification of a judgment, see above Rule 57(5).

⁴⁷² See Report "Authority of the Constitutional Court as the precondition of execution of the decisions" by Mr. Gunars Kutris, President of the Constitutional Court of Latvia, Conference on Execution of Decisions of Constitutional Courts organized by the Venice Commission in Baku, Azerbaijan, 14-15 July 2008.

Court's judgment in the Official Gazette (*ex nunc*) or as specified by the Court (*pro futuro*).

How far a constitutional court could go in specifying in its judgment the manner in which the judgment should be implemented by providing a detailed outline of the text of new legislation which should replace legislation found to be unconstitutional, is shown by the Federal Constitutional Court of Germany⁴⁷³, which ruled in its decision BVerfGE 99, 300 (304) on a case about the civil service law and the law concerning judges in the Federal Republic of Germany that the existing legal situation was unconstitutional, but fixed a transitional period of slightly more than a year for a new regulation⁴⁷⁴.

Moreover, it ordered that the event that the legislature did not comply with its mandate to adopt anew regulation, a specific payment had to be made to the civil servants and judges affected from the day following the expiry of the time limit. In this case, the concretization by earlier case law of the Federal Constitutional Court (BVerfGE 44, 249 and 81, 363) which, however, had been disregarded by the legislature, was so narrow and so highly differentiated as regards its details that it was possible for the Federal Constitutional Court itself to provide "execution" by determining a payment in such a specific manner⁴⁷⁵.

In this connection, it is interesting to note that in some jurisdictions the enforcement of the judgments of the Constitutional Court is entrusted to a specific institution, like in Austria, where the execution of judgments of the constitutional court is not left to the relevant authorities, but to the Federal President⁴⁷⁶, with the exception of judgments concerning monetary claims under public law⁴⁷⁷ and those on differences of opinion regarding the interpretation of provisions regulating the competence of the Audit Office⁴⁷⁸, the execution of which is entrusted to the regular courts. Furthermore, in cases of disputes regarding conflicts of competence between certain state organs (for instance, between regular courts and administrative authorities, between the Constitutional Court and other courts, between the Federation and one Land, etc.) execution of the judgment is impossible, because the Constitutional Court judgment itself resolves the competence question by way of a declaratory act⁴⁷⁹.

A further example concerns judgments annulling a statute or an ordinance or declaring the illegality of an international treaty is not enforceable, because the annulment occurs *eo ipso* as a rule with the promulgation of the findings of the

⁴⁷³ Section 35 of the Federal Constitutional Court Act provides that in individual cases, the Federal Constitutional Court can also regulate the manner of execution.

⁴⁷⁴ Decision of 24. November 1998 - 2 BvL 26/91 u.a. - (BVerfGE 99, 300 <304>)

⁴⁷⁵ See the Report of Dr Siegfried Bross, Venice Commission Seminar in Azerbaijan: Reflection on the Execution of Constitutional Court Decision in a Democratic State under the Rule of Law on the Basis of the Constitutional Law, Situation in the Federal Republic of Germany. Conference on Execution of the Decision of the Constitutional Courts, Baku, Azerbaijan (14-15 July 2008).

⁴⁷⁶ See Article 146(2) B-VG (Law on the Constitutional Court of Austria).

⁴⁷⁷ See Article 137 B-VG.

⁴⁷⁸ See Article 126a B-VG.

⁴⁷⁹ See Report "Effects and Execution of Constitutional Court Judgments", by Ms. Britta Wagner, Secretary General, Constitutional Court, Austria, presented at the Mini Conference on Effects and execution of constitutional review decisions", organized by the Venice Commission in Tallinn, 19 June 2009, CDL-JU(2009)013.

Constitutional Court's judgments in the respective Law Gazettes. The obligation to promulgate the finding of the Constitutional Court might be executed under the condition that the Court has so pronounced in its finding⁴⁸⁰.

Finally, the Report concludes that the Austrian Constitutional Court is a highly respected state organ, not only by the general public, but also by the institutions subject to its review. Therefore, the enforcement of Constitutional Court judgments generally does not cause any problems, since, as a rule, the other state organs voluntarily comply with these judgments.

The Rule also defines that in its judgment the Court may specify a time limit for the enforcement of its decision and return the case to the body responsible for the unconstitutional act, ordering it to rectify the situation within that time limit. In the cases cited above, the Court has actually done so.

- V. The reference to the body under the obligation to enforce the Court's decision does not explicitly entail that the body concerned must have expressly been mentioned in the Court's judgment.

That the Court has already expressly done so, is shown by the operative provisions of both Judgments, cited under the previous paragraph, where the Court required the bodies to implement the decisions and to submit information about the measures taken to execute its decision. In Case 01/09, the Court required the Municipality of Prizren to report to it on progress made in relation to compliance with its Order to amend the Municipal's statute and emblem prior to the expiry of the period of three months from the delivery of the judgment. In Case 08/09, the Court required that the Government and the Privatization Agency of Kosovo should submit to the Court, within a six months period, information about the measures taken to enforce the judgment.

However, as mentioned above, the implementation of decisions is not the task of the Court, but it will, at least, monitor the implementation as defined in Rule 63(7).

- VI. Since the Court is not empowered under the Constitution or the Law to impose sanctions upon uncooperative parties, the only measure the Court has at its disposal is the one under Rule 63(6) providing that the Court renders a ruling regarding the non-enforcement of its judgment and to publish the ruling in the Official Gazette. In this manner, the Court may reach out to other state institutions and authorities as well as to the public and, for instance, the opposition (in case the Assembly is unwilling to pass a new law or new provisions of a law which have been declared unconstitutional) who might be able and willing to put pressure on the authority concerned to implement the judgment.

Also the Federal Constitutional Court does not execute its decisions itself, and problems can arise where the institution affected or the person affected takes the view that the execution has not been performed in accordance with the constitutional court decision. In its decision BVerfGE2, 139, the Federal Constitutional Court ruled that:

"1. Whoever is affected by an act performed by an administrative authority executing a decision of the Federal Constitutional Court can only invoke the

⁴⁸⁰ See Report by Ms. Britta Wagner above.

Federal Constitutional Court's jurisdiction directly by means of a complaint against such act of execution, if the authority has acted on account of a concrete mandate to execute that has been issued by the Federal Constitutional Court, and that does not leave any latitude to the authority's discretion.

2. If the Federal Constitutional Court has assigned the execution to an authority in a general manner, the acts of execution are performed in the authority's own discretion and can only be challenged by means of the remedies generally available against such acts”⁴⁸¹.

The question remains, however, whether there should not be an appropriate institution, besides the implementing authority, to coordinate the prompt and adequate implementation of decisions of the Court. Although the Law does not provide for such an institution, it would not be unreasonable to point to the Government, as the Executive, to take on this role and, if the implementing authority (if it is not the Government or one of its ministries) fails to implement the Court's judgment, to take over the responsibility.

For instance, the Constitutional Court of Latvia, in a judgment of December 2007⁴⁸², drew the attention of the Council of Ministers to its duty to ensure the binding force of the judgments of the Court. As a consequence, the Council of Ministers adopted a Regulation in April 2008, charging the Ministry of Justice with the task to coordinate the executions of the judgments of the Constitutional Court, to prepare informative reports on such executions, to collaborate with the Parliament, to carry out analysis of the judgments, and to prepare a yearly review of the results of the execution of these judgments⁴⁸³. This example may be worth following in the Kosovo context.

VII. Under Rule 63(7), the Secretariat (it may have been more appropriate to mention the Secretary General) is tasked to monitor the enforcement of the judgment under the supervision of the Judge who in accordance with Rule 44 [Deliberations and Voting] drafted the decision, and to report back to the Court with a recommendation for appropriate measures when it turns out that the implementing body does not follow the instructions of the Court laid down in the operative provisions of the judgment.

However, according to Rule 63(6) the only appropriate measure which the Court is authorized to take, is to render a ruling and publish it in the Official Gazette. It is, therefore, not clear what other “appropriate measures” the Secretariat could recommend to the Court.

⁴⁸¹ See the Report of Dr Siegfried Bross, Venice Commission Seminar in Azerbaijan: Reflection on the Execution of Constitutional Court Decision in a Democratic State under the Rule of Law on the Basis of the Constitutional Law, Situation in the Federal Republic of Germany. Conference on Execution of the Decision of the Constitutional Courts, Baku, Azerbaijan (14-15 July 2008).

⁴⁸² Constitutional Court decision No. 2007-12-039 of 21 December 2007.

⁴⁸³ See Report (CDL-JU(2008)028 by Mr. Gunars Kutris, President of the Constitutional Court of Latvia, presented at the Conference on “Execution of the Decisions of Constitutional Court: a Cornerstone of the process of Implementation of Constitutional Justice”, Baku, Azerbaijan, 14-15 July 2008, mentioned above.

Article 27 [Interim Measures]

- 27.1 The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.**
- 27.2 The duration of the interim measures shall be reasonable and proportionate.**

As mentioned above, the competence of the Court to take interim measures is derived from paragraph 2 of Article 116 [Legal Effect of Decisions] of the Constitution, reading as follows: “While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that the application of the contested action or law would result in unrecoverable damages”⁴⁸⁴. For instance, the imposition of such measures can be necessary to avoid situations where, if these measures were not taken, the Court would be prevented from properly dealing with the referral submitted by an applicant and from effectively securing to the applicant the enjoyment of the constitutional rights invoked, if a violation of such rights would be found. In situations arising under Article 113 of the Constitution, the Court could impose such measures *ex officio* or at the request of the authorized parties.

However, the Court will only impose such measures, if the party requesting interim measures has shown a *prima facie* case on the merits of the referral and, if its admissibility has not yet been determined, a *prima facie* case on the admissibility of the referral (see Rule 55 hereafter). At the same time, the party must have submitted sufficient evidence showing that, if the request would not be granted, he/she would suffer unrecoverable damages. So far, a considerable number of applicants has requested the Court to impose an interim measure, however, in most cases without success, their requests having been fully unsubstantiated.

Also in the proceedings before the ECtHR in Strasbourg interim measures play an important role to avoid irreversible situations, which would prevent the ECtHR from properly examining an application and securing to the applicant the enjoyment of the relevant rights, guaranteed by the ECHR, in particular, in cases concerning the imminent deportation or extradition of the applicant to a country, where he/she would run the risk to be subjected to treatment contrary to Articles 2 [Right to life] and 3 [Prohibition of inhuman or degrading treatment] ECHR. The ECtHR’s power is laid down in Rule 39 of the Court Rules, providing as follows:

“1. The Chamber or, where appropriate, its President may, at the request of a party or of any person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. [...]

⁴⁸⁴ Paragraph 2 of Article 116 [Legal effect of Decisions] does not seem to fit under this heading, since it does not concern the legal effect of a decision of the Court, but the stage of proceedings before a decision is taken.

3. *The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.*”

Unlike the Constitutional Court, the ECtHR does not issue any formal decision on the use of interim measures, but the President or Chamber informs the respondent Government of the interim measures which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings. In practice, the ECtHR applies the Rule, as stated above, mostly, if there is an imminent risk of irreparable damage, as may be the case regarding certain deportation and extradition proceedings. As the ECtHR stated very clearly: “[...] *If there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court’s determination of the justification for the measure*”.

As such, being intended to ensure the continued existence of the matter that is the subject of the application, the interim measure goes to the substance of the Convention complaint. As far as the applicant is concerned, the result is that what he or she wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it. Consequently, the interim measure is sought by the applicant, and granted by the ECtHR, in order to facilitate the “effective exercise” of the right of individual petition under Article 34 [Right of Application] of the Convention in the sense of preserving the subject matter of the application, when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State⁴⁸⁵.

In these circumstances, the ECtHR considers that a failure of the respondent Government to comply with the interim measures is to be regarded as preventing the Court from effectively examining the applicant’s complaint and as hindering the effective exercise of his/her right and, accordingly, as a violation of Article 34 of ECHR.

- 1 Article 27.1 does not consider it only a prerogative of the Court to decide on interim measures on its own motion as Article 116.2⁴⁸⁶ of the Constitution suggests, but also entitles the party, meaning any authorized party under Article 113 of the Constitution, submitting the referral, to request the Court the imposition of interim measures. In such a case, the requesting party should submit *prima facie* evidence⁴⁸⁷ that he/she/it will suffer irreparable damages, if the request for interim measures is not granted. Although Article 116.2 of the Constitution uses the wording “unrecoverable” damages and Article 27 of the Law speaks of “irreparable” damages, there does not seem to be a great difference between these terms. If the party has to show “irreparable” damage, the burden of proof may be

⁴⁸⁵ See *Mamatkulov v. Turkey*, Grand Chamber Judgment of 4 February 2005, Application No. 46951/99.

⁴⁸⁶ Article 116.2 of the Constitution provides: “*While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision if the Court finds that application of the contested action would result in unrecoverable damages*”.

⁴⁸⁷ Rule 55 [Decision on Interim Measures], paragraph 4, goes even further than that, stipulating that “...Before the Review Panel may recommend that the request for interim measures be granted, it must find that: [...] (a) the party requesting interim measures has shown a *prima facie* case on the merits of the referral and, if admissibility has not yet been determined, a *prima facie* case on the admissibility of the referral; [...]”.

lighter than to have to show “unrecoverable” damage, meaning that the damage is not only irreparable, but can also not be recovered, for instance, through the payment of compensation.

Moreover, under Article 27.1 of the Law, the legislature has further extended the authority of the Court under Article 116.2 of the Constitution, by granting it the power to also impose an interim measure, if such measure would be, in the Court’s opinion, “in the public interest”. This would mean that, even if the applicant, who asked for the interim measure, would not succeed in showing sufficient evidence that he/she would suffer irreparable damage if the interim measure would not imposed, the Court could still take such a measure, if it would consider the measure to be “in the public interest”, in the sense of “to the benefit of the public”. In Case No. KI 11/09, *Tome Krasniqi vs RTK et Al*,⁴⁸⁸ the Court considered that “*this individual application does not concern only the personal interest of the applicant, but also the public interest and that for this reason it deems opportune to grant the requested interim measure [...]*”.

The notion “in the public interest” seems to be rather vague and could, therefore, be used by the Court (at the request of a party or *ex officio*) without much explanation to justify the imposition of interim measures. However, for an authorized party, in particular, an individual, to prove that the interim measure would also be in the public interest may, in the majority of cases, not be easy. It is suggested, that the Court would issue an explanatory note- as a further aspect of the implementation of its outreach program - in which the notion of interim measure, in particular, the interim measure in the public interest, is set out in a clear and concise manner for a better understanding by the public.

- 2 Article 27.2 stipulates that the duration of interim measures shall be reasonable and proportionate. Interim measures should, therefore, only last as long as they are necessary to maintain the status quo pending the Court’s adjudication of the referral. Therefore, much will depend on the speed with which the Court will deal with the referral. Moreover, the duration of the measures must be proportionate to the aim envisaged, while the measures should be lifted, as soon as the need to keep them in place is no longer there or the Court has been able to effectively examine the applicant’s complaint.⁴⁸⁹ In any case, if not lifted during the proceedings, interim measures will expire, when the Court issues its final judgment on a referral, as stipulated by Rule 55(9), commented on hereafter.

For instance, in Case No.KI. 56/09, *Fadil Hoxha and 59 others vs. Municipal Assembly of Prizren*⁴⁹⁰, of 15 December 2009, wherein the applicants challenged the constitutionality of a Municipal Assembly Decision to construct several multi-storey buildings instead of green areas in their neighborhood and claimed that the

⁴⁸⁸ Decision on Interim Measures/IM/Case No. KI 11/09, *Tome Krasniqi vs RTK et Al* of 16 October 2009, Bulletin of Case Law 2009-2010, page 11; and on the Court’s webpage.

⁴⁸⁹ See, for instance, Decision to strike out the Referral in Case No. KI 11/09, *Tome Krasniqi*, Constitutional review of Section 2.1 of the United Nations Mission in Kosovo (UNMIK), Administrative Direction No. 2003/12 and Article 20.1 of the Law on Radio Television of Kosovo, Law No. 02/L-47.

⁴⁹⁰ Decision on the request for interim measures in Case No. KI 56/09, *Fadil Hoxha and 59 Others vs Municipal Assembly of Prizren* of 15 December 2009, Bulletin of Case Law 2009-2010, page 26; and on the Court’s webpage.

Municipality had failed to inform them properly, the applicants requested the Court to grant interim measures in order to stop any action or work of the Municipality in constructing the buildings, with a view to avoiding any irrecoverable damage. Considering that the applicants had put forward enough convincing arguments proving that the request for interim measures was reasonable and justified, since the implementation of the contested urban plan decision of 30 April 2009 might result in unrecoverable damages for the applicants, the Court decided to grant the request for interim measures for a duration of no longer than 3 months from the date of the adoption of the decision and to immediately suspend the execution of the relevant Urban Plan as well as to order the Municipality to suspend any construction at the location concerned for the same duration. Several extensions of the interim measures for similar periods followed.

In a further Case No. KO. 119/10⁴⁹¹, the Ombudsperson of Kosovo, Constitutional Review of Articles 14.1, 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, the Ombudsperson alleged that these Articles of the Law enabled members of the Kosovo Assembly to realize pensions which were more favourable than any other retirement benefit for other citizens, and that they were not in compliance with the values proclaimed by Article 7 [Values] of the Constitution, which founds its constitutional order upon principles of democracy, equality, non-discrimination and social justice. The Ombudsperson requested the Court to impose interim measures in order to suspend the implementation of the Law in question until the case was decided based on its merits. On 22 December 2010, the Court decided to grant interim measures for a period of 3 months, by immediately suspending the implementation of the disputed law on the grounds that the applicant had put forward enough convincing arguments that the implementation of the challenged provisions of the law might result in unrecoverable damages and that such an interim measure was in the public interest. Several extensions of the interim measures followed.

However, in Case No. KI 121/10, Sitaram Chamlagai and others⁴⁹², the Court used a different approach by granting the request for interim measures, by Decision of 13 December 2010, “*until it [the Court] would have adjudicated the Referrral*”, thereby avoiding the necessity to extend its decision on interim measures several times, if deemed necessary. This approach seem to be the most appropriate, although it may not follow Rule 55.5 to the letter, which stipulates that “no decision granting interim measure may be extended unless the expiration date is specified”.

Article 27 is supplemented by Rules 54 [Request for Interim Measures] and 55 [Decision on Interim Measures] of Chapter VI. [Interim Measures] of the Rules of

⁴⁹¹ Decision on Interim Measures in Case No. KO 119/10, The Ombudsperson of the Republic of Kosovo, Constitutional Review of Articles 14(1)6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111, of 22 December 2010, Bulletin of Case Law 2009-2010, page 445; and on the Court’s webpage.

⁴⁹² Resolution on Inadmissibility of 14 December 2010 in Case 121/10, Sitaram Chamlagai, Krishna Bandur Chamlagai, Chandra Kala Chamhan and HomBahadur Battarai, Constitutional Review of the Decisions of the High Court of Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010, Bulletin of Case Law 2011, page 669; and on the Court’s webpage.

Procedure which contain more details regarding the imposition of interim measures by the Court.

Rule 54 [Request for Interim Measures] of the Rules of Procedure

- 1. At any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.**
 - 2. The request for interim measures must be submitted in writing, must describe the facts related to the request, the arguments in support of the request, the measures requested and the reasonably foreseeable consequences if the request is not granted. The party requesting interim measures may attach to the request other documents and evidence that is relevant and supportive of the request.**
 - 3. The Secretary shall forward a copy of the request to all Judges and to all other relevant parties.**
- I. Not only at the moment of the submission of the referral, but also during the time that the case is being examined by the Judge Rapporteur, the Review Panel, or the full Court before or during a hearing and even thereafter, the applicant can request the Court to impose interim measures, as long as the Court has not adjudicated the referral on its merits. The rationale of the Rule supposedly is, irrespective of the stage of the proceedings before the Court, as long as the merits have not been decided, an unexpected situation may arise that would justify the request for the imposition of interim measures in order to avoid unrecoverable damages or that such a measure would be in the public interest.
- II. The request for interim measures cannot be submitted by electronic means or orally, but only by letter, delivered by mail or hand or facsimile and must comply with other clear requirements stipulated by Rule 54(2). In short, similarly to the submission of the referral itself, the requesting party must substantiate the request concerned as much as possible in order to show its justification.
- III. The “Secretary” stands supposedly for “Secretary General”. Not only the judges will receive a copy of the request (including all accompanying documents), but also all other relevant parties, who may be given a deadline by the Court, within which they would be able to comment on the request (see also Rule 55(3) hereafter).

Rule 55 [Decision on Interim Measures] of the Rules of Procedure

- 1. A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals.**
- 2. The President shall assign the request for interim measures to the Review Panel assigned to the referral. If no Review Panel has yet been so assigned, the President shall assign a Review Panel by random draw. If any Judge on**

- the Review Panel is unavailable for expedited consideration, the President shall assign a new Review Panel by random draw.
3. The Review Panel may request additional facts, documents or information from the party requesting interim measures and may order a reply or additional facts, documents or information from other parties in the case. The Review Panel shall not make a decision without giving other parties, to the extent possible, an opportunity to present their views on the request for interim measures.
 4. Within seven (7) days, the Review Panel shall recommend in writing to the Court whether the request for interim measures be granted, either in whole or in part, or denied. Before the Review Panel may recommend that the request for interim measures be granted, it must find that:
 - (a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;
 - (b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and
 - (c) the interim measures are in the public interest. If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.
 5. If the request for interim measures is granted, either in whole or in part, the resolution of the Review Panel shall state the reasons supporting the decision and how the legal standard has been met, and shall state the limited time during which the interim measures will be effective. No decision granting interim measures may be entered unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court. If the admissibility of the referral has not yet been determined, the resolution shall state that interim measures will expire immediately if the Court determines the referral to be inadmissible.
 6. The Secretary shall forward the recommendation to all Judges. The recommendation of the Review Panel on the application for interim measures shall become the decision of the Court unless one or more Judges submit an objection to the Secretary within three (3) days. If one or more Judges object to the recommendation, the application will be forwarded to the Court for consideration.
 7. The President ex officio may order additional information from the parties or schedule a hearing when requested by one of more Judges of the Court or the Court may deliberate and decide as soon as possible on the request for interim measures without a hearing. In deciding whether to grant or deny the request for interim measures, the Court must apply the legal standards set forth in this Rule.
 8. At the request of a party, or ex officio, the Court may, at any time prior to final Judgment, revoke or modify any decision concerning interim measures if a change in the situation justifies such revocation or modification. Any party requesting such revocation or modification shall specify the change in the situation supporting such change. Before

determining whether to grant or deny the request for revocation or modification, or before acting ex officio, the Court shall give the parties an opportunity to present their views on the matter.

- 9. Unless otherwise stated by the Court, interim measures that are granted by the Court during a proceeding on a referral expire when the Court issues its final Judgment on a referral.**

I. According to Rule 55(1), every request for interim measures should receive expedited consideration by the Court. However, applicants may abuse the right to request interim measures by simply adding it to the referral without providing any justification. In such cases, the Court would lose valuable time, if each and every request for interim measures should receive priority over all other cases. The reason for adding such a request to a referral may be that the applicant hopes that, when the Court gives priority to the examination of the request for interim measures, it will also deal with his/her referral expeditiously. Rule 55(1), however, clearly states that only the request will be given expedited consideration by the Court, not the referral itself. In order to avoid abuse of the procedure, the Court has developed case-law, whereby it decides on the request for an interim measure and, if rejected, deals with the referral in the normal order of registration, together with the admissibility of the referral, when it is clear that the request for interim measures is fully unsubstantiated⁴⁹³.

II. No Judge Rapporteur is apparently involved in the initial handling of a request for interim measures. Instead, the Review Panel, assigned to the referral, is tasked to deal with it, unless no Review Panel has yet been assigned to the referral. The procedure to have the President assign a Review Panel by random draw in that situation, appears to deviate from the procedure laid down in Rule 9 [Appointment of Review Panels], stipulating that the Review Panel shall be chosen by a system of random draw by the Secretariat and be appointed by the President. It is not clear, for what reason Rule 9 would not be applicable for the appointment of a Review Panel in the situation as described in Rule 55(2). The same is true in case of the assignment of a new Review Panel, if no Judge of the Review Panel is available for expedited consideration, as mentioned by Rule 55(2). Namely, contrary to the provisions of Rule 9, the assignment of the new Review Panel is, in the same way as in the previous situation, done by the President by random draw.

III. When, pursuant to Rule 55(3), the Review Panel, through its Presiding Judge, forwards its request for additional information and documents directly to the party requesting the interim measures, it is assumed that, in view of the expediency of the request, it will set a very short time limit for the submission of such information. It will, supposedly, also fix similar short deadlines, when it orders a reply or additional facts, documents or information from other parties in the case, thus, respecting the “equality of arms” principle, before recommending to the

⁴⁹³ See, for instance, Resolution on Inadmissibility of 12 December 2011 in Case No.KI. 92/11, Muhamet Bucaliu, Constitutional Review of the Notification of the State Prosecutor, KMLC.no. 37/11 dated 2 June 2011, Bulletin of Case Law 2011, page 647; and on the Court’s webpage.

Court, whether or not the request should be granted. The other party is, thereby, given the opportunity to present its views on the request, supposedly also within a very short period of time. The Rule restricts the right of the other party, however, to a certain extent, since it only stipulates that ‘other parties’ be given the opportunity to present their views on the request “*to the extent possible*“, probably meaning: “*as far as the Court deems fit*” “.

A request for interim measures may need an immediate decision by the Court, when, for instance, the representative of an applicant, who is about to be deported to a country where he/she might run a serious risk of being submitted to inhuman or degrading treatment (in violation of Article 3 ECHR), requests the Court for an interim measure and is already being taken to the plane, which would transport him/her to that country. In such case there would be no time to first ask the deporting authorities to submit their opinion about the request for an interim measure. The Court may, thus, have to impose the measure with immediate effect in order to maintain the status quo pending its consideration of the admissibility and merits of the case⁴⁹⁴.

- IV. It is assumed that the period of “seven days” mentioned by Rule 55(4), will start to run from the moment that the Review Panel has received all information it had asked for from the parties and after having verified the conditions laid down in the Rule.

A *prima facie* evidence *on the merits* of the referral could be - using the same deportation example - that the applicant shows a reasonable beginning of proof that he/she would be submitted to inhuman or degrading treatment in the country to which he/she is about to be deported⁴⁹⁵. Such evidence could be, for instance, the information about similar cases or that he/she has already been submitted to such treatment before fleeing the country, to which he/she is about to be deported (receiving country)⁴⁹⁶.

A *prima facie* case *on the admissibility* of the referral could be, using the above example, that, while the applicant’s deportation case on the merits is still pending before the competent authorities and he/she is, therefore, still in the process of exhausting all legal remedies available under applicable law, the removal procedure, on which the deportation case on the merits has no suspending effect, should be temporarily halted in order to give the competent authorities dealing with the case on the merits the possibility to properly deal with it, thus avoiding the

⁴⁹⁴ See *Mamatkulov v. Turkey*, Judgment of 4 February 2005, Application no. 46951/99. In the following case, the Applicant was unable to submit *prima facie* evidence as to the alleged inhuman or degrading treatment, contrary to Article 3 ECHR, to which he would be exposed, if extradited to Switzerland: see Decision on the request for interim measures in Case No. KI 22/09, *Dede Gecaj* against Decision PKL-KKZ.76/08 of the Supreme Court, of 15 December 2009, Bulletin of Case Law 2009-2010, page 22; and on the Court’s Webpage.

⁴⁹⁵ See, for instance, Decision on the request for interim measures in Case No. KI 27/09, *Rafet Hoxha* vs. Decision No. Pn. Nr. 168/2005 of the Supreme Court, 15 December 2009, Bulletin of Case Law 2009-2010, page 30; and on the Court’s Webpage.

⁴⁹⁶ In the above mentioned Case No. KI 22/09, the Court found that the Applicant had been unable to submit any evidence which would justify the suspension of the extradition proceedings pending the final outcome of his Referral.

embarrassing situation that the applicant may already have been deported, when a final decision on the merits would be found in his/her favour.

Unlike Article 27 of the Law, the Rule uses the word “unrecoverable” damages, which is in fact the same word as the one mentioned in Article 116.2 of the Constitution. The remarks made on Article 27.1 of the Law are equally valid here: if the party has to show “irreparable” damage (the term used in the Article), the burden of proof is lighter than to have to show “unrecoverable” damage, meaning that the damage is not only irreparable, but can also not be recovered, for instance, through the payment of compensation. Since the term “unrecoverable” is being used in Article 116.2 of the Constitution, it could be held that the term “irreparable” in Article 27 of the Law is incorrect and should be replaced. However, as far as the Court’s case-law is concerned, the problem has never been raised. In fact, in the relevant decisions of the Court, both terms “irreparable” and “unrecoverable” have been used.

As a first example of a Court decision in which an interim measure was imposed, reference is made to the Decision on the request for interim measures in Case No. KI 56/09⁴⁹⁷, where *“the Court concluded, without prejudging the final outcome of the Referral, that the Applicants have put forward enough convincing arguments proving that the request for interim measures is reasonable and justified, since the implementation of the contested Decision of 30 April 2009 may result in unrecoverable damages for the Applicants”*.

Rule 55(4)(c) provides also that the Review Panel must find that “the interim measures are in the public interest”. Would this mean that, if the Review Panel does not find that there is a public interest, the Review Panel can only recommend to the Court to deny the request for interim measures? Moreover, it is difficult to see, how interim measures should always be “in the public interest”. Article 27 [Interim Measures] of the Law clearly stipulates that the Court can take such a decision on the following grounds: *“(1) if such measures are necessary to avoid any risk of irreparable damages, or (2) if such an interim measure is in the public interest”*. Unlike in Rule 55(4), where the word “and” is used, Article 27 does not require the grounds to be cumulative. It may, therefore, well be that Rule 55(4)(c) erroneously uses the word “and” instead of “or”.

It is rather the task of the Court to judge “*ex officio*” whether, in a certain case, the imposition of interim measures would be justified “*in the public interest*”. The closing sentence of Rule 55(4): *“If the requesting party has not made this necessary showing, the Review Panel shall recommend denying the application”*, seems, therefore, to be unreasonably harsh for an individual as the requesting party, since he/she will certainly have great difficulty in showing the necessity of the imposition of interim measures not only in his/her own interest, but also “*in the public interest*”.

⁴⁹⁷ Decision on the request for interim measures in Case No. KI 56/09, Fadil Hoxha and 59 Others vs. Municipal Assembly of Prizren, 15 December 2009, Bulletin of Case Law 2009-2010, page 26; and in the Court’s Webpage.

In Case No. KI 11/09⁴⁹⁸, the Applicant succeeded, however, to convince the Court that the interim measure requested was not only in his own interest, arguing that it concerned also a violation of the public interest as foreseen in Art. 27.1 of the Law, putting forward the same Article as a legal basis for the imposition of the interim measure as requested.

- V. It seems that Rule 55(5), in its first and last sentence, erroneously refers to the resolution “of the Review Panel”, whereas clearly the “of the Court” is meant. Resolutions are decisions of the Court as mentioned in Rule 57 [Content of Decisions]. It is suggested to amend the Rule accordingly.

Moreover, the Rule, which clearly deals with the Court’s powers should be placed between the present paragraphs 7 and 8 of the Rule.

As to the contents of the Rule, it is obvious that the Court must reason its resolution and indicate how the legal standard (certainly “the legal standards set forth in this Rule”, mentioned at the end of paragraph 7 of the present Rule, are meant here) has been met. It should also indicate the duration of the measure. As mentioned above, the Court has extended the measure in several cases, sometimes more than once during the adjudication of the referral⁴⁹⁹. However, as set out under Rule 53(2), in a recent case the Court has opted for a different solution than to set an expiration date, by leaving such date open⁵⁰⁰ and only determining that the measure should be in force for as long as it would take the Court to adjudicate the referral. This method is also being used by the ECtHR by requesting the State concerned not to take action until the consideration of the application.

However, the Albanian Law on the Organization and Operation of the Constitutional Court allows the Constitutional Court, in its Article 45 [Power of Suspension]⁵⁰¹, even after its final decision, to leave the suspension order in place. The Article does not mention a time limit, but it is assumed that the Court will indicate in its decision the duration of the suspension order. A continuation of the suspension order may be deemed necessary by the Court, for instance, in cases where the Court wants to leave the implementing authorities sufficient time to execute its decision, without the applicant risking to suffer irreparable damages during the implementation phase.

- VI. The Court may not be in session, when the Review Panel’s recommendation will be forwarded by the Secretary General to all (other) judges of the Court. The Secretary General must, therefore, ensure that the recommendation will reach those

⁴⁹⁸ See, Decision on Interim Measures in Case No. KI 11/09, Tome Krasniqi vs. RTK et Al, 16 October 2009, Bulletin of Case Law 2009-2010, page 11; and in the Court’s Webpage.

⁴⁹⁹ See, for instance, Case No. KI 56/09, Fadil Hoxha and 59 Others vs. Municipal Assembly of Prizren, in which the Court extended the interim measure three times, each time for 3 months.

⁵⁰⁰ See comments on Article 27.2 of the Law above re. Resolution on Inadmissibility of 14 December 2010 in Case 121/10, Sitaram Chamlagai, Krishna Bandur Chamlagai, Chandra Kala Chamhan and HomBahadur Battarai, Constitutional Review of the Decisions of the High Court of Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010, Bulletin of Case Law 2011, page 669; and on the Court’s webpage.

⁵⁰¹ Article 45 provides: “In its final ruling the Constitutional Court shall state whether a suspension order shall remain in force.”

judges and, after confirmation of the reception of a copy of the recommendation by each of them, wait for 3 days. If, after 3 days, none of the judges has objected to the recommendation of the Review Panel, the text will become the decision of the Court, in a similar way as is the case with a Resolution on Inadmissibility unanimously adopted by the Review Panel (see comments on Article 22.8 of the Law above). If one or more judges object however, the full Court will consider the request with or without a hearing.

VII. Apparently pursuant to Rule 55(7), the President may only order additional information from the parties *ex officio*, but can also schedule a hearing when requested by one or more judges. In case the President has asked for additional information from the parties, such information will have to be forwarded by the Secretary General to all judges. The Court should then deliberate and decide as soon as possible on the request for interim measures without a hearing or, when requested by one or more judges, a hearing should be held scheduled by the President. Because of the expediency of the Court decision on interim measures, the hearing on such measures will have to take place at short notice. However, if time permits, the hearing could also be used to deal with admissibility and merits issues.

As to the last sentence of the Rule, it is assumed that the Court will not only apply the legal standards set forth in the Rule, but - in the same way as the Review Panel needs to do in its recommendation - state in the Resolution the reasons for granting or denying the request for interim measures.

So far, no judge has requested the President of the Court to schedule a hearing regarding a request for interim measures. Thus, all requests for interim measures have been decided by the Court on the basis of the submissions of the applicant and, where applicable, the parties.

VIII. If, under Rule 55(8), a party requests the revocation or modification (for instance, an extension or additional measure) of a decision on interim measures, it must specify the change in the situation supporting such change in the interim measures, and, supposedly, will have to give reasons for such modification or revocation, in particular, when presenting its view on the matter. In accordance with the equality of arms principle, the responding party will equally be enabled to give its comments on the issue. It is assumed that the Court may consider to set a time limit, when giving the parties an opportunity to present their views on the matter.

For instance, in order to give an example of a case where the Court *ex officio* put an end to the interim measure it had imposed at the request of the applicant, reference is made to the Decision to Strike out the Referral in Case No. KI 11/09⁵⁰², in which the Court held *ex officio* that “*At the time of the granting of the interim measures there was no sufficient degree of certainty surrounding the issue*

⁵⁰² Decision to Strike out the Referral in Case No. KI 11/09, Tome Krasniqi, Constitutional Review of Section 2.1 of the United Nations Mission in Kosovo (UNMIK) Administrative Direction No. 2003/12 and Article 20.1 of the Law on Radio Television of Kosovo, Law No. 02/L-47, 30 May 2011, Bulletin of Case Law 2011, page 230; and on the Court’s webpage.

and it was necessary to protect the interests of the Applicant by the granting of the interim measures in the manner described above. There is therefore no further necessity to grant further, interim or permanent measures. [...] The issue is effectively moot. On that basis it is not appropriate to make any further order on interim measures or to continue to examine the Referral”.

- IX.** Rule 55(9) is similar to Rule 55, providing that interim measures will expire immediately, when the Court determines the referral to be inadmissible. The difference is that here the interim measure expires automatically, when the Court hands down a final judgment in a referral. The rationale of the automatic expiration after adjudication of the referral is that the purpose of the interim measures, i.e. to maintain the status quo awaiting the outcome of the referral, has been achieved. However, under Rule 55, the Court may decide to extend the measures for a certain period of time, for instance, in connection with the due implementation of its final judgment by the relevant authorities.

Article 28 [Procedural Costs]

- 28.1 Parties cover their own procedural costs, unless otherwise decided by the Constitutional Court.**
- 28.2 The party that has made a referral pursuant to Article 113, paragraph 7 of the Constitution shall be exempted from the obligation to cover procedural costs, if the Constitutional Court decides that such a referral is admissible and grounded.**

It seems to be reasonable to assume that procedural costs include the costs of witnesses and experts and other costs, including compensation for loss of earnings. Such payments are defined in paragraph 4 of Rule 46 [Summons of Witnesses], paragraph 4 of Rule 48 [Expert Report] and 50 [Reimbursements of Witnesses and Experts] of the Rules of Procedure. The comments on Article 28 should, therefore, be read in conjunction with the comments on these Rules.

- 1** That parties in court proceedings have to cover their own procedural costs is a widely accepted principle.⁵⁰³ Article 28.1 of the Law contains a similar rule, providing that parties cover their own procedural costs, meaning all costs stemming from the proceedings before the Constitutional Court. However, the Article also stipulates, without elaborating, that the Court can make exceptions to the rule. Whether it can do so *ex officio* or at the request of a party, to a certain extent and at which stages of the proceedings, is not clear. Moreover, assuming that the Court decides otherwise, the Article does not define who will pay the bill instead. The Court or the other party or even a third party? Only Article 28.2 provides for a particular case, where the Court may exempt the party that has made a referral pursuant to Article 113.7 of the Constitution, from the payment of the procedural costs.

⁵⁰³ See, for instance, Chapter XXV [Procedural Costs] of the Law on Contested Procedure.

- 2 It is certainly fair and appropriate that public institutions involved in any of the referrals before the Court pay their own procedural costs, since these costs are usually covered by their budgets. However, individuals (and legal persons) who refer alleged violations of the Constitution to the Court may not always possess the necessary financial means to cover their procedural costs. For instance, when the referral is complex, the payment of fees for professional legal assistance may be required. However, Article 28.2 restricts the possibility of an individual who shall be exempted from the payment of procedural costs to the situation where the Court has decided that the referral is admissible and grounded. This may be unfair in a referral, where the respondent party is a public authority which can use the services of its own lawyers or of a law firm and pay compensation to witnesses and experts who have been allowed to be heard by the Court.

Since an individual may rarely be in the same position, such a situation may create a serious imbalance between the positions of the parties before the Court and easily lead to an infringement of the equality of arms principle. If such an individual only qualifies for an exemption from paying his/her own procedural costs, once his/her referral has been declared admissible and grounded, this would mean that an applicant without sufficient financial means could have a serious disadvantage in presenting his/her case to the Court, in particular, if, as mentioned above, the case is complex and would need expertise to properly build it and to counter-balance the expertise called in by the respondent party.

By not disposing of the same or a similar position before the Court, the individual may well risk to have his/her referral declared inadmissible or ungrounded. It would, therefore, be worth reflecting whether a procedure could be envisaged, whereby an individual could qualify for free legal aid at least after the referral has been declared admissible in order for both parties to dispose of the same or a similar position before the Court at the merits stage of the proceedings.

As to the procedural costs of Article 28.2, it is not clear whether they will be borne by the Court, similarly to Article 471 of the Law on Contested Procedure, providing that “If the party is exempted from all expenses, then the court will pay for all costs incurred for witnesses, experts, direct examinations, publications of the court acts as well as for the expenses for assigned representatives”. So far, no such request has been submitted to the Court. In any case, it would be logical that the responding party covers the procedural costs as is the case under Article 452 of the Law on Contested Procedure⁵⁰⁴. Since the respondent party in proceedings brought under Article 113.7 cases is normally a public authority, it may be reasonable for the Court to impose the payment of the applicant’s procedural costs on the public authority concerned. However, if the Court determines that, for instance, the Supreme Court has issued a decision which violates constitutional rights, it will be difficult for the Court to impose the payment of the procedural costs of the applicant on the Supreme Court, which has not been a party to the proceedings. In that case the Court could only bear these procedural costs itself. So far, the Court has apparently not dealt with this issue.

⁵⁰⁴ Article 452(1) of the Law on Contested Procedure provides: “The party that loses the case has to entirely cover all costs of the winning party as well as the costs of intermediaries who joined the proceedings”.

The Court Rules of the ECtHR also deal with the unequal positions of the applicant and the Contracting Party in the proceedings before it. The President of the Chamber may grant free legal aid, either of his/her own motion or at the request of the applicant, once the application has been communicated to the respondent Contracting Party (the Government of the State against which the application has been lodged). The President will do so, if it is necessary for the proper conduct of the proceedings and if the applicant has insufficient means to meet all or part of the costs entailed⁵⁰⁵.

⁵⁰⁵ See Chapter X [Legal Aid] of the ECtHR's Court Rules.

Chapter III: [Special procedures]

In its Article 113.1, the Constitution provides, as mentioned above, that the Court decides only on matters referred to it in a legal manner by authorized parties. This provision implies that the jurisdiction of the Court can only be exercised within a framework of procedural rules established by law. Since ex officio proceedings on the part of the Court are not mentioned in those rules, such proceedings are excluded.

This Chapter of the Law sets out the details of special procedures to be followed by the Court for the adjudication of specific matters listed in Article 113.2 to 113.9 of the Constitution and referred to it by the authorized parties concerned. The special procedures for each of those matters must be considered as a “lex specialis” and are laid down in Articles 29 to 54 of the Law which clearly show that, as discussed in detail hereafter, abstract review, concrete review, and individual complaint procedures coexist in the Republic of Kosovo.

In other countries, like Albania, Bosnia & Herzegovina, Macedonia, Croatia, Slovenia, similar special procedures are laid down in the constitution and the law and will be commented on where appropriate.

1. Procedure for cases defined under Article 113, paragraph 2 items 1 and 2 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraphs 2 (1) and (2) of the Constitution:

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

- (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;**
- (2) the compatibility with the Constitution of municipal statutes.**

In Kosovo only the Constitutional Court has the power to decide whether a law, a decree of the President, or Prime Minister, Government regulations, or the Municipal Statutes are inconsistent with the Constitution (so called “abstract control”). No regular court has such power, but has only the right, under certain circumstances as defined in Article 113.8, commented on hereafter, to refer questions of constitutional compatibility of a law to the Court in a concrete case pending before it. Only the Assembly, President of Kosovo, Government and Ombudsperson are authorized to initiate proceedings before the Court regarding compliance with the Constitution of laws, Presidential or Prime Ministerial Decrees, Government Regulations, and Municipal Statutes, in the abstract.

Therefore, as the guardians of the constitutionality of normative acts, these institutions are allowed under the Constitution to directly seize the Court in the above circumstances without such normative acts being applied to any concrete set of facts. In this sense, the Court is bound to reject as inadmissible any request that is submitted directly, and without regard to the application of such acts to any concrete set of facts, by any other person who is not an authorized party, pursuant to Article 113.2 of the Constitution.

Articles 113.2.1 and 113.2.2 of the Constitution are implemented by Articles 29 [Accuracy of the Referral] and 30 [Deadlines] of the Law.

Article 29 [Accuracy of the Referral]

- 29.1 A referral pursuant to Article 113, paragraph 2 of the Constitution shall be filed by either one fourth (1/4) of the deputies of the Assembly of Republic of Kosovo, the President of the Republic of the Government or by the Ombudsperson.**
- 29.2 A referral that [concerns] a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution.**
- 29.3 The referral shall specify the objections put forward against the constitutionality of the contested act.**

- 1 Article 29.1 implements Article 113.2 of the Constitution, reiterating who the authorized parties are, in particular, by providing the minimum number of members of the Assembly necessary to be able to file a referral with the Constitutional Court as to the constitutionality of laws of the Assembly, decrees of the President or Prime Minister and Government regulations, as well as municipal statutes. So, the authorized parties are:
 - a) One fourth (1/4), meaning, at least, thirty (30) deputies;
 - b) The President of the Republic;
 - c) The Government of the Republic, or
 - d) The Ombudsperson.

If an application is submitted to the Court by one or more of the aforementioned parties, the Court cannot reject the referral as being inadmissible, provided that all other procedural requirements have been met. If such a referral is submitted to the Court by an individual or an institution other than the above authorized parties, the Court will reject the referral as inadmissible for the reason that the referral was lodged by an unauthorized person.⁵⁰⁶

In fact, Article 29.1 provides the opposition and/or minorities in the Assembly, if composed of at least thirty (30) deputies, with a powerful instrument to raise the question of compatibility with the Constitution of the above legal instruments if they consider them to be unconstitutional. In particular, with regard to a law, adopted by a majority of deputies against the wishes of the opposition (who voted

⁵⁰⁶ See Rule 36 par. 3 item c, of the Rules of Procedure of Constitutional Court that determines the details of the admissibility criteria.

against the law, for instance, because they considered it already to be unconstitutional), this instrument would be very useful.

Thirty or more deputies could, thus, have the opportunity to exercise a certain political control over the majority in the Assembly, since it could seize the Constitutional Court, pursuant to Article 29 of the Law, on the basis of similar objections as the ones they had previously presented in the Assembly before the majority adopted the law. The constitutional objections of the minority against the challenged act, which the majority had rejected (for instance, for purely political reasons) may well be accepted by the Court and result in the law or parts thereof being found unconstitutional. The opposition would, in this example, thus turn out to be stronger than the majority of deputies of the Assembly.

Another example could be that the majority would silently approve a certain Presidential or Prime Ministerial decree or a particular Government regulation for purely political reasons, thus depriving the opposition and/or minorities who are against the decree or regulation on constitutional grounds, of their right to express their opinion on the challenged instruments in the Assembly and vote against them. Also in such cases, the opposition and/or minorities could be successful by submitting such a referral to the Constitutional Court. Similar scenarios are possible with regard to municipal statutes.

Article 29.1 also enables the President of the Republic to exercise constitutional control, through the Constitutional Court, over Assembly laws, Prime Ministerial decrees and Government regulations as well as municipal statutes.⁵⁰⁷ The Government has similar powers, for instance may challenge the constitutionality of a law adopted by the Assembly, the initiated by the Government, in case the law got mutilated in such a way by the Assembly that the constitutionality of the version, which the latter finally adopted, has become questionable.

Finally, Article 29.1 also specifies the powers of the Ombudsperson⁵⁰⁸ to directly raise the issue of constitutional compliance of relevant legal instruments with the Court. A number of countries do allow the Ombudsperson to challenge normative acts before the constitutional courts (e.g. Albania, Armenia, Georgia, Estonia, Moldova, Poland, Portugal, Romania, Russia, and Spain). Since the Constitution prescribes that the Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act of public authorities⁵⁰⁹ he/she has now an additional powerful tool under Article 113.2 of the Constitution to challenge before the Court the constitutionality of laws, decrees of the President or Prime Minister, regulations of the Government as well as municipal statutes.

⁵⁰⁷ See for instance Case KO 80/10, Applicant President of the Republic of Kosovo, His Excellency Fatmir Sejdiu, Judgment of 7 October 2010. Case KO 57/12, Applicant President of the Republic of Kosovo, Her Excellency, Atifete Jahjaga, Judgment of 9 September 2012.

⁵⁰⁸ See also Article 135 [Ombudsperson Reporting], paragraph 4 of Chapter XII, Independent Institutions, of the Constitution, providing: *4. the Ombudsperson may refer matters to the Constitutional Court in accordance with the provisions of this Constitution.*

⁵⁰⁹ See, Article 132 [Role and Competence of the Ombudsperson], paragraph 1, of the Constitution, providing: *“The Ombudsperson monitors, defends and protects the rights and freedoms of individuals from unlawful or improper acts or failures to act by public authorities”.*

However, so far, the Ombudsperson has only submitted a few referrals for constitutional review under Article 29 of the Law in conjunction with Article 113.2 of the Constitution.⁵¹⁰

Except for the competence under these Articles of the Constitution and the Law, the Ombudsperson Institution and its powers are being governed by Law No. 03/L-195 on the Ombudsperson, promulgated on 9 August 2010. It abrogated the relevant UNMIK Regulations as well as other provisions which were contrary to the Law.

Article 15 [Competencies], paragraph 7, of Chapter III [Powers and Responsibilities of the Ombudsperson, implements his/her powers under Article 113.2 of the Constitution, by stipulating that the Ombudsperson may initiate matters to the Constitutional Court in accordance with the Constitution and the Law on the Constitutional Court. It is to be hoped that, under the new law, the Ombudsperson will make as much use as possible of the powers bestowed on him/her by these legal instruments in the interest of the people of Kosovo.

- 2 In the referral, authorized parties must mention, pursuant to Article 29.2, whether they consider the entire challenged act (normative act) or one or more specific provisions of the act unconstitutional. In a democracy, where checks and balances are normally built into almost every segment of society, it may rarely happen that an entire law, adopted by the Assembly, would need to be annulled by the Court due to its incompatibility with the Constitution. When an entire law is struck down by the Court, it certainly regulated a rather controversial issue, which had already divided the deputies (and possibly also the population) before the adoption of the law for instance, like a law on abortion. Or the law may have been discriminatory or in violation of an international instrument.

In such a case, ¼ or more deputies of the Assembly (certainly the most ferocious contesters of the challenged act who wish to continue the political battle at the constitutional level), the President and/or the Ombudsperson might challenge the constitutionality of the entire law or only parts thereof.

Surprisingly enough, the Law and the Rules of Procedure do not contain any specific provisions, setting out who could participate in the proceedings before the Court besides the applicant. For instance, if the President of Kosovo submits a referral to the Court under Article 113.2 of the Constitution, by which he/she challenges, for instance, the constitutionality of a law enacted by the Assembly, it would be appropriate if the Assembly and eventually the Government (normally the originator of the challenged law) would be considered as responding parties and join the proceedings at the invitation of the Court. In such a case, the President of the Assembly would be representing the Assembly which adopted the law as well as the Prime Minister or other Government representative. The Court is certainly free to invite other (interested) parties to the (written or oral) proceedings, if it deems fit.

⁵¹⁰ See for instance Judgment, KO 97/12, Constitutional Review of Articles 90, 95 (1.6), 110, 111 and 116 of the Law on Banks, Microfinance Institutions and Non-Bank Financial Institutions, No. 04/L-093, of 12 April 2012.

- 3 Under Article 29.3, the authorized party must identify the challenged act or parts thereof which it considers incompatible with the Constitution and must give reasons why it considers such act or parts thereof to be unconstitutional.⁵¹¹ How detailed the objections, submitted by an authorized party to the Court, should be, depends on the complexity of the issues raised by the contested act.⁵¹²

Article 30 [Deadlines]

A referral made pursuant to Article 29 of the Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.

The authorized parties must raise the compliance issue before the Court within six (6) months from the date upon which the contested act entered into force. This will give authorized parties sufficient time to properly prepare the referral, but it would even be more preferable (for the sake of legal certainty), if they would take less time and seize the Court as early as possible in order for the contested act – if found to be unconstitutional – to be in force only for the shortest possible period. However, in order to avoid undesirable effects amounting to unrecoverable damages or if it would be in the public interest, the Court could also - ex officio or at the request of an authorized party - suspend the contested act or law and impose an interim measure, until it renders a final decision on the referral (see for details, comments on Article 27 [Interim Measures] and Article 116 [Legal Effect of Decisions], paragraph 2, of the Constitution,⁵¹³ above).

Relevant case law

An example of an authorized party who, under Article 113.2 of the Constitution has referred to the Court questions of the compatibility with the Constitution of laws, decrees of the President or Prime Minister, and regulations of the Government as well as of municipal statutes, is the following:

Case No. KO 119/10 of 8 December 2011, the Ombudsperson of the Republic of Kosovo, Constitutional Review of Articles 14(1) 6, 22, 24, 25 and 27 of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010, wherein the Ombudsperson requested the Court to assess the constitutionality of the above articles of the Law on Rights and Responsibilities of Deputies.⁵¹⁴

⁵¹¹ On procedure of application in the Constitutional Court see Article 22 of the Law on Constitutional Court.

⁵¹² For more on the abstract review of the constitutionality of normative acts, see Jackson, Vicki C., and Mark V. Tushnet. *Comparative constitutional law*. New York: Foundation Press, 1999.

⁵¹³ Article 116.2 of the Constitution provides: “*While a proceeding is pending before the Constitutional Court, the Court may temporarily suspend the contested action or law until the Court renders a decision, if the Court finds that application of the contested action or law would result in unrecoverable damages*”.

⁵¹⁴ See for the complete text of the Judgment: Bulletin of Case Law 2011 of the Constitutional Court, page 556 or the Court’s website: http://www.gjk-ks.org/repository/docs/ko_119_10_eng.pdf, (accessed June 9, 2014).

The Court held that the Referral was admissible, because the Ombudsperson was authorized by Articles 113.2 and 113.4 of the Constitution to make the Referral, and that the Referral was submitted within the 6-month deadline set by Article 30 of the Law on the Constitutional Court, calculated from the date of the challenged law's enactment. The Court decided, *inter alia*, that the pension arrangement for the Deputies was incompatible with the Constitution.

2. Procedure for cases defined under Article 113, paragraph 3 item 1 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraph 3 (1) of the Constitution

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

- (1) conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;**

Before shortly commenting on Article 113.3(1) of the Constitution, a word needs to be said about the Assembly, mentioned in Article 113.3 as one of the authorized parties. Unlike under Article 113.2 of the Constitution, which also mentions the Assembly as an authorized party, but which is implemented by Article 29 of the Law, spelling out that by “the Assembly” as an authorized party is meant “one fourth (1/4) of the deputies of the Assembly”, this clarity does not exist in respect of Article 113.3, since the Law does not indicate at all, how many deputies are needed to be able to lawfully submit a referral to the Court under sub-paragraphs (1) to (5) of the Article. Therefore, the question will be discussed under each sub-paragraph, whether the term “the Assembly” could be interpreted in a certain manner, in the absence of any implementing legislation to that effect.

As to the text of Article 113.3 (1) itself, it contains the classical competence of a constitutional court, namely, to deal with conflicts of competencies between the different state institutions, based on the principle of the “separation of powers” between the legislature and the executive, consisting of both the President of Kosovo and the Government).

Article 113.3(1) of the Constitution is implemented by Articles 31 and 32 of the Law.

Article 31 [Accuracy of referral]

A referral made pursuant to Article 113, Paragraph 3 (1) of the Constitution shall be filed by any authorized party in conflict or from any authorized party directly affected from the said conflict. The referral shall include any relevant information in relation to the alleged conflict as further determined by the Rules of Procedures of the Constitutional Court.

According to Article 113.3(1) of the Constitution, the Constitutional Court decides on possible conflicts of constitutional competencies between the Assembly, the President of Kosovo and the Government, if one of these institutions submits to the Court a claim, alleging that one of the other institutions, through its actions, has overstepped its powers set forth in the Constitution or has assumed powers of one or more other institutions. This means that the role of the Constitutional Court is to clarify the Constitution's system of institutional competences, and hence to safeguard the functioning and ability to function of state institutions in a country based on the principle of the separation of powers and the rule of law.

Article 113.3(1) of the Constitution enumerates the state institutions that have legal standing to lodge applications with the Constitutional Court regarding a conflict over constitutional competencies. Only the Assembly, the President and the Government are authorized to file a referral with the Court in case of such a conflict. In this respect, Article 31 of the Law does not name the institutions, but only speaks of "any authorized party in conflict or from any authorized party directly affected from the said conflict".

In a conflict about competencies between these state institutions, as already suggested by the word "conflict", at least two parties confront one another, one acting as the applicant and the other as the responding party before the Constitutional Court or vice versa. The conflict between these institutions is, therefore, a contentious procedure concerning the constitutional relationship existing between the applicant and the responding party. The adjudication of the dispute between these institutions does not concern an abstract review of the objective constitutionality of a particular act of the challenged institution, but is rather meant to clarify the delimitation of the competence of that institution, when it committed the act.

When deciding on a conflict of constitutional competencies of the aforementioned institutions, the Court must interpret the Constitution as to the extent of the powers of the institutions involved in the conflict and, possibly, other parties affected by the conflict. The Court has to decide, whether the institution, challenged by an authorized party, acted within its constitutional competencies, or exceeded them. As to the parties, authorized to submit a referral under Article 31 of the Law, the provision fails to specify in what manner the Assembly, as an authorized party, should address the Court. In fact, there are three possibilities:

- (1) the decision of the Assembly to seize the Court on a competence issue under Article 113.3(1) of the Constitution has to be considered as a decision falling under Article 80 [Adoption of Laws], paragraph 1⁵¹⁵, of the Constitution and, therefore, has to be adopted "by a majority vote of deputies present and voting" (in that case, the majority will be represented before the Court by the President of the Assembly); or
- (2) the Assembly votes by majority vote that there is no competence issue between the Assembly and, for instance, the Government. However, in this particular case, a minority of the Assembly may disagree with that decision of the majority, since it is of the opinion that there is indeed a constitutional issue between the Assembly and (in this example) the Government, which should be submitted to the Court for

⁵¹⁵ Article 80.1 of the Law reads as follows: 1. Laws, decisions and other acts are adopted by the Assembly by a majority vote of deputies present and voting, except when otherwise provided by the Constitution.

adjudication. In this example, the minority (in fact: at least ten (10) or more deputies of the Assembly) could make use of the possibility under Article 113.5 of the Constitution (see also comments on this Article hereafter) to contest the constitutionality of any decision adopted by the Assembly. So, the majority as well as a minority of 10 or more deputies would have the same right under Article 113.3(1) to seize the Court in a competency conflict with the President or the Government. If there is no vote at all, the situation seems to be blocked, opening the possibility for a third option.

- (3) The third option is that the number of deputies authorized to seize the Court in a competency conflict could be similar to the number necessary to initiate constitutional review proceedings regarding the compatibility of normative acts mentioned under Article 113.2(1) and (2) as implemented by Article 29 of the Law. This would mean that a referral under Article 31 of the Law, could, similarly, be submitted to the Court by at least one forth (1/4) of the deputies of the Assembly.

While in other countries, the issue has been dealt with more clearly, for instance, in the Constitution of Bosnia and Herzegovina, the Assembly members as initiators of proceedings before the Constitutional Court to review a conflict of constitutional competencies between the Assembly, President and Government are clearly determined⁵¹⁶, in Kosovo it is left to the interpretation to the Constitutional Court, whenever such a referral would be submitted, which is fully in accordance with the Constitution.⁵¹⁷

Article 31 finally provides that the inclusion in the referral of any relevant information in relation to the alleged conflict shall be further determined by the Rules of Procedure of the Court.

Details of such relevant information are to be found in Rule 67 [Referral] of the Rules of Procedure.

Rule 67 [Referral] of the Rules of Procedure

- 1. When filing a referral pursuant to Article 133.3(1), an authorized party shall state precisely what conflict exists between the constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo or the Government of Kosovo.**
- 2. The authorized party shall identify the act which violates its competence and the relevant provision of the Constitution which has been violated by such act.**

The application to the Court to initiate a conflict of constitutional competencies between authorized parties must describe the details of such a conflict, identify the

⁵¹⁶ Article VI.3 of the Constitution of Bosnia and Herzegovina determines that “the authorized parties for submission to the Constitutional Court of the application for review of the constitutionality related to conflict of competences are the Chairperson of the Deputy Chairperson of any House of Parliamentary Assembly, one fourth of any House of Parliamentary Assembly, or one fourth of members of any House of the Legislature of Entities “.

⁵¹⁷ Article 112 [General Principles] of the Constitution say as follows: “ 1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution”.

challenged act and the Article(s) of the Constitution, violated by that act. This means, that, if the Assembly, the President, or the Government raises a competence issue before the Constitutional Court, the authorized party necessarily has to provide details about the manner in which the other institution has violated the specific competencies of the authorized party and include sufficient evidence that proves that the competencies that were allegedly violated are powers granted to the authorized party by the Constitution. The opposing party must, thus, show that it did not exceed the competencies, attributed to it by the pertinent Articles of the Constitution and submit evidence to that effect, where necessary. In adjudicating the referral, the Court may decide to involve all authorized parties mentioned in Article 113.3(1) of the Constitution, in particular, if the challenged act affected them all, depending on the circumstances.

Article 32 [Deadline]

Application filed pursuant to Article 31 of this Law shall be submitted within six (6) months from the time the conflict.

The request for review of constitutionality in case of a conflict of powers between the Assembly, the President and the Government submitted to the Constitutional Court by any authorized party, must be submitted to the Court within six (6) months from the date on which the alleged conflict of competencies defined by the Constitution occurred. For similar reasons evoked above, when commenting on the time limit contained in Article 30, this reasonably long time limit is important for ensuring legal clarity and legal certainty and leaving an authorized party sufficient time to prepare a well-founded referral. However, it is more probable that the consequences of the overstepping of powers by one party may not always be clear at the very beginning, since it may well need some time before the other party may become aware of it. Of course, if a conflict of competence between Assembly, the President of the Republic and the Government is not noticed by any of the parties, it will fade away in the passage of time, since the deadline is final and does not permit the restoration of the status quo ante.

Relevant case law

The first Referral submitted to the Court dealing with the issue of clarification of the competencies, is the Referral of the President of the Republic of Kosovo, for clarification of competencies in the case of Mayor of Rahovec.⁵¹⁸

The President of Kosovo filed a referral requesting from the Court a clarification as to which institution "...is responsible to assess the effectiveness and validity of a resignation and assess an eventual termination of the mandate of a mayor based on a

⁵¹⁸ JUDGMENT, Case No. KO 80/10, The Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr. Qazim Qeska of 7 October 2010, Bulletin of Case Law 2009 – 2010, page 30, available at: <http://www.gjk-ks.org/repository/docs/buletini%20eng.pdf>, (accessed April 28, 2014).

release issued to its citizens...” The President requested this clarification based on the case of resignation of the Mayor of Rahovec through a press release, reconfirmation of such resignation by the Ministry of Local Government, and afterward on the revocation of this resignation by the Mayor himself. The President claimed that the competencies of respective institutions in determining the validity of the resignation and termination of the mandate of a mayor are unclear, and as a consequence, he as a President “... could not proceed with further action in compliance with the constitutional principle of free and equal elections, envisaged in Article 123 (2) of the Constitution as far as municipal elections are concerned.”

In this case the Court decided that the referral is admissible based on the authorizations of the President in the Constitution to raise such Constitutional issues before the Court. It decided that the resignation of a given mayor is final and definitive and marks the termination of his/her mandate based on the Law on Local Self-governance, and that the constitutional consequences of such an action are the announcement of new elections by the President in order to ensure that citizens enjoy the right to free and fair elections when establishing their local self-governance.

Another example of a referral submitted to the Court by an authorized party under Article 93.10 and Article 113.3(1) of the Constitution is Case 98/11 of 20 September 2011,⁵¹⁹ where the Government as the Applicant requested an interpretation of the immunities afforded the President of Kosovo, Assembly Deputies and Members of the Government, specifying Articles 89, 75.2 and 98 of the Constitution.

The Court held that the Referral was admissible, concluding that the Prime Minister was an authorized party pursuant to Article 113.3(1), because each question raised an issue related to the abilities of the President, Assembly Deputies and Members of Government to perform their constitutional functions independently, noting that Chapter III of the Law on the Constitutional Court provides no deadlines under Article 93 [Competencies of the Government], paragraph 10.

On the merits, the Court held, *inter alia*, that Articles 7 [Values], paragraph 1, 89 [Immunity] and 98 [Immunity] of the Constitution afford the President, Assembly Deputies and Members of Government functional immunity for actions taken or decisions made within the scope of their responsibilities, encompassing opinions expressed, votes cast or decisions made, which is of unlimited duration. The Court clarified that the expression “[w]hile performing his/her duties” refers to performing the work of the Assembly during its plenary and committee meetings.

⁵¹⁹ See for the complete text of the Judgment: Bulletin of Case Law 2011, page 340 or the web-page of the Court.

3. Procedure for cases arising under Article 113, paragraph 3 item 2 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraph 3 (2), of the Constitution

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

(2) compatibility with the Constitution of a proposed referendum;

It may be useful to shortly describe what a referendum is and by whom it may be proposed, since the Constitution only uses the term without any further explanation. Generally speaking, a referendum can be described as a principle or practice of submitting to a popular vote a measure passed on or proposed by a legislative body (at national and other levels) or by popular initiative. The nature of a referendum can vary according to whether it is mandatory or optional and depends on the body competent to call it. A referendum is mandatory, when certain texts are automatically submitted to a referendum after their adoption by the Parliament, while a referendum at the request of an authority may be called by the President, the legislature (or part of it) or another public body. A referendum at the request of part of the electorate would be a further option.⁵²⁰

Kosovo still needs a law regulating the holding of referenda. The Assembly should not further hesitate to implement Article 2 [Sovereignty] of the Constitution, providing in its paragraph 1: *“The sovereignty of the Republic of Kosovo stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of the Constitution”*. The Constitution, thus, clearly recognizes the referendum as a mechanism for the exercise of sovereignty by the people and needs swift implementation in order to let the people of Kosovo, through popular consultation participate, as much as possible, in the adoption of legislation. By doing so, the Assembly should follow the Code of Good Practice on Referendums, adopted by the Council for Democratic Elections and the Venice Commission in December 2006 and October 2007, respectively,⁵²¹ which is largely based on the Code of Good Practice in Electoral Matters adopted by the same organs in 2002.⁵²²

Apart from Article 113.3 (2) of the Constitution and Article 2 of the Constitution, the Constitution uses the term “referendum” on several other occasions. For instance, it is

⁵²⁰ Tierney, Stephen. *Constitutional referendums: the theory and practice of republican deliberation*. Oxford, United Kingdom: Oxford University Press, 2012. available at: http://www.upf.edu/dcpis/_pdf/2009-2010/forum/Tierney_paper.pdf p. 20 (accessed April 28, 2014)

⁵²¹ Code of good practice on Referendums adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007). [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)008rev-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)008rev-e) (accessed June 9, 2014).

⁵²² Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report - Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002). [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023-e) (accessed June 9, 2014).

also mentioned in its Article 65 [Competencies of the Assembly]: “*The Assembly of the Republic of Kosovo: [...] (3) announces referenda in accordance with the law*”. Moreover, its Article 81 [Legislation of Vital Interest], paragraph 2, of the Constitution contains a reference to a referendum: “*None of the laws of vital interest may be submitted to a referendum*”.⁵²³ Finally, the term is used in its Article 139 [Central Election Commission], paragraph 1, of the Constitution, providing: “*The Central Election Commission is a permanent body, which prepares, supervises, directs, and verifies all activities related to the process of elections and referenda and announces their results*”.

Although a referendum can presently not be held in the absence of the necessary implementing legislation, it may become a powerful tool for the people of Kosovo to be consulted on questions, which are important to it, like constitutional amendments.⁵²⁴ Presently, pursuant to Article 144 [Amendments], paragraph 3, of the Constitution, amendments to the Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred them to the Constitutional Court for a prior assessment that the proposed amendments does not diminish any of the rights and freedoms set forth in Chapter II of the Constitution. For instance, in Case KO No. 29/12 and 48/12, Applicant President of the Assembly of the Republic of Kosovo, Judgment of 20 July 2012.⁵²⁵

As to the implementation of Article 113.3(2) of the Constitution, Articles 33 and 34 of the Law provide the following:

Article 33 [Accuracy of referral]

A referral made pursuant to Article 113, Paragraph 3, item 2 of the Constitution shall be filed by either the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo or the Government. The referral shall include any relevant information in relation to the alleged

⁵²³ Article 81 [Legislation of Vital Interest] of the Constitution reads as follows: 1. The following laws shall require for their adoption, amendment or repeal both the majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority:

- (1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in inter-municipal and cross-border relations;
 - (2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution;
 - (3) Laws on the use of languages;
 - (4) Laws on local elections;
 - (5) Laws on protection of cultural heritage;
 - (6) Laws on religious freedom or on agreements with religious communities;
 - (7) Laws on education;
 - (8) Laws on the use of symbols, including Community symbols and on public holidays;
2. None of the laws of vital interest may be submitted to a referendum.

⁵²⁴ In Switzerland the consultation of the population on an amendment to the Constitution is mandatory.

⁵²⁵ KO 29/12 and KO 48/12, Judgment, Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, 20 July 2012. Available at:

http://www.gjk-ks.org/repository/docs/Aktgjkim%20Anex%20A&B%20KO29_48_12_ANG.pdf, (accessed April 28, 2014).

incompatibility with the Constitution and the proposed referendum as further determined by the Rules of Procedure of the Constitutional Court.

As was the case with Article 31 of the Law, where a similar problem arose, Article 32 is equally problematic, since it also fails to specify in what manner the Assembly could seize the Court. Hence, this provision of the Law should be clarified as well and clearly determine the procedure for the Assembly to address the referendum issue to the Court. As commented on Article 31 in this respect, there may be two or more solutions: for instance, (1) to apply the criteria of Article 80 [Adoption of Laws] of the Constitution and, thus, consider the decision to seize the Court as a decision requiring the majority vote of deputies present and voting, or (2) to apply, *mutatis mutandis*, the criteria of Article 29 of the Law, meaning that one fourth (1/4) of the deputies of the Assembly is sufficient to submit the referral.

As is the rule in all cases in which referrals are submitted to the Court, the applicant bears the burden of having to produce all relevant evidence in support of the claim addressed to the Court. So, also here, it is the authorized party which has to substantiate the referral in detail and answer the question, why, in its/his/her opinion, the proposed referendum is incompatible with one or more specific Articles of the Constitution and should, therefore, not be held.

As to the question whether there is any deadline for the submission to the Court of a referral, which has only the intention to stop the holding of a proposed referendum, it follows from Article 113.3(2) of the Constitution as well as Article 33 of the Law, that an authorized party has to submit the referral before the proposed referendum is held, meaning, supposedly, at the latest the day before the polling stations open.

Many European countries, for instance, Albania, Armenia, Bulgaria, Cyprus, Estonia, Macedonia, Georgia, Hungary, Italy, Malta, and Poland foresee a constitutional review of decisions on the question whether or not to organize a referendum on a particular issue. Usually, the review by a constitutional court relates to the question whether the questions posed in the referendum are in compliance with the Constitution⁵²⁶.

Article 33 of the Law is further supplemented by Rule 69 of the Rules of Procedure. However, the Rule repeats the contents of the second sentence of Article 33 of the Law, but does not provide further details as to the submission of the referral to the Court, which makes it superfluous.

Article 34 [Deadline]

34.1 The Constitutional Court shall decide on the constitutionality of the proposed referendum within thirty (30) days after receipt of the referral.

34.2 A referendum that is subject of a referral made pursuant to Article 33 of this Law shall be held only after the Constitutional Court decides on the constitutionality of the proposed referendum.

⁵²⁶ See for further information on this issue: "European Commission for Democracy through Law, Referendums in Europe- an Analysis of the Legal Rules in European States" (Venice Commission 2005). Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdfFile=CDL-AD\(2005\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdfFile=CDL-AD(2005)034-e) (accessed June 9, 2014).

- 1 The legislator leaves the Court a very short time limit for the adjudication of such an important referral, probably in order not to let the incompatibility question as to the holding of the referendum, which must already have been extensively discussed in the Assembly and the media, be left unanswered for a much longer period of time after its submission to the Court. In the above countries, similar deadlines exist.
- 2 The text of Article 34.2 in English version is not precise. What it may mean to say is that, if the authorized party addresses the Constitutional Court to have the constitutionality of the proposed referendum reviewed on its compatibility with the Constitution, the referendum shall be held only, if the Constitutional Court decides that the proposed referendum is in compliance with the Constitution. Thus, the Article has a suspending effect on the referendum procedure during the time that the referral is under adjudication by the Court.
As a final comment on Articles 33 and 34, it has to be noted, that these Articles are presently not operational in the absence of a law regulating the holding of a referendum to be adopted by the Assembly, as suggested above.

4. Procedure for cases defined in Article 113, paragraph 3 item 3 of the Constitution

Article 113.3 (3) of the Constitution

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

- (3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;**

The state of emergency is mentioned amongst the powers of the President in Article 84 [Competencies of the President], paragraph 22, of the Constitution and spelled out in greater detail in Article 131 [State of Emergency] of the Constitution.

Article 84.22 of the Constitution

The President of the Republic of Kosovo:

- (22) decides to declare a State of Emergency in consultation with the Prime Minister;**

Article 131 [State of Emergency] of the Constitution:

1. **The President of the Republic of Kosovo may declare a State of Emergency when:**
 - (1) there is a need for emergency defense measures;**

- (2) there is internal danger to the constitutional order or to public security;
or
 - (3) there is a natural disaster affecting all or part of the territory of the Republic of Kosovo.
- 2. During the State of Emergency, the Constitution of the Republic of Kosovo shall not be suspended. Limitations on the rights and freedoms guaranteed by the Constitution shall only be to the extent necessary, for the least amount of time and in full accordance with this Constitution. During the State of Emergency, the law on elections of the Assembly and Municipalities shall not be changed. Further principles for the actions of the public institutions during the State of Emergency shall be regulated by law, but shall not be inconsistent with this Article.
- 3. If there exists the need for emergency defense measures, the President of the Republic of Kosovo shall declare a State of Emergency upon consultation with the Prime Minister. In declaring the State of Emergency, the President of the Republic of Kosovo shall immediately issue a decree setting forth the nature of the threat and any limitations on rights and freedoms. Within forty eight (48) hours, the Assembly may provide its consent by two thirds (2/3) vote of the deputies present and voting. If consent is not provided, the President's decree shall have no force or effect.
- 4. If there exists a danger to the constitutional order and to the public safety in the Republic of Kosovo or there exists a natural disaster in all or part of the territory of the Republic of Kosovo, the President of the Republic of Kosovo may declare a State of Emergency upon consultation with the Prime Minister. In declaring the State of Emergency, the President of the Republic of Kosovo shall immediately issue a decree setting forth the nature of the emergency and any limitations on rights and freedoms. Within forty eight (48) hours, the Assembly may provide its consent by a majority vote of the deputies present and voting. If consent is not provided, the President's decree shall have no force or effect.
- 5. A State of Emergency shall last only as long as the danger continues and may last no longer than a period of sixty (60) days. With the consent of a majority vote of the deputies of the Assembly present and voting, the State of Emergency may be extended if necessary for successive periods of thirty (30) days up to a total of ninety (90) additional days.
- 6. The Assembly may place such limitations on the duration and extent of the State of Emergency as deemed necessary. When the President determines that the danger to the Republic of Kosovo is of an extraordinary nature, the Assembly may authorize an extension of the State of Emergency beyond the one hundred fifty (150) days, only if adopted by two thirds (2/3) vote of all deputies of the Assembly.
- 7. The President of the Republic of Kosovo may, upon consultation with the Government and the Assembly, order mobilization of the Kosovo Security Force to assist in the State of Emergency.
- 8. The Security Council of the Republic of Kosovo, only during the State of Emergency, shall exercise executive functions which shall be limited to

those functions which specifically relate to the State of Emergency. In a State of Emergency the Security Council of the Republic of Kosovo shall be chaired by the President of the Republic of Kosovo, as provided by law. During the State of Emergency, the Security Council of the Republic of Kosovo shall closely cooperate with the Government, the Assembly and international authorities.

- 9. The law shall define the principles, areas and manner of compensation for any losses resulting from the limitations imposed during a State of Emergency.**

In short, Article 131 [State of Emergency] of the Constitution contains specific provisions which define: the circumstances under which the President may declare a State of Emergency; the procedure to obtain the consent of the Assembly; the duration and extent of the State of Emergency; and powers of the President, Assembly and Government during the State of Emergency. During the state of emergency, certain constitutional rights can be limited in accordance with the Constitution. However, Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution explicitly defines the rights and freedoms, the derogation of which shall not be permitted under any circumstances, even not during a State of Emergency⁵²⁷. The above Articles 113.3(3) and 131 of the Constitution are implemented by Article 35 of the Law:

Article 35 [Deadline]

The decision of the Constitutional Court taken in accordance with Article 113, Paragraph 3, item 3 of the Constitution, may be rendered within 24 hours after the entry into force of a declaration or action referred to therein.

During the State of Emergency, the Constitution remains in effect, pursuant to Article 131.2 (see text above) of the Constitution and, consequently, the Court retains its powers as laid down therein. Article 35 of the Law provides for a time limit of 24 hours within which the Court may decide on the declaration of a State of Emergency and the actions taken during the State of Emergency. However, this does not seem to make much sense, since the Article does not mention any referral submitted by the authorized parties under Article 113.3(3) of the Constitution. What the Article may mean to regulate is the time limit from the moment, when the relevant authorized party or parties refer(s) the question of compatibility of the declaration of the State of Emergency and the actions referred to therein to the Court. Taking into account the

⁵²⁷ Article 56 of the Constitution provides:

"1. Derogation of the fundamental rights and freedoms protected by this Constitution may only occur following the declaration of a State of Emergency as provided for by this Constitution and only to the extent necessary under the relevant circumstances.

2. Derogation of the fundamental rights and freedoms guaranteed by Articles 23, 24, 25, 27, 28, 29, 31, 33, 34, 37 and 38 of this Constitution shall not be permitted under any circumstances.

emergency situation, the Court is given 24 hours to render the decision, but may take longer, as indicated by the use of the words “may be rendered within 24 hours”.

Moreover, this Article is incorrect in another aspect, since it only speaks about actions referred to in the declaration of the State of Emergency, whereas Article 113.3(3) of the Constitution refers to actions undertaken during the State of Emergency, meaning actions undertaken after the State of Emergency had been declared. This is a further argument for the above opinion, that the timeframe of 24 hours foreseen by Article 35 of the Law should be calculated from the moment of the submission of a referral to the Constitutional Court by an authorized party wishing to challenge the declaration of the State of Emergency itself or any action undertaken during that State of Emergency.

It is suggested that the text of Article 35 is amended accordingly.

As is the case regarding Sub-Chapters 2 and 3 above (Articles 31 and 33 of the Law), also Sub-Chapter 4 does not specify how many deputies of the Assembly may refer the question of compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency to the Court. Again it is not clear from the text, whether the decision of the Assembly to seize the Court with the compatibility issue regarding the declaration of the State of Emergency is a simple decision in the sense of Article 80 [Adoption of Laws] of the Constitution, requiring the adoption by a majority vote of deputies present and voting, or whether one of the voting criteria mentioned under the different paragraphs of Article 131 of the Constitution would be applicable. It would certainly have been helpful, if the Law on the Constitutional Court would have specified this in a special provision.

As a final remark, it needs to be said that Article 35 of the Law may only be operational, when, pursuant to Article 131.2 of the Constitution, “[...] Further principles for the actions of the public institutions during the State of Emergency shall be regulated by law....” So far, the Assembly has not adopted any Law on the State of Emergency, which would implement Article 131 of the Constitution and define the principles, areas and manner of compensation for any losses resulting from the limitations imposed during a State of Emergency, as stipulated by Article 131.9 of the Constitution. Article 35 may, therefore, not be operational yet.

Article 35 of the Law is not supplemented by any Rule of the Rules of Procedure.

5. Procedure for cases defined under Article 113, paragraph 3 item 4 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraph 3 (4) of the Constitution

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

- (4) compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;**

Authorized parties under Article 113.3(4) are entitled to submit the question to the Court whether the proposed amendment is compatible with the provisions of one or more international agreements which have been ratified by the Kosovo institutions in compliance with the requirements of the Constitution and the law. At the same time, the authorized parties could request the Court to review whether the procedure, followed by the party who has proposed the amendment concerned, is compatible with constitutional requirements.

In this context, it is appropriate to refer to Article 19 [Applicability of International Law] of the Constitution which stipulates:

1. *International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.*
2. *Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.*

In the adjudication of the referral under Article 113.3(4) of the Constitution, the Court will, thus, have to determine whether the proposed constitutional amendment is compatible with the binding international agreements (mentioned in the referral) which has become part of the internal legal system of Kosovo.

However, apart from the compatibility check of the proposed amendment at the request of an authorized party under Article 113.3(4) of the Constitution, the President of the Assembly is held by virtue of Article 144.3 of the Constitution to refer the proposed amendment to the Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.⁵²⁸

Furthermore, the same question arises as to the “Assembly” as an authorized party as under the previous paragraphs of Article 113.3 of the Constitution.

Article 113.3(4) of the Constitution is implemented by Articles 36 and 37 of the Law.

Article 36 [Suspension Effect]

The application under Article 113, paragraph 3, item 4 of the Constitution shall have a suspensive effect. The Assembly of the Republic of Kosovo shall act upon the contested amendment only after a decision of the Constitutional Court has been rendered.

Article 18 [Ratification of International Agreements] of the Constitution, inter alia, defines the rules for the ratification of international agreements, amendments or withdrawal of such agreements and the principles and procedures for ratifying and contesting international agreements as set forth by law. Furthermore, Article 19.2 of the Constitution stipulates that international agreements ratified in accordance with the Constitution, during the time of their applicability, prevail over any applicable laws.

⁵²⁸ Article 144.3 of the Constitution provides: “Amendments to this Constitution may be adopted by the Assembly only after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II of this Constitution.”

As Article 16.3 of the Constitution defines that the Republic of Kosovo shall respect international law⁵²⁹, it will, therefore, also be held to respect the Vienna Convention on the Law of Treaties⁵³⁰, and, thus, to ensure that the institutions of Kosovo do not avoid the implementation of international obligations laid down in ratified international treaties by amending the domestic legislation including the Constitution, contrary to the provisions of such binding international agreements. In this spirit, the Constitution mandates the Constitutional Court to review, at the request of an authorized party, the compliance of proposed constitutional amendments with binding international agreements and the review of the constitutionality of the procedure followed. If one or more authorized parties address the Constitutional Court under Article 113.3(4) of the Constitution, the President of the Assembly is obliged, pursuant to Article 36, to suspend the approval of the proposed amendment, until the Constitutional Court has rendered a decision on the compatibility issue regarding the disputed amendment. Article 36 of the Law is supplemented by Rule 70 [Judgment] of the Rules of Procedure.

Rule 70 [Judgment] of the Rules of Procedure

- 1. If the Court concludes in its judgment that in a Referral made under Article 113.4 of the Constitution the proposal to amend the Constitution is in breach of international agreements that are binding on Kosovo or that have otherwise been ratified pursuant to the Constitution, or respectively with the provisions of the Constitution on the procedure that should be followed for amending the Constitution, the Court shall order the proposal not to be adopted by the Assembly.**
 - 2. The Court in its judgment may advise on the type of modifications that could be made to the proposal, so that the proposal to amend the Constitution is in compliance with international agreements that are binding on Kosovo or that have otherwise been ratified pursuant to the Constitution, or respectively with the provisions defined in the Constitution for the procedure to be followed for amending the Constitution.**
- I.** Rule 70.1 erroneously mentions Article 113.4 of the Constitution instead of Article 113.3(4). It stipulates that if the Court, on the basis of a referral under Article 113. [3] (4) of the Constitution, decides that the proposed constitutional amendment is inconsistent with binding or otherwise international agreements, the Court shall order the Assembly not to adopt the proposed amendment. Similarly, if the Court decides that the procedure for amending the Constitution as provided in Article 144 [Amendments] of the Constitution has been violated by the proposing party, the Court shall equally order the Assembly not to adopt the proposed amendment.
- II.** The Court has the possibility in its judgment to advise the party who has proposed the challenged amendment, how to modify it in order to harmonize it with the

⁵²⁹ See Article 16.3 of the Constitution.

⁵³⁰ Corten, Olivier. "Part III Observance, Application and Interpretation of Treaties." In *The Vienna Conventions on the Law of Treaties a commentary*. Oxford: Oxford University Press, 2011.

relevant international agreements. Thus, it is assumed that, if the Court gives such an advice and the proposing party prepares a new amendment in conformity therewith, the newly proposed amendment will not risk to be taken once more to the Court for a constitutional check on its compatibility with such international agreements. However, if (for whatever reason) the proposing party would not follow the Court's advice, the newly proposed amendment will certainly again be referred by the authorized party under Article 113.3(4) to the Court for adjudication.

Furthermore, if the Court has found that the procedure to be followed for amending the Constitution has been conducted in breach of the Constitution, it also has the possibility, in its judgment, to advise the proposing party on the appropriate procedure to be followed for amending the Constitution. So, in case the Court gives such an advice and the proposing party follows it to the letter, it is assumed that no further complaint of the same authorized party under Article 113.3(4) of the Constitution will be submitted to the Court. However, if (for whatever reason) the proposing party chooses not to follow the procedure as advised by the Court, the authorized party, who had requested the Court to review the constitutionality of the procedure followed, would certainly submit an similar request to the Court.

Article 37 [Deadline]

The Constitutional Court shall decide, pursuant to Article 113, paragraph 3 item 4 of the Constitution, on the referral filed by authorized parties within thirty (30) days from the day after receipt of a referral.

Article 37, as a *lex specialis*, departs from the general deadlines for the adjudication of a referral by the Court as laid down in Article 22 of the Law (see above). It is interesting to note that, as is the case regarding a referral made pursuant to Article 34.1 (compatibility with the Constitution of a proposed referendum), the deadline, within which the Court needs to render a decision, is equally thirty (30) days. So, the legislature must have considered that the adjudication of the compatibility of the proposed referendum should take the Court no longer than the adjudication of the compatibility of the proposed constitutional amendment. Of course, if time consuming research on binding international agreements would be necessary, the period may seem to be short. But also research on the referendum issue may be time consuming. In any case, without further elaborating on the matter, the time limits concerned seem to be reasonable.

Article 37 of the Law is not supplemented by any Rule of the Rules of Procedure.

6. Procedure in cases defined in Article 113, paragraph 3 item 5 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraph 3, of the Constitution

[The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:]

- (5) questions whether violations of the Constitution occurred during the election of the Assembly.**

Article 113.3 (5) is implemented by the provision Article 38 [Accuracy of the Referral] and 39 [Deadlines] of the Law, hereafter, indicating the guidelines to be followed for the submission of such questions to the Court.

Article 38 [Accuracy of the Referral]

In a referral made pursuant to Article 113, Paragraph 3, item 5 of the Constitution the following information shall, inter alia, be submitted:

- 1.1 description of facts of the alleged violation;**
- 1.2. concrete provisions of the Constitution allegedly violated; and**
- 1.3. presentation of evidence that supports the allegation for violation of the Constitution.**

The Article spells out in detail, how the authorized parties under Article 113.3 of the Constitution must build their case, when submitting questions to the Constitutional Court under Article 113.3 (5) of the Constitution. However, the guidelines are not much different from the requirement contained in Article 22 [Processing Referrals] of the Law that referrals should be justified and necessary supporting information and documents should be attached (see hereafter). Also Rule 29 [Filing of Referrals and Replies] of the Rules of Procedure contains similar requirements. The only difference is that information about the concrete provisions of the Constitution allegedly violated must also be submitted.⁵³¹

That, according to the above interpretation, authorized parties can directly seize the Constitutional Court pursuant to Article 113.3(5) of the Constitution, does not mean that, in the field of elections, the Court's mandate is limited to reviewing the constitutionality of the election of the Assembly, or that other entities do not have the opportunity to address the Constitutional Court with alleged violations which may have occurred during the elections, either general or local ones. For instance, pursuant to Article 122 [Electoral Appeals] of the Law on General Elections in Kosovo (Law No. 03/L-73), a natural or legal person whose legal rights have been affected by certain decisions of the Central Elections Commission may appeal that decision to the Election

⁵³¹ This requirement is now also laid down in the revised Referral Form and the Guidelines for completing this Form. Constitutional Court of the Republic of Kosovo. "Form for filing a referral." - Gjykata Kushtetuese. <http://www.gjk-ks.org/?cid=2,24> (accessed June 9, 2014).

Complaints and Appeals Commission (ECAC). If the plaintiff is not satisfied and, *inter alia*, the matter affects a fundamental right, an appeal with the Supreme Court can be filed under Article 118.4 [Decisions] of the Election Law. In case the Supreme Court rejects the plaintiff's case, the latter can request the Constitutional Court for a constitutional review of the question whether or not one or more of the plaintiff's rights and freedoms guaranteed by the Constitution have been infringed.⁵³²

However, as said above, the right to directly address the Constitutional Court, without going first through appeal procedures, with the request to examine whether the Constitution was violated, lies only with the authorized parties and that, only pertaining to the election of the Assembly of Kosovo. This procedure is certainly in compliance with the spirit of the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), which sets out a number of (minimum) guidelines (European standards) for the conduction of elections, including appeal procedures before ordinary courts, a special court or the constitutional court.⁵³³

Article 39 [Deadlines]

Claims must be filed within thirty (30) days from the date of exhaustion of other legal remedies.

As set out above, the purpose of Article 113.3 (5) of the Constitution actually is to enable the authorized parties to directly address the Constitutional Court. Therefore, Article 39 of Law seems to be inconsistent with the spirit and the letter of the Article 113.3(5) of the Constitution, since it makes the powers of the authorized parties under that Article conditional upon "the exhaustion of other legal remedies".

However, apart from this, the text regarding the deadline of 30 days may only make sense, if this deadline would start to run from the date when the alleged violation of the Constitution, during the election of the Assembly, occurred. It is suggested that the legislature reconsiders the text of Article 39 of the Law in light of this remark.

Articles 38 and 39 of the Law are not supplemented by any Rule of the Rules of Procedure.

⁵³² See, for instance, Case RESOLUTION ON INADMISSIBILITY In Case No. KI 73/09, Mimoza Kusari-Lila vs. The Central Election Commission of 23 March 2010, available at http://www.gjks.org/repository/docs/KI%2073_vendimi_ang.pdf (accessed June 9, 2014).

⁵³³ See Venice Commission. "Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report." Available at: [http://www.regjeringen.no/upload/KRD/Kampanjer/valgportal/valgobservatorer/Code_of_good_practice_CDL_AD\(2002\)023rev_e.pdf](http://www.regjeringen.no/upload/KRD/Kampanjer/valgportal/valgobservatorer/Code_of_good_practice_CDL_AD(2002)023rev_e.pdf) (accessed June 9, 2014).

7. Procedure in cases defined in Article 113, Paragraph 4 of the Constitution

Article 113 [Jurisdiction and Authorized Parties] of the Constitution of the Republic of Kosovo

The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court]

- 4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.**

In this context, reference is made to Article 11 [Legal protection of Local Self-government] of the European Charter of Local Self-Government (adopted by the member States of the Council of Europe on 15 October 1985), providing that “*Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.*” Under Article 133.4, the recourse of municipalities to a judicial remedy is the direct access to the Constitutional Court which will review the alleged infringement upon their responsibilities and a diminishing of their revenues.

The obligation to implement the Charter is provided for in Article 123 [General Principles], paragraph 3 of Chapter X [Local Government and Territorial Organization] of the Constitution, which stipulates that: “[...] *The Republic of Kosovo shall observe and implement the European Charter on Local Self-Government to the same extent as that required of a signatory state*”. Chapter X itself has been implemented by Law No. 03/L-040 on Local Self-Government, adopted by the Assembly on 20 February 2008. This Law sets out, inter alia, the powers and revenues of municipalities, but, strangely enough, does not mention the right of the municipality under Article 113.4 of the Constitution to submit a referral directly to the Court in the circumstances mentioned by the Article.

Article 113.4 of the Constitution is implemented by Articles 40 and 41 of the Law.

Article 40 [Accuracy of the Referral]

In a referral made pursuant to Article 113, Paragraph 4 of the Constitution, a municipality shall submit, inter alia, relevant information in relation to the law or act of the government contested, which provision of the Constitution is allegedly infringed and which municipality responsibilities or revenues are affected by such law or act.

That an Assembly law would infringe upon the constitutional rights of municipalities is less probable than that individual acts of the Government would do so (in particular, of the Ministry responsible for Local Self-Government as the supervisory authority). Such individual acts may concern issues of “Delegated Competencies” and the necessary funding under Article 18 [Delegated Competencies] of the Law of Local Self-

Government. Moreover, conflicts relating to the administrative review of municipalities by the Ministry responsible for Local Self-Government, laid down in Chapter X [Relationships between Central and Local Government] of that Law, could also force municipalities to seize the Court directly under Article 113.4 of the Constitution, for instance, if the Ministry would accuse a municipality of having exceeded its competencies under the Law on Local Self-Government and infringe in a disproportionate manner upon their responsibilities.

Also, if, pursuant to Article 82 [Procedure for the Review of Legality] of the Law of Local Self-Government, the supervisory authority considers a decision or other act of a municipality to be inconsistent with the Constitution and laws and requests the municipality to re-examine such decision or act, the municipality concerned should be able to submit a request for a constitutional review to the Court. A municipality, making use of this remedy, must, therefore, carefully follow the guidelines laid down in Article 40 of the Law.

Article 41 [Deadlines]

The referral should be submitted within one (1) year following the entry into force of the provision of the law or act of the government being contested by the municipality.

At first glance, it might not be clear for what reason the legislature has chosen such a long deadline. The more so, since, in particular, conflicts regarding competencies and revenues should be settled as soon as possible in the interest of transparency and legal certainty. However, there is a logic regarding such a long deadline. Municipal authorities may not be aware of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues immediately upon their entry into force. Within a year time frame, a municipality would be affected by such law or act of the Government. Up to now, the Constitutional court has been firm regarding the time frame, and has rejected referrals by municipality as inadmissible, as time barred in cases they are submitted after the deadline.⁵³⁴

8. Procedure for cases defined under Article 113, Paragraph 5 of the Constitution

Article 113 [Jurisdiction and Authorized Parties], paragraph 5 of the Constitution

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

- 5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the**

⁵³⁴ See, for instance, Bulletin of Case Law 2012, Volume I, page 67. "Case No. KO 117/10, The Referral of the Mayor of the Municipality of Hani i Elezit, Rufki Suma, concerning the name of the Municipality of Hani i Elezit, in the Serbian language known as -Dženeral Janković.". http://www.gjks.org/repository/docs/buletini_ang_vol_1.pdf (accessed June 9, 2014)

constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed.

As already mentioned above, only 10 or more deputies have a period of 8 days after the adoption of a law or a decision of the Assembly to submit a referral to the Constitutional Court, in which they can challenge the constitutionality of that law or decision. For such a small number of deputies it is certainly an important political weapon, with which they can try once more, after having lost the political battle in the Assembly, to stop the adoption of that law or decision.

The ten or more deputies do not necessarily need to come from the opposition or minorities in the Assembly. Also some majority deputies, who simply disagree with the adopted law or decision, could have joined the group.

In fact, the possibility for deputies to request the Court for a constitutional review of laws forms already part of Article 113.2 of the Constitution (see comments above), which stipulates in this respect, that the Assembly (meaning $\frac{1}{4}$ of the deputies, as specified in Article 29(1) of the Law) is authorized to refer to the Court “[...] (1) *the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government* [...]”.

A further difference between the two groups of deputies is, that, under Article 113.5 of the Constitution, the 10 or more deputies have only eight (8) days from the date of adoption (not the entry into force) to submit their referral to the Court, whereas, under Article 30 of the Law, the 30 or more deputies have 6 months from the day upon which the contested law enters into force to do so. Finally, the 10 or more deputies can also challenge the constitutionality of a decision of the Assembly and the procedure followed.

It must also be mentioned, that, when seized by 10 or more deputies, the Court can only undertake an abstract constitutionality control of the newly adopted law (or decision), before its entry into force. When seized by $\frac{1}{4}$ of the deputies, it can undertake a much more extensive control of the practical effects, since the law was (most probably) already being applied for a certain time before the deputies seized the Court.

The Article only provides for a constitutional review prior to the enforcement of a normative act (“a priori “constitutional review) initiated by ten or more deputies. Unlike in some other countries, no provision of the Constitution or the Law entitles the Court to start proceedings for an ”a priori “ review of normative acts on its own account (“proprio motu”). Also an “a priori” constitutional review cannot be initiated by individuals. However, individuals and constitutional bodies can both initiate a constitutional review after the enactment of a normative act (“a posteriori “constitutional review).

As an example of a Referral submitted under Article 113.5 of the Constitution, reference is made to Case KO 29/11 of 30 March 2011, wherein the Court adjudicated a first complaint submitted under Article 113.5 of the Constitution by 25 deputies of the LDK and 9 deputies of the AAK, who requested the Court to assess the constitutionality of the decision of the Assembly, by which Mr. Behgjet Pacolli was elected President of the Republic of Kosovo. The Court found, by seven votes in favour and two votes against, that the election procedure with only one candidate

running for the office of President of Kosovo was unconstitutional and that, even assuming that the Constitution would allow for one candidate to run for the office of President, the participation of less than the number of Deputies required by Article 86 of the Constitution rendered the voting procedure also invalid. The Court concluded that the voting procedure was in breach of Article 86 of the Constitution and, therefore, unconstitutional.

Article 113.5 of the Constitution is implemented by Articles 42 and 43 of the Law.

Article 42 [Accuracy of the Referral]

In a referral made pursuant to Article 113, paragraph 5 of the Constitution the following information shall, inter alia, be submitted:

- 1.1 names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;**
- 1.2 provisions of the Constitution or other act or legislation relevant to this referral; and**
- 1.3 presentation of evidence that supports the contest.**

Article 42.1 (erroneously indicated as 1.1) stipulates that the referral shall contain the names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly. However, the text is confusing, since instead of “all deputies”, it should better mention “ten (10) or more deputies”. No doubt, the relevant deputies will follow the guidelines for submitting the referral by the letter. It is of utmost importance that they substantiate their claim on the basis of supporting evidence and the relevant articles of the Constitution and/or relevant legislation.

Relevant case law

Another example of a referral submitted to the Court under Article 113.5 of the Constitution is Case KO 107/10 of 17 August 2011, Gani Geci and other deputies vs. Assembly Decision of 14 October 2010 regarding the Draft Strategy and the Decision of the Government on the Privatization of Kosovo Post & Telecommunications. The Applicants, 12 Assembly Deputies, filed a referral pursuant to Article 113.5 of the Constitution contending that the Assembly President put a draft strategy and decision to vote without having the necessary quorum of Deputies, thereby violating Articles 51(1), (2) and (3) of the Rules of Procedure of the Assembly, which requires a quorum of more than 50% of the Deputies. In reply, the Assembly President advised that the vote did not produce a signed decision and that the drafts were not adopted due to a complaint about a lack of quorum, indicating that the issues would be submitted to the Assembly for consideration at a later time.

The Court found that the Referral had become moot because the Assembly President had invalidated the questioned decision due to a lack of quorum and issued a Decision to Strike Out the Referral pursuant to Rule 32.4 of the Rules of Procedure.

Article 43 [Deadline]

- 43.1 A law or decision adopted by the Assembly of the Republic of Kosovo shall be sent to the President of the Republic of Kosovo for promulgation after the expiry of the deadline prescribed by Article 113, paragraph 5 of the Constitution.**
- 43.2 In the event that a law or decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with modalities determined in the final decision of the Constitutional Court on this contest.**
- 43.3 In the event that a law or decision adopted by the Assembly is contested in accordance with Article 113, paragraph 5 of the Constitution, the Constitutional Court shall render a final decision on this contest no later than sixty (60) days following the submission of the referral.**

- 1 The text of the provision seems somewhat problematic, since it stipulates that not only “a law”, but also a “decision”, adopted by the Assembly, shall be sent to the President of the Republic of Kosovo for promulgation after the deadline prescribed by Article 113.5 of the Constitution has expired. This inaccuracy apparently stems from the incorrect interpretation of Article 113.5 of the Constitution, which, as can be seen from its text quoted above, does not mention what will happen to the adopted law or decision after the expiry of the period of eight days. The drafters of Article 43.1 of the Law, however, seem to have taken it for granted that, after the expiry of the deadline of 8 days, both legal instruments would follow the same procedure. i.e. promulgation by the President of Kosovo.

By doing so, the drafters have overlooked the fact that, by virtue of Articles 80 [Adoption of Laws], paragraph 2,⁵³⁵ and 84 [Competencies of the President], paragraph 4,⁵³⁶ of the Constitution, only laws adopted by the Assembly are promulgated by the President of Kosovo. Thus, decisions (and other acts) adopted by the Assembly are not sent to the President for promulgation. It is, therefore, suggested that the words “or decision” are deleted from Article 43.1, whenever the Law is amended.

As to the reference in Article 43.1 to the deadline of eight days mentioned in Article 113.5 of the Constitution, within which the 10 or more deputies have the right to contest the constitutionality of any law or decision, the drafters must have considered that such a short period would clearly serve the principle of legal certainty, because a longer period could give rise to a lot of uncertainty on the part of the other deputies and the public at large whether or not the adopted law would be enacted by promulgation by the President or be subject of a constitutional review.

⁵³⁵ Article 80.2 of the Constitution provides: “2. Laws adopted by the Assembly are signed by the President of the Assembly of Kosovo and promulgated by the President of the Republic of Kosovo upon his/her signature within eight (8) days from receipt”.

⁵³⁶ Article 84.4 of the Constitution provides: [The President of Kosovo] “...(4) promulgates laws approved by the Assembly of Kosovo”.

- 2 Also Article 43.2 erroneously mentions the “decision” in connection with the promulgation procedure by the President, as commented on Article 43.1 above. It is, therefore, suggested that the words “or decision” in the first and third line of the Article be deleted, whenever the Law will be amended and that a separate paragraph is added to the Article, dealing with the contest of a decision adopted by the Assembly. This new Article 43.3 may read as follows: *“In the event that a decision adopted by the Assembly is contested in accordance with Article 113, Paragraph 5 of the Constitution, such a decision shall be amended in accordance with the modalities determined in the final decision of the Constitutional Court on this contest”*.

As to the substance of the Article, when the Court finds that one or more provisions of the contested law have to be modified because of its (their) unconstitutionality (See, for instance, Cases Nos. KO 45/12 and KO 46/12, request of Liburn Aliu and 11 other Members of the Assembly of the Republic of Kosovo for constitutional assessment of the Law on the Village of Hoce e Madhe / Velika Hoca and the Law on the Historic Centre of Prizren⁵³⁷), the law should be returned to the Assembly which, after it has modified the law, would once more forward it to the President for promulgation. However, if the Assembly members, who blocked the promulgation of the law a first time, are not satisfied with the amendments, they can again submit a referral to the Court under Article 113.5 of the Constitution, challenging the amended provisions of the law as still being unconstitutional and, thus, not in accordance with modalities established by the Court in its final decision. This may lead to a political impasse.

In this connection, reference is made to a Report [The Role and Competences of the Constitutional Court] by Prof. Luis Lopez Guerra, submitted at the UniDem Seminar organized in Bucharest on 8-10 June 1994, wherein he considers that *“Only an organ of the State or a significant part of it may accuse the Parliament of violating the Constitution. Evidently the purpose of this limitation on standing is to restrict the procedure to serious cases in which the supremacy of the Constitution is actually considered to be in obvious danger. These characteristics make abstract constitutional control a technique which is used only exceptionally in consolidated democratic regimes. In a setting of open political competition and alternative political options for power, minority political parties in the opposition would hardly feel the need to accuse the parties in power of violating the Constitution. On occasion, however, constitutional jurisdiction has been said to have become a form of protection for political minorities. But this affirmation is debatable. Continuous challenges of the majority party’s loyalty to the Constitution does not seem to be an appropriate technique for guaranteeing the stability of a regime. And in a democratic framework, minorities have other, less extreme ways of defending their interests. In addition, another aspect of this technique must be considered: a challenge by a minority group to the constitutionality of a law passed by the parliamentary majority must almost inevitably be interpreted as an act of partisan politics. And as a result, the decision of the Court in this case will inevitably have undesirable political overtones.”*

⁵³⁷ Judgment of 25 June 2012, Bulletin of Case Law 2012 (I), p. 735: and also on the Court’s Webpage.

Thus the Report makes it clear that, when using the right under Article 113.5 of the Constitution, there is always a risk that political minorities may abuse it for political purposes.

If the Court decides that the law as a whole is unconstitutional, the Assembly should redraft it or return it to the Government authorities who, in most cases, were the initiators and/or drafters of the law. A new draft may then be forwarded to the Assembly for adoption or the whole idea of having a new law might simply be abandoned. In the same way as mentioned above, the initial opponents could once more submit a referral to the Court challenging the constitutionality of certain provisions of the new law or of the new law as a whole, referring to the modalities mentioned in the Court's decision or invoking additional questions of unconstitutionality.

The issue of amending the law in accordance with the modalities established by the Court, is regulated in Article 35 [Enforcement of Decisions of the Constitutional Court] of the Rules of Procedure of the Assembly, providing that: "*1. The President of the Assembly shall inform Members of the Assembly and the Government of the decision of the Constitutional Court.*

2. The President of the Assembly shall seek from the sponsor of the act and bodies of the Assembly to start the preparation of the Act as a whole or parts of it in compliance with the content of the decision of the Constitutional Court."

In this context, the Committee on Legislation and Judicial Affairs (see, Article 3 of Annex Nr. 2 [Scope of Activities and Responsibilities of the Parliamentary Committees]) which is a permanent committee for reviewing the legal and constitutional basis of every law that is to be enacted by the Assembly and, as such, has been involved in the elaboration of the law declared, as a whole or parts of it, unconstitutional, will certainly play an important role in the "*preparation of the Act [...] in compliance with the content of the decision of the Constitutional Court.*" In the same way, other relevant Assembly Committees will be involved.

As to the constitutionality of the procedure followed, in the event that the complainants allege that the procedure followed for the adoption of a law or decision was unconstitutional, the Court may find that, as a result of the unconstitutional procedure, the outcome of the contested procedure is null and void. The whole procedure should, therefore, be repeated in accordance with the modalities determined in the decision of the Court, pursuant to Rule 63 [Enforcement of Decision], or abandoned if a majority of the Assembly would so decide.

Finally, it is not clear whether the Court could declare provisions of a law or a decision unconstitutional *ex officio*, for instance, if, during the adjudication of the referral, it discovers that not only the provisions contested by 10 or more deputies, but also some other provisions are unconstitutional. In such a situation, the Court should be empowered to declare the law or decision unconstitutional as a whole. Neither the Constitution, nor the Law expressly provide for such a rule. So far the Court has not dealt with the issue.

In any case, it would be interesting to look at the legal situation in some of the neighboring and other countries. For instance, Article 49 of Chapter VII [Special Procedures, Special Procedures for Reviewing the Compatibility of Laws and

Other Normative Acts with the Constitution and International Agreements] of the Albanian Law on the Constitutional Court provides that: “*For the review of the compatibility of a law or other normative act with the Constitution or an international agreement, the Constitutional Court is set in motion by a request of [...] no less than one-fifth of the deputies of the Assembly [...]*.. Chapter VII does not contain any reference to “*ex officio*” powers of the Constitutional Court.

The only exception is apparently Article 48 [Limits of Review] of Chapter VI [Operation of the Constitutional Court] which empowers the Court to review other provisions of contested laws than the ones which are the object of the review. The Article 48 stipulates that:

“1. The review of a case shall be limited to the object of the complaint and the reasons presented therein.

2. Exceptionally, if there is a connection between the object of a request and other normative acts, the Constitutional Court decides all the issues.”

Thus, although the Constitutional Court can widen the scope of its review to other laws, the Article does not appear to allow the Court to review other provisions of the contested law which are not the object of the complaint.

As to the Law on the Constitutional Court of Croatia, Article 35 of Chapter IV [Review of the Constitutionality of laws and the Constitutionality and Legality of Other Regulations], its Article 35 stipulates that: “*The request by which the proceedings before the Constitutional Court are instituted may be presented by: one fifth of the members of the Croatian Parliament,[...]*. Also here the Article does not mention any “*ex officio*” powers of the Constitutional Court allowing it to review different provisions of the contested law than the ones requested. The only exception is apparently Article 38, dealing with the right of every individual or legal person to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations. Pursuant to Article 38(2), the Constitutional Court is empowered to decide itself: “*[...] to institute proceedings to review the constitutionality of the law and the review of constitutionality and legality of other regulations.*” (See, also comments on 10. Procedure in the case defined under Article 113.7 of the Constitution of Kosovo).

Furthermore, under Article 76 of the German Constitutional Court Act: “*An application by [...] one third of the Bundestag members [...] shall be admissible only if one of the parties entitled to apply considers Federal or Land law 1. Null and void on account of its formal or material incompatibility with the Basic Law or ther Federal law, or [...]*. However, pursuant to Article 78 of the Federal Law on the Consitutional Court (BVG), is authorized to extend its adjudication to further provisions by providing: “*If the Federal Constitutional Court comes to the conclusion that Federal law is incompatible with the Basic Law or that Land law is incompatible with the Basic Law or other Federal law, it shall declare the law to be null and void. If further provisions of the same law are incompatible with the Bais Law or other Federal law for the same reasons, the Federal Constitutional Court may also declare them to be null and void.*”

Thus, under this Article the Federal Constitutional Court clearly possesses the power to review *ex officio* other provisions whose unconstitutionality had not been expressly invoked by the authorized party.

- 3 Article 43.3 does not suffer from the inaccuracy spotted in Article 43(1) and (2) regarding the use of the term “decision” alongside the term “law”, since it does not contain a reference to the Assembly sending the “law or decision to the President of Kosovo for promulgation”. The text of Article 43.3 is, therefore, correct in that respect.

As to its substance, it sets a period of 60 days after the “submission” of the referral, within which the Court shall render a final decision. The term “submission” is, unfortunately, incorrect and should be replaced by the word “registration”, since, in practice, the date of submission does not necessarily correspond with the date of registration, which, by virtue of Rule 28(2) of the Rules of Procedure, “*is the crucial date for the referral to be considered a pending case before the Court*”.

It is difficult to assess whether the maximum period of 60 days granted to the Court to decide on such a referral is too short or not long enough in the circumstances. Whether the Court would always be able to remain within the given timelimit will certainly depend on the complexity of the contested law or decision, in particular, since the Court needs to render a decision on the constitutionality of both the substance and the procedure followed. In fact, it could happen that the Court would need more time than the allocated 60 days. So far, it appears that, in the cases adjudicated under Article 113.5 of the Constitution, the Court has been able to remain within the deadline in most cases. Only in Case

The only other period of 60 days within which the Court must decide on an issue raised under the Special Procedures of Chapter III is the one mentioned in Article 54 [Deadline], which implements Article 113.9 of the Constitution providing that the President of the Assembly refers proposed constitutional amendments before approval by the Assembly to confirm that the proposed constitutional amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution⁵³⁸. Thus, Article 54 grants the same period of 60 days to the Court to adjudicate the referral. The drafters of the Law may have chosen the same period in both situations without much reflection, being of the opinion that, although different, both situations were sufficiently comparable to merit a similar period of 60 days for the Court to decide, the more so, since in both cases the text to be considered emanates from the same source, i.e. the Assembly.

Be that as it may, it does not seem to be unreasonable, if in an exceptional situation the Court would exceed the time limit for justified reasons. In any case, no sanction can be imposed on the Court, if it would not render the decision within the prescribed period. In fact, Article 54 seems not to exclude such a situation, since it provides that the Court should respect the sixty days period “to the extent possible”.

⁵³⁸ Article 113.9 of the Constitution provides: “*The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.*”

9. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 6 of the Constitution

Article 113 [Jurisdiction and Authorized Parties] of the Constitution

[...]

- 6. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic has committed a serious violation of the Constitution.⁵³⁹**

[...].

The Article does not contain any indication as to how the Court should interpret the concept of “serious violation of the Constitution”. Also paragraph 1 of Article 91 [Dismissal of the President]⁵⁴⁰ of the Constitution, stipulating that “[T]he Assembly may dismiss the President by 2/3 vote of all its deputies, inter alia, if the Constitutional Court has determined that he/she has seriously violated the Constitution “, does not provide any indication as to the possible interpretation of this concept. It only defines the possible sanction. This means that it is entirely left to the Court to develop the necessary criteria for such a serious finding.

The Court has already had the opportunity to express itself on the issue in Case KI 47/10, Naim Rustemi and 31 other Deputies of the Assembly of the Republic of Kosovo versus His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, in which it was alleged that the President had violated and continued to violate Article 88.2⁵⁴¹ of the Constitution which prohibits the President from exercising any political party functions and that such a violation was a serious violation of the Constitution⁵⁴². Considering that every citizen of the Republic of Kosovo is entitled to be assured of the impartiality, integrity and independence of their President, the Court was of the view that this could not be said when the President still holds high office in one of the most prominent political parties in the country. The Court, therefore, needed to determine whether “[...] this violation is merely a technical violation of the Constitution or rather a serious violation [...]”, and concluded that the President had committed a serious violation of the Constitution under Article 88.2 of the Constitution “by continuing to permit himself to be recorded as President of the LDK (Democratic League of Kosovo).”

The Court’s consideration seems to imply that the commission of a mere “technical violation” of the Constitution by the President may not necessarily lead to the

⁵³⁹ The classical impeachment of a President before a constitutional court.

⁵⁴⁰ Article 91 [Dismissal of the President] of the Constitution provides: “1. The President of the Republic of Kosovo may be dismissed by the Assembly if he/she has been convicted of a serious crime or if he/she is unable to exercise the responsibilities of office due to a serious illness or if the Constitutional Court has determined that he/she has committed a serious violation of the Constitution. [...]”

⁵⁴¹ Article 88.2 of the Constitution reads: “2. After election, the President cannot exercise any political party functions”.

⁵⁴² Case No. KI 47/10, Naim Rustemi and 31 other Deputies of the Assembly of the Republic of Kosovo vs. His Excellency, Fatmir Sejdiu, President of the Republic of Kosovo, Judgment of 28 September 2010, Bulletin of Case Law 20019 – 2010, page 239; and also on the Court’s Webpage.

consequences which a “serious violation” of the Constitution would lead to (see also the comments on Article 44 hereafter).

Referrals submitted under Article 113.6 of the Constitution will certainly remain rare. In every future case of this kind, when having to assess whether the alleged violation of the Constitution merits the conclusion that it is indeed a “*serious*” violation, the Court will certainly refer to its considerations in Case No. KI 47/10.

Article 113.6 of the Constitution is implemented by Articles 44 [Accuracy of the Referral] and 45 [Deadlines] of the Law, which are themselves supplemented by Rules 71 [Notification], 72 [Cancellation of Proceedings] and 73 [Withdrawal] of the Rules of Procedure.

Article 44 [Accuracy of the Referral]

- 1. In a referral made pursuant to Article 113, paragraph 6 of the Constitution, the following information shall, inter alia, be submitted:**
 - 1.1. description of facts of the alleged violation;**
 - 1.2. concrete provisions of the Constitution allegedly violated by the President; and**
 - 1.3. presentation of evidence that supports the allegation for a serious violation of the Constitution by the President of the Republic.**

The allegation that the President has committed a serious violation of the Constitution is a very serious one and it must be clear that the 30 or more Deputies, necessary to launch the referral, must not take such an accusation lightly. Therefore, their referral must contain an accurate and detailed description of the facts, the provisions of the Constitution violated and, in particular, sufficient and convincing evidence in support of their allegations. In Case 47/10, the complainants fulfilled the Article 44 requirements and explained the reasons why, in their view, the President had committed a serious violation of the Constitution.

As already set out under “General comment” above, neither Article 113.6 of the Constitution, nor Article 44 of the Law contains any indication how the term “serious violation” should be understood. Also the relevant Rules of Procedure (Rules 72 [Cancellation of Proceedings] and 73 [Withdrawal] are silent in this respect. In the absence of any guideline laid down in these legal instruments, the Court had the occasion to develop its view on the concept of “serious violation of the Constitution” in the above Case No. KI 47/10.

Apart from the quotations mentioned above, the Court also held that: “*Bearing in mind the considerable powers granted to the President under the Constitution it is reasonable for the public to assume that their President, “representing the unity of the people” and not a sectional or political party interest, will represent them all. Every citizen of the Republic is entitled to be assured of the impartiality, integrity and independence of their President. This is particularly so when he exercises political choices such as choosing competing candidates from possible coalitions to become Prime Minister.*”

The Court continued that “[T]his cannot be said when the President still holds office in one of the most prominent political parties in the country [...]” and concluded that “the

President has committed a serious violation of the Constitution under Article 88.2 of the Constitution by continuing to permit himself to be recorded as President of the LDK.”

As to the contents of Article 44.1, it does not more than elaborating the general rules for the submission of a referral with the Court as laid down in Rule 29 [Filing of Referrals and Replies]. As mentioned before, in general, a referral may not need to mention the particular Article of the Constitution or of the ECHR which is allegedly violated, as long as the referral mentions the substance of the violated provisions. However, Article 44.1 is more precise and clearly indicates that the “*concrete provisions of the Constitution allegedly violated by the President need to be mentioned.*” In such a serious case, it is to be expected that the deputies concerned will do their utmost to comply with this requirement.

Article 45 [Deadlines]

The referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

The question arises, what the drafters really meant, when they adopted the wording: “the alleged violation of the Constitution by the President *has been made public*”. It seems to suggest that some institution or person should first make a public announcement about the President allegedly having committed a serious violation, before the time limit will start running. It could even be the case, that the President him/herself would make a public announcement, which contains the “serious violation”, the date which would be the starting point of the 30 days period.

The Court expressed itself on the issue in its judgment in the above Case No. KI. 47/10, where the Court apparently considered the freezing of the position as Chairman of the LDK as the starting date of the period of 30 days of Article 45. This information had been made public by a communiqué issued by the LDK at the beginning of the tenure of President Sejdiu. Although the referral was only submitted more than the 30 days after the date of the communiqué, the Court considered whether the holding of the office of President and, at the same time, of Chairman of the LDK, “*but freezing that position*”, was a continuing situation that remained in violation of the Constitution every day that the President held both offices or if it was an isolated event. The President admitted that he had continued to be the Chairman of LDK and President of Kosovo at all times since his election to the office of President in 2006. The Court held that, if this was the case, the consequences of the freezing of the position continue and, therefore, there was a day by day ongoing situation. It, therefore, found that the ongoing situation continued to this day and that, therefore, the 30 day time limit required by Article 45 of the Law did not apply in this case.⁵⁴³

⁵⁴³ See for further details the text of the Judgment.

Rule 71 [Notification] of the Rules of Procedure

- 1. Following the filing of a referral by an authorized party pursuant to Article 113.6 of the Constitution, the Court shall immediately notify the President and send a copy of the referral to the President of Kosovo no later than three (3) days from its filing with the Court.**
- 2. The Court shall request the President of Kosovo to reply to the referral no later than fifteen (15) days from the date the referral is served on the President of Kosovo, unless good cause is shown for a later reply.**

- I. Rule 71.1 clearly shows that this type of referral is treated by the Court with expediency from the moment it is filed.⁵⁴⁴ Not only shall the Court, or more precisely, the Secretary General immediately notify the President of the Court (to have the Judge Rapporteur and Review Panel appointed without delay), but will also send a copy of the referral to the President of Kosovo no later than 3 days from its filing⁵⁴⁵ with the Court. In order to save time, the Judge Rapporteur could, if he/she deems it necessary, request the referring party to clarify or supplement the referral and submit any additional documents and relevant information, in accordance with Article 22.4 of the Law.

The question may be asked for what reason the proceedings should be conducted so speedily and why President of Kosovo should only be given 15 days to prepare a reply to the referral instead of being entitled to a period of 45 days, as normally granted to an applicant, pursuant to Article 22.2 of the Law. The claim that the President of Kosovo has allegedly committed a serious violation of the Constitution is of such a serious nature, that one would expect that he/she would be granted an even longer period of time for the preparation of a proper reply, also out of respect for the institution of “President of the Republic of Kosovo”. For instance, in an impeachment procedure, the Albanian Law on the Organization and Operation of the Constitutional Court⁵⁴⁶ and the Slovenian Constitutional Court Act⁵⁴⁷ do not specify any time limit for the reply of the President. Also in the Croatian Constitutional Court Act⁵⁴⁸ no time limit is provided. However, it is not excluded that the constitutional courts concerned may fix a reasonable deadline by which the President must submit his/her comments.

- II. Of course, under Rule 71(2), a later reply is possible as a favor, not a right and only, if good cause is shown. It may, however, be argued that, if the President

⁵⁴⁴ For the same reasons as set out above, it would be more appropriate to use the term “registered” instead of “filed”.

⁵⁴⁵ The word “registration” would have been more appropriate.

⁵⁴⁶ Article 61.3 of the Albanian Law provides: “*The Constitutional Court shall send to the President of the Republic a copy of the decision of the Assembly and the supporting evidence, and he shall be entitled to give explanations in written.*”

⁵⁴⁷ Article 64.1 of the Slovenian Law stipulates: “*The Constitutional Court sends the resolution on impeachment to the President of the Republic, who may reply to the impeachment.*”

⁵⁴⁸ Article 83(2) of the Croatian Law provides: “*The Constitutional Court shall obtain the statement of the President of the Republic about the act of impeachment of the Croatian Parliament and shall enable him to participate in the proceedings.*”

continues to exercise his/her functions from the day of his impeachment until the Court has found that he/she has seriously violated the Constitution, the people are entitled to know as soon as possible whether or not the referring party was justified in submitting such a serious claim to the Court. Moreover, it may also be held that the acts performed as President during the period of impeachment might have to be considered null and void⁵⁴⁹. Thus, the shorter the period of the impeachment proceedings lasts, the quicker the Court will be able to adjudicate the referral and confirm whether or not the claim was justified and the lesser decisions the President might have been able to take.

However, there exists a more important reason, why Rule 71 may be somewhat problematic. Namely, Article 22.2 of the Law provides that the opposing party or participant has 45 days from the reception of the referral to submit to the Secretariat his reply to the referral. The question is whether this period of 45 days can be shortened by a Rule adopted by the Court to 15 days.. Tin principle, the hierarchy of legal norms prescribes that Rules of Procedure (in this case Rule 71 of the Rules of Procedure) cannot restrict rights obtained by a normative act of Parliament (in this case Article 22.2 of the Law).

A further issue may arise, if a President accused of an alleged serious violation of the Constitution would request an oral hearing in the public interest and for the sake of transparency, but the Court would dismiss the request. It seems to be rather the rule than the exception that constitutional court acts of other states provide that impeachment proceedings imply an oral hearing where the President could have the opportunity to orally dismiss the accusations⁵⁵⁰ or, at least, to allow the presence of the impeached President at the plenary session of the constitutional court where his case is being dealt with⁵⁵¹. However, neither the Constitution, nor the Law contains any specific indication that impeachment proceedings would call for an oral hearing of the parties. Therefore, it is assumed that such proceedings follow the general rule that the Court can decide *ex officio* or at the request of a party to hold an oral hearing (See comments on Article 20 above). For instance, in the above Case No. KI 47/10, the Court did not schedule a hearing *ex officio*, nor did President Fatmir Sejdiu request a hearing.

Rule 72 [Cancellation of Proceedings]

The Court shall dismiss the proceedings initiated pursuant to Article 113, paragraph 6 of the Constitution in the event that before issuing a Judgment the President has resigned or has otherwise terminated his/her mandate.

The procedure laid down in Rule 72 deviates from the one stipulated by Article 23 of the Law, which provides that “*The Constitutional Court shall decide on matters*

⁵⁴⁹ The Constitution or the Law does not contain any provision, as Article 61(2) of the German Basic Law providing: “After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions”.

⁵⁵⁰ See, for instance, Article 64 of the Constitutional Court Act of Slovenia; Article 55 of the Law on the Federal Constitutional Court;

⁵⁵¹ See, for instance, Article 62 of the Albanian Law on the Organization and Operation of the Constitutional Court and Article 83 of the Croatian Law on the Constitutional Court.

referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings". Under Article 23, the Court decides itself what to do, when a party withdraws from the proceedings, since it may determine that the matter referred to would merit a decision in the public interest, whereas Rule 72 prescribes that the Court "*shall dismiss the proceedings*", if the President resigns or has otherwise terminated his/her mandate.

Neither the Law nor the Rules of Procedure apparently allow the President, after his resignation or termination of mandate, to request the Court to continue with the proceedings, as, for instance, is the case in Albania⁵⁵² and Slovenia⁵⁵³, where, if the President asks for such a continuation, the Constitutional Court has no other choice than to continue the proceedings. For instance, the President may well have a valid interest, after his/her resignation, to see the proceedings continue in order to have his/her name cleared or for other reasons, if the Court finds that the allegations of the authorized party were unsubstantiated. In the absence of any possibility to request the continuation of the proceedings, the President's right to a fair trial may, thus, be at risk. It is suggested that Article 23 as well as Rule 72, provide for such a possibility.

Rule 73 [Withdrawal] of the Rules of Procedure

In the event that an authorized party withdraws the referral, the President may request the Court to continue with the proceedings and issue a Judgment. Such request shall be determined by the Court upon by a majority of Judges present and voting.

Rule 73 deals with the situation, where the authorized party (the 30 or more deputies) withdraws the referral for whatever reason (lack of evidence or political reasons), whereas the President of Kosovo may request the Court to continue to deal with the referral. He or she may wish to take the calculated risk that the Court would find in his/her favor by rejecting the referral, the more so, as the deputies might have withdrawn it, realizing that the reasons for the impeachment could not be sufficiently proven. The Court will certainly beware not to be drawn into a political game between the deputies and the President and adjudicate the case in accordance with the Constitution and the Law. It is, however, unclear why under Rule 72 whether, after his/her resignation, the President is not allowed to request the Court to continue with the proceedings (as suggested above), whereas under Rule 73, after the initiators (the 30 or more deputies) have withdrawn the referral, the President has indeed the right to do so. In fact, in both cases, the right to a fair trial under Article 31 of the Constitution and Article 6 ECHR is at stake. As suggested in the comments on Rule 72, a President

⁵⁵² See Article 65 of the Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania: "When the President of the Republic presents his resignation, while the case for his dismissal is being heard, or his tenure is terminated, the Constitutional Court cancels the procedures. The Constitutional Court commences the procedure, if so requested by the Assembly of Albania or the President himself".

⁵⁵³ See Article 65(4) of the Constitutional Court Act of Slovenia: "If the President of the Republic resigns or if his term expires during the proceedings, the Constitutional Court stays the proceedings. The Constitutional Court continues the proceedings, if the accused or the Assembly so requests".

might, therefore, request a continuation of the proceedings for the reason that otherwise his right to a fair trial would be infringed.

The German Constitutional Court Act contains a similar provision as Rule 73, its Article 52(3) providing that *“The revocation of impeachment shall not take effect if the Federal President contradicts it within one month.”*

The Rule does not specify whether, after a certain stage of the proceedings, the initiators can no longer withdraw the referral. In the absence of any indication to the contrary, it is assumed that the initiators could do so as long as the Court has not taken a decision on the referral.

Article 52(1) of the above German Act is clear in that respect, stipulating: *“Impeachment may be revoked up to the pronouncing of the judgment due to a decision by the body making the application. This decision requires the approval of the majority of the statutory number of members of the Bundestag or the majority of the votes in the Bundesrat.”*

10. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 7 of the Constitution

Article 113 [Jurisdiction and Authorized Parties] of the Constitution

[...]

- 7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.⁵⁵⁴**

[...].

The individual complaints procedure under Article 113.7 of the Constitution allows natural persons direct access to the Constitutional Court in order to claim an infringement of their constitutional rights and freedoms by the acts of public authorities and to request the protection of these rights through a declaration of unconstitutionality of those acts by the Court.

This complaints procedure is not only a prerogative of individuals, but also of legal persons, contrary to Article 47 [Individual Requests] of the Law which does not contain any reference to legal persons.⁵⁵⁵ Since, pursuant to Article 21.4 of the Constitution, *“Fundamental rights and freedoms set forth in the Constitution are also valid for legal persons to the extent applicable”*, it must be assumed, as confirmed by the Court’s case law,⁵⁵⁶ that legal persons are equally entitled to the protection of their rights by way of a constitutional complaint submitted to the Court.

⁵⁵⁴ Similar to Articles 34 [Individual applications] and 35 [Admissibility criteria] of the ECHR.

⁵⁵⁵ Article 47.1 of the Law stipulates: *“Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority”*.

⁵⁵⁶ Case No. KI 41/09, AAB-RIINVEST University L.L.C. vs. Government of the Republic of Kosovo, Resolution of 27 January 2010, Bulletin of Case Law 2009 2010, page 50; and on the Court’s Webpage.

Furthermore, Article 113.7 requires complainants to fulfill certain conditions - i.e. proof that their individual rights and freedoms have been violated by public authorities and that they have exhausted all legal remedies available under Kosovo law - before the Court would be able to adjudicate their referrals on the merits. Details about these requirements are laid down in the Law and the Rules of Procedure and will be commented on hereafter.

This so-called “direct access” by natural and legal persons to constitutional review comprises all legal means given to them to petition the Court themselves without the intervention of a third party.⁵⁵⁷ In contrast, in case of “indirect access” to the Court, any complaint by a natural or legal person reaches the Court for adjudication only through the intermediary of another body, i.e. in the Kosovo context, through the ordinary courts⁵⁵⁸ or the Ombudsperson,⁵⁵⁹ which constitute both important elements of a democratic society protecting human rights.

A similar individual complaint mechanism is laid down in the constitutions of neighboring and other countries, like Albania (Article 131.i of the Albanian Constitution), Croatia (Article 129 of the Croatian Constitution) Macedonia (Article 50 of the Macedonian Constitution), Slovenia (Article 160 [Powers of the Constitutional Court] of the Slovenian Constitution) and Germany (Article 93 [Jurisdiction of the Federal Constitutional Court] of the German Basic Law).

Article 113.7 of the Constitution is implemented by Articles 46 [Admissibility], 47 [Individual Requests], 48 [Accuracy of the Referral], 49 [Deadlines] and 50 [Return to the Previous Situation] of the Law, whilst these Articles are supplemented by Rules 36 [Admissibility Criteria] and 74 [Judgment] of the Rules of Procedure.

Article 46 [Admissibility]

The Constitutional Court receives and processes a referral made in accordance with Article 113, paragraph 7 of the Constitution, if it determines that all legal requirements have been met.

According to Article 46, the referral submitted under Article 113.7 of the Constitution must first have met all procedural requirements, before it can be declared admissible by the Court and adjudicated on the merits in order for the Court to determine whether or not a violation of the complainant’s constitutional rights and freedoms has occurred. So what are “all legal requirements” mentioned by Article 46 and where are they to be found? Some of the legal requirements for the admissibility of a referral are laid down in Article 113.7 of the Constitution itself. The complainant must:

(1) mention the violations of their individual rights and freedoms guaranteed by the Constitution;

⁵⁵⁷ CDL-AD(2010)039, Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session, Venice, 17-18 December 2010) on the basis of comments by Mr. Gagik Harutyunyan (Member, Armenia), Ms. Angelike Nussberger (Substitute Member, Germany), and Mr. Peter Packolay (Member, Hungary).

⁵⁵⁸ See, CDL-AD(2010)039 above.

⁵⁵⁹ See comments on the competence of the Ombudsperson to refer matters to the Court under Article 135.4 of the Constitution and Article 15.7 of the Law on the Ombudsperson.

(2) indicate which public authorities have violated their individual rights and freedoms; and

(3) show that he/she has exhausted all legal remedies available under Kosovo law.

Other requirements are provided in Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law commented on hereafter. Moreover, Rule 36 [Admissibility Criteria] which supplements these Articles contains an extensive list of admissibility requirements, including those already laid down in the Constitution and the Law. This Rule has already been commented on in detail in connection with Article 22 [Processing Referrals] and Rule 34 [Report of Judge Rapporteur], providing that the Report of the Judge Rapporteur shall contain: [...] *(e) a tentative assessment of the admissibility of the referral; [...]*”⁵⁶⁰

Article 47 [Individual Requests]

47.1 Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.

47.2 The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.

1 Like Article 113.7 of the Constitution which uses the term “individuals”, Article 47.1 refers to a similar notion, i.e. “every individual”. However, although, as commented on under Article 113.7, the notion “every individual” means “every natural and legal person”, none of the provisions of the Constitution, the Law or the Rules of Procedure contains any indication as to how far the circle of natural and legal persons stretches. As to natural persons, not only a citizen of Kosovo, but also a foreign national visiting the Republic of Kosovo or residing there, whose rights have been violated by a Kosovo public authority in or outside Kosovo is entitled to submit a referral to the Court. For instance, in Case No. KI 121/10 (Sitaram Chaulagai, Krishna Bandur Chamlagai, Chandra Kala Chauran and Hom Bahadur Batterai)⁵⁶¹ the Court confirmed that Nepalese nationals temporarily residing in Kosovo were entitled to challenge the constitutionality of the proceedings regarding the annulment of their residence permit and their imminent deportation.

Moreover, also the notion “legal person” needs to be determined. Using a similar reasoning as used in the case of natural persons, the term should cover not only legal persons established under Kosovo law, like the AAB-RIINVEST University L.L.C. in Case No. KI 41/09,⁵⁶² but also foreign legal persons whose representatives are visiting Kosovo or residing there and whose constitutional

⁵⁶⁰ See detailed comments on Rule 36 above.

⁵⁶¹ Case No. 121/10, Sitaram Chaulagai, Krishna Bandur Chamlagai, Chandra Kala Chauran and Hom Bahadur Batterai, respectively, Constitutional Review of the Decisions of the High Court for Minor Offences in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010, Resolution on Inadmissibility of 14 December 2011, Bulletin of Case Law 2011, page 669; and on the Court’s Website.

⁵⁶² Case No. KI 41/09, AAB-RIINVEST University L.L.C. vs. Government of the Republic of Kosovo, Resolution of 27 January 2010, Bulletin of Case Law 2009 2010, page 50; and on the Court’s Webpage.

rights have been violated by a Kosovo public authority in or outside⁵⁶³ Kosovo. The question also arises whether the term “legal person” includes both private and public legal persons. For instance, in Case No. KI 25/10,⁵⁶⁴ in which the Court reviewed the decision of the Special Chamber of the Supreme Court which was challenged by a public authority, the Kosovo Privatization Agency (PAK), the Court held that the Referral was admissible, finding, *inter alia*, that the Applicant was an authorized party pursuant to Article 113.7, since the Law on PAK had granted it “full juridical personality.”

Thus, in principle, any public authority with “full juridical personality” is entitled to bring a constitutional complaint before the Court, for instance, challenging a decision of a judge by which its property rights, guaranteed by Article 46 [Protection of Property] of the Constitution and Article 1 [Property Right] of Protocol 1 to the ECHR, has allegedly been infringed. It must be clear that, like the private legal person in Case No. KI 41/09, the relevant public legal person must equally meet all the admissibility requirements necessary to enable the Court to adjudicate its constitutional complaint on the merits.

The request for legal protection from the Court (or, as also frequently used: the request for a constitutional review)⁵⁶⁵ enables natural and legal persons to question before the Court the constitutionality of an individual act or action of a public authority, including the ordinary court, that (1) allegedly violates their constitutional rights directly or (2) is based upon a normative act (e.g. law or regulation)⁵⁶⁶ - to be applied by the administration or a judge - which is allegedly unconstitutional. In the former case (under (1), it is rather the individual act or action of the administration or the decision of a judge which is being judged than the norm,⁵⁶⁷ whilst in the latter case (under (2)), it is rather the norm which is being reviewed.

In short, natural or legal persons may complain of any individual act of a public authority which violates directly their constitutional rights or may challenge a normative act, which is directly applicable to them, for the same reasons. However, the Court cannot intervene on the basis that a domestic court has come to a wrong decision or has wrongly applied the law. The Court can, therefore, not review the legality of the contested individual act or decision, but only its constitutionality. Otherwise, the Court would turn into a further court of appeal i.e. a fourth-instance

⁵⁶³ For instance, at an Embassy or Consulate of the Republic of Kosovo.

⁵⁶⁴ Case 25/10, Kosovo Privatization Agency, Constitutional Review of the Decision of the Special Chamber of the Supreme Court, ASC-09-089, dated 4 February 2010, Judgment of 31 March 2011, Bulletin of Case Law 2011, page 156; and on the Court’s Webpage.

⁵⁶⁵ So far, the number of constitutional complaints by individuals and legal persons received by the Court represents 90% of all cases filed with the Court.

⁵⁶⁶ According to the Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), normative acts are international treaties, if these have infra-constitutional value, laws and rules that have the force of law, decrees and regulations by the executive, general rules of local self-governing bodies that have a generally binding effect, that is, without distinct or distinguishable addressees.

⁵⁶⁷ See, “The Role and Competences of the Constitutional Court”, Report by Prof. Luis Lopez Guerra, Spain. The role of the constitutional court in the consolidation of the rule of law, Proceedings of the UniDem Seminar, organized in Bucharest, 8-10 June 1994, Venice Commission, Council of Europe Press, 1994, CDL-STD(1994)010.

court,⁵⁶⁸ instead of being subsidiary to the ordinary courts when it comes to protecting human rights and freedoms.⁵⁶⁹

Once seized with a constitutional complaint, the Court, acting as a judicial body,⁵⁷⁰ is held to provide to the complainant legal protection under Article 47 of the Law. Thus, the constitutional complaint procedure constitutes merely a subsidiary review mechanism, whereas the ordinary courts initially have the opportunity to determine the questions raised under the Constitution by the complainant and prevent or put right the alleged violation of the Constitution,⁵⁷¹ of course, assuming that the legal order in Kosovo is able to provide an effective remedy⁵⁷² which is appropriate and adequate to repair the violation complained of.

Finally, the term “public authority” is not elaborated by the Article, unlike, for instance, the laws on the constitutional courts of Croatia and Slovenia. Article 62(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia⁵⁷³ reads: “*Everyone may lodge a constitutional complaint with the Constitutional Court, if it deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations [...]*”, while Article 50(1) of Chapter V. Constitutional Complaint of the Constitutional Court Act of the Republic of Slovenia⁵⁷⁴ provides: “*Due to a violation of human rights or fundamental freedoms, a constitutional complaint may, under the conditions determined by this Act, be lodged against individual acts by state authorities, local community authorities, or bearers of public authority [...]*”.

It is assumed that the terms “public authority” used in Article 47 as well as “public authorities” mentioned in Article 113.7 of the Constitution cover the same authorities as those mentioned in the provisions of the above laws of Croatia and Slovenia. If so, a complainant must show that the violation complained of was committed by a state- or municipal authority⁵⁷⁵ as well as legal persons with public

⁵⁶⁸ See, Individual Complaint Mechanism as a Means to Protecting Fundamental Human Rights and Freedoms: The Case of the Constitutional Court of Kosovo, Enver Hasani, Dren Doli and Fisnik Korenica, page 7.

⁵⁶⁹ See, for instance, Case No. KI. 06/09, X vs. Supreme Court Judgment Nr. 215/2006, District Court Judgment Nr. 741/2005, Municipal Court Judgment Nr. 217/2004, Decision of 17 June 2010, Bulletin of Case Law 2009-2010, page 169; and published on the Court’s Webpage.

⁵⁷⁰ Constitutional courts do interpret the Constitution on the basis of the facts that have been established by the ordinary courts and are confined to applying the Constitution to those facts which regular courts have declared as proven: see Report “Limits of fact, law and remedies: myths and realities of constitutional review of judicial decisions, Constitutional Court of Spain experience” by Ignacio Borrajo Iniesta, Judge of the Constitutional Court of Spain, Venice Commission Conference “The Limits of Constitutional Review of the Ordinary Court Decisions in Constitutional Complaint Proceedings”, Brno, Czech Republic, 14-15 November 2005. In the author’s opinion, “*the courts whose decisions are challenged are never parties before the constitutional court*”.

⁵⁷¹ Case No. KI 41/09, AAB University L.L.C., Pristina, vs. Government of the Republic of Kosovo, Resolution of 27 January 2010, Bulletin of Case Law 2009-2010, page 50; and on the Court’s Webpage.

⁵⁷² See, also ECtHR case law, e.g. *Selmouni v. France*, Application no. 258031/94, Judgment of 28 July 1999.

⁵⁷³ Official Gazette (Narodne Novina) No. 49/02 of 3 May 2002.

⁵⁷⁴ Official Gazette of the Republic of Slovenia, No. 64/07.

⁵⁷⁵ See, for instance, Case No. KI 63/09, Bajram Santuri, Constitutional Review of Judgment of the Municipal Court in Prizren C.no.368/2000 of 8 May 2003, Judgment of the Supreme Court of Kosovo,

authority, including persons or institutions for whose acts a public authority is responsible.⁵⁷⁶ If, in the case of such persons and institutions, the applicant cannot show that a public authority is responsible for their acts, the Court will have to reject the referral as incompatible *ratione personae*.

Under Article 47.1 of the Law, only the violation of a right or freedom guaranteed by the Constitution can be claimed before the Court. When the alleged right or freedom is not mentioned in the Constitution, including in any of the international instruments (the Universal Declaration, ECHR and others) which pursuant to Article 22 of the Constitution are directly applicable in Kosovo, or when the complaint falls outside the scope of the constitutional right or freedom invoked by the claimant, the Court will have to reject the claim as incompatible *ratione materiae*.⁵⁷⁷

However, it may well be that, neither in the proceedings before the ordinary courts nor in the referral before the Court, the complainant has expressly formulated the specific right or freedom guaranteed by the Constitution, but has done so implicitly or in substance. In this respect, the ECtHR held, for instance in Application No. 56679, *Azianas v. Cyprus*, ECtHR Judgment of 28 April 2004, that: “ 38. While in the context of machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been aired before those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I). The object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address the allegation made of violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). In so far as there exists at national level a remedy enabling the national courts to address, at least in substance, the argument of violation of the Convention right, it is that remedy which should be used. If the complaint presented before the Court (for example, unjustified interference with the right of property) has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it. It is not sufficient that the applicant may have, unsuccessfully, exercised another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of violation of a Convention right. It is the Convention complaint which

Rev.46/2005(C.nr.99/07) of 28 December 2006 as well as Swedish Court decisions and Judgments No.8329/06 and 9005/07 of the European Court of Human Rights.

⁵⁷⁶ See, ECtHR case law: for instance, *Ilascu and Others v. Moldova and Russia* [GC], para. 318.

⁵⁷⁷ See also detailed comments on Rule 36.

must have been aired at national level for there to have been exhaustion of “effective remedies”. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see *Van Oosterwijck v. Belgium*, judgment of 6 November 1980, A Series no. 40, pp. 16-17, §§ 33-34).

In conformity with the ECtHR case law, the Court has determined that “*it is not necessary for the constitutional rights to be explicitly raised in the proceedings concerned, as long as the issue was raised implicitly or in substance.*”⁵⁷⁸ However, once a complainant has not done so, the Court will be bound to reject the referral as inadmissible for the reason that he/she has not fulfilled the admissibility requirement that a complainant must first show to have exhausted all legal remedies available under Kosovo law (this issue will be further commented on under the exhaustion rule laid down in Article 47.2 hereafter).

Finally, complaints in the abstract about legislation or acts by public authorities which have not been applied to applicants personally through a measure of implementation or which do not in any other manner directly apply to them, would also have to be rejected by the Court as inadmissible, since such applicants cannot be considered to be a victim of a violation of a constitutional right within the meaning of Article 47.1. Such complaint not related to a specific case is known as an “*actio popularis*,” implying that every person is entitled to take action against a normative act after its enactment without needing to prove that his/her constitutional rights are currently and directly affected by the provision.⁵⁷⁹

On several occasions, the Court has rejected referrals asserting that one or more provisions of a normative act allegedly violated the applicant’s fundamental rights and freedoms guaranteed by the Constitution, declaring that “*the Constitution does not provide for an “actio popularis” initiated by an individual who cannot show that he/she is directly affected by the alleged constitutional violation.*”⁵⁸⁰

In Europe, the Hungarian Constitution provided for an *actio popularis* until recently, whereby individuals could initiate a process of abstract control by submitting a referral to the constitutional court alleging that a norm was unconstitutional without it being necessary to prove that they were themselves the victim of a violation of their constitutional rights.⁵⁸¹ In Croatia the frequent use of

⁵⁷⁸ See, the above Case No. KI 41/09, AAB-RIINVEST University L.L.C. vs. the Kosovo Government.

⁵⁷⁹ See, CDL-AD(2010)039rev, Study on individual access to constitutional justice, adopted by the Venice Commission at its 85th Plenary session (Venice, 17-18 December 2010).

⁵⁸⁰ See, for instance, Case No. KI 102/11, Shahe Ramaj vs. Government of the Republic of Kosovo, Ministry of Health, Resolution of Inadmissibility of 12 December 2011, Bulletin of Case Law 2011, page 606; and on the Court’s webpage. Case No. KI 45/09, Teki Bokshi, Constitutional Review of UNMIK Administrative Direction No. 2003/13 (as amended and replaced), Resolution on Inadmissibility of 30 November 2010, Bulletin of Case Law 2011, page 13; and on the Court’s website. Case KI 118/10, The Insurance Association of Kosovo, Constitutional Review of Articles 14.1.7 of Law No.03/L-179 on the Red Cross of the Republic of Kosovo, Resolution on Admissibility of 14 November 2011, Bulletin of Case Law 2011, page 518; and on the Court’s Website.

⁵⁸¹ Article 32/A(4) of the Constitution of the Republic of Hungary and Article 21(2) of the Hungarian Act on the Constitutional Court provided for such a system, before it was abolished by the Parliament in December 2011. The *actio popularis* is also found in the constitutional jurisdictions of Latin American

the *actio popularis* has lead to the overburdening of the constitutional court.⁵⁸² Also the ECHR does not provide for such a review and complaints to that effect are rejected by the ECtHR as incompatible “*ratione personae*.”⁵⁸³ (see also comments on Rule 36(3)(f).

However, as discussed under Articles 48 and 49 [Deadlines] hereafter, in certain circumstances the applicant can directly file a claim with the Court which is made against a law or where the Court, when requested to decide on an individual claim, “*in order to repair the violation [...] must ultra petitem rule on the law which is supposed to cause the violation.*”⁵⁸⁴

2 According to Article 47.2, a complainant must show:

- (1) to have made use of all effective legal remedies available under applicable law in Kosovo, including an appeal to the highest competent public authority and, if unsuccessful, to the competent courts, including the highest instance possible (i.e., in most cases, the Supreme Court of Kosovo);
- (2) to have previously raised the constitutional complaint, which is now being submitted to the Court, at least implicitly or in substance⁵⁸⁵, during the proceedings before the relevant public authorities and/or ordinary courts during the exhaustion process.

The rationale of the exhaustion rule is, as mentioned in the detailed comments on Rule 36(1)(a) above,⁵⁸⁶ that the public authorities, including the courts, should have the opportunity to remedy the matter themselves and to prevent or put right the violation of a constitutional or convention right.⁵⁸⁷ Thus, the Court is rather a supervisory institution of last resort, whereas the main business of enforcing human rights should be conducted by the public authorities, including the courts, who are in the best position to do so.⁵⁸⁸ Pursuant to Article 47.2, it is up to the applicant to show to the Court that the alleged violation of constitutional rights has not been remedied by the Kosovo legal order.

It follows that the Kosovo legal order must provide to everyone an effective remedy as stipulated by Article 54 of the Constitution, providing that: “*Everyone enjoys the right to judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal*

countries, like Colombia and Nicaragua. See for details, Opinion on Three Legal Questions arising in the Process of Drafting the New Constitution of Hungary, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), Doc. CDL-AD(2011)001.

⁵⁸² The Venice Commission has pronounced itself critically on the issue. See, CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro.

⁵⁸³ See, for instance, *Scordino v. Italy (no 1)*, [GC], no. 36813/97, ECHR 2006-II.

⁵⁸⁴ See, the publication “Individual Complaint Mechanism as a Means to Protecting Fundamental Human Rights and Freedoms: The Case of the Constitutional Court of Kosovo, Enver Hasani, Dren Doli and Fisnik Korenica, page 15.

⁵⁸⁵ See, Case No. KI 41/09, AAB-RIINVEST University L.L.C., Pristina, vs. Government of the Republic of Kosovo. Also, ECtHR case law: for instance, *Cardot v. France*, Application no. 11069/84, ECtHR Judgment of 19 March 1991, para. 34.

⁵⁸⁶ Rule 36(1)(a) reads: [The Court may only deal with Referrals, if] “*All effective remedies that are available under the law against the judgment or decision challenged have been exhausted*”

⁵⁸⁷ See, Case 41/09, AAB-RIINVEST University, L.L.C., Pristina vs Kosovo Government.

⁵⁸⁸ See, for the ECtHR approach: A Practitioner’s Guide to the European Convention on Human Rights by Karen Reid.

remedy if found that such right has been violated.” The Article means to provide that any natural and legal person should be entitled to judicial protection from the courts whenever their constitutional rights have been violated or denied and that, once a court finds such a violation, that court should be able to redress the unconstitutional situation in an adequate and effective manner or through another effective remedy.

In connection with Article 54 [Judicial Protection of Rights] of the Constitution, reference should be made to Article 13 ECHR which provides for a similar right, providing: “*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity.*” According to the ECtHR in its Practical Guide on Admissibility Criteria issued in December 2010⁵⁸⁹, “the existence of remedies must be sufficiently certain not only in theory, but also in practice. In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the case. The Court (ECtHR) must take realistic account not only of formal remedies available in the domestic legal system, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicant.”⁵⁹⁰ It must examine whether, in all circumstances of the case, the applicant did everything that could reasonably be expected of him/her to exhaust domestic remedies.”⁵⁹¹

As to the scope of Article 13 ECHR, the Court recalled, for instance in Case No. KI 06/10, that “*according to the case-law of the European Court of Human Rights, Article 13 of the Convention guarantees the availability at (national level of) a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be served in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable claim” under the Convention and to grant appropriate relief. The scope of the obligation under Article 13 of the Convention varies depending on the nature of the applicant’s complaint; however, the remedy required by Article 13 must be “effective” in practice as well as in law. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, European Court of Human Rights judgment in the case Silver and Others v. the United Kingdom, judgment of 25 March 1983, Series A no. 61, p.42, para. 113).*”

However, it may well be that the Kosovo legal order does not provide for an effective legal remedy as required by Article 54 of the Constitution and Article 13 ECHR. In that case, it is up to the complainant to prove that this is the case and

⁵⁸⁹ To be downloaded from the webpage of the ECtHR.

⁵⁹⁰ See, for instance, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, ECtHR Judgment of 24 February 2005, paras. 116-117.

⁵⁹¹ See, for instance, *D.H. and Others v. the Czech Republic*, [GC], nos. 57325/00, ECHR 2007-XII, paras 116-22.

that he/she should be exempted from the exhaustion requirement, since no remedy exists or that the existing remedy is ineffective⁵⁹² or inadequate⁵⁹³ in the circumstances of the case or that there existed special circumstances absolving him/her from the exhaustion requirement according to the principles laid down by the Court in the above case law. Thus, if the complainant is successful in doing so, the Court may consider in a similar way as in the above ECtHR Case that he/she is not required to comply with the exhaustion rule (See, for instance, Case No. KI. 06/10).⁵⁹⁴

As occurred in that case,⁵⁹⁵ the Court first considered the question whether the absence of an effective legal remedy in itself constituted a violation of the Applicant's right under Article 54 of the Constitution. However, when analyzing the Judgment, it appears that the Applicant has not, as such, invoked Article 54 of the Constitution, but has only complained "*that there were no legal remedies in Kosovo that could be used to remedy his situation.*" According to him, "*there was a need to create mechanisms within the State for the citizens of Kosovo that are in his situation to prevent further violation of the right to be given a passport.*" The Court found indeed that the Applicant was not required to exhaust extraordinary remedies that appeared not be effective, and held that there had been a violation of Article 54 of the Constitution, thereby confirming that it would be sufficient for an applicant to invoke the right under Article 54 "implicitly" or "in substance".

In that same Case, the Court also confirmed that, "*According to the well established jurisprudence of the European Court of Human Rights, the Applicants are only required to exhaust domestic remedies that are available and effective. Furthermore, this rule must be applied with some degree of flexibility and without excessive formalism.*"⁵⁹⁶ The European Court of Human Rights further recognized that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the country concerned, but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see European Court of Human Rights judgment in the Case *Akdivar v. Turkey*, Judgment of 16 September 1996). Moreover, where a suggested remedy did not in fact offer reasonable prospects of success, for example in light of settled domestic case law, the fact that the applicant did not use it is no bar to admissibility (see European Court of Human Rights Judgment in the Case of *Pressos Compania Naviera S.A. v. Belgium* of 20 November 1995, para.

⁵⁹² See, for instance, Case No. KI 108/10, Fadil Selmanaj, Constitutional Review of Judgment A.no.170/2009 of the Supreme Court, dated 25 September 2009, Judgment of 5 December 2011, Bulletin of Case Law 2011, page 579; and published on the Court's Webpage.

⁵⁹³ See, *mutatis mutandis*, *Akdivar v. Turkey*, 16 September 1996, 1996-IV, No. 15.

⁵⁹⁴ Case No. KI 06/10, Valon Bislimi vs. Ministry of Internal affairs, Kosovo Judicial Council and Ministry of Justice, Judgment of 30 October 2010, Bulletin of Case Law 2009-2010, page 344; and on the Court's Webpage.

⁵⁹⁵ See also, ECtHR case law, for instance, *Vanek v. Slovak Republic*, Decision as to the Admissibility of Application no. 53363/99 of 31 May 2005.

⁵⁹⁶ See, *Lehtinen v. Finland*, Application no. 39076/97, Decision on Admissibility, ECHR 1999-VII..

27; *Radio France v. France*, no. 53984/00, decision of 23 September 2003, para. 33). According to the case law of the European Court of Human Rights the administrative authorities form one element of a State that respects the rule of law and their interests coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose (see, *mutatis mutandis*, *Hornsby v. Greece*, judgment of 19 March 1997, Reports 1997-II, p. 511, para. 41).”

Thus, in Case No. KI. 06/10, the Court followed the ECtHR’s case law, that the exhaustion rule, which is neither absolute nor capable of being applied automatically, should be applied with some degree of flexibility and without excessive formalism. The Court further mentions a number of other exhaustion criteria which a prospective applicant should carefully read together with the ECtHR Judgements.⁵⁹⁷

For example, it may well be that an ordinary court allows a case to drag on for an unreasonable period of time, without there being any serious indication that it would conclude the proceedings in the near future⁵⁹⁸. If the court concerned ignores the complainant’s objection, he/she should not be required to exhaust the available remedy by having to await the conclusion of the proceedings, but should be allowed to submit the complaint directly to a higher court or, if applicable, directly to the Constitutional Court.⁵⁹⁹ Thus, the applicant may complain, on the one hand, that due to the long delays the court proceedings concerned can no longer be considered as an effective remedy, exempting him/her from exhausting them, and, on the other hand, that his/her right to a fair trial within a reasonable period of time (as guaranteed by Article 31 of the Constitution and Article 6 ECHR) has been violated.⁶⁰⁰

Also in cases where the applicant is able to show that adhering to the exhaustion rule would cause irreparable damage, exhaustion of remedies should usually not be required. This may be the case, if the applicant would be exposed to a risk of reprisals or other measures by the authorities, if he/she would attempt to submit his/her human rights complaints to the competent authorities.⁶⁰¹

However, this situation could also occur in constitutional review proceedings before a constitutional court. In this connection, the ECtHR has ruled that the right to constitutional justice also implies that constitutional courts adopt their decisions within an appropriate delay to respect this right (see, ECtHR, 16 September 1996, *Suessmann v. Germany*, Application No. 20024/92). So, pursuant to Articles 53 of the Constitution, the Court will have to apply this ECtHR ruling in the adjudication of referrals.

⁵⁹⁷ It is also interesting to read the Council of Europe/ECtHR’s Practical Guide on Admissibility Criteria, published in 2011, Chapter I. Procedural Grounds for Inadmissibility, A. Non-exhaustion of domestic remedies, pages 15 to 20.

⁵⁹⁸ See, for instance, *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, ECtHR Judgment of 3 June 2004.

⁵⁹⁹ See, for instance, *Suessmann v. Germany*, no. 20024/92, ECtHR Judgment of 16 September 1996.

⁶⁰⁰ See, for instance, ECtHR case law: *Castells v. Spain*, no. 11798/85, ECtHR Judgment of 23 April 1992.

⁶⁰¹ See, for instance, *Akdivar & Others v. Turkey*, [GC], 16 September 1996, Reports of Judgments and Decisions 1996-IV.

Apart from this case, the ECtHR has developed substantive case law under Article 6 ECHR as to the question when the length of court proceedings violates the ECHR, thereby taking into account the relevant period and the reasonableness of the length of proceedings (complexity of the case; conduct of the applicant; conduct of the courts and other public authorities; and reasons for special diligence). According to Prof. dr. Martin Kuijer, this single issue still accounts for more judgments of the ECtHR than any other. *“It is clear why speedy judicial proceedings are deemed essential from a human rights perspective. Justice delayed is justice denied in saying that is often used in this regard. If society sees that judicial settlement of disputes functions too slow, it will lose its confidence in the judicial institutions. Even more importantly, slow administration of justice will undermine the confidence society has in peaceful settlement of disputes. In corporate litigation, parties to proceedings need to receive legal certainty within a reasonable period of time or it will affect economic activities and the willingness of corporations to make financial investments. In civil litigation, such as custody issues, there is a great personal interest to have a speedy outcome of the proceedings, also because lapse of time may strengthen de facto situations which may not be in conformity with de jure entitlements. In administrative law, one may refer to the undesirability of prolonged uncertainty for (failed) asylum seekers. Deterrence of criminal law will only be effective if society sees that perpetrators are sentenced within a reasonable time, whereas innocent subjects undeniably have a huge interest in speedy determination of their innocence.* (footnote: see, The Right to a Fair Trial: effective remedy for excessively lengthy proceedings (Articles 6 and 13 ECHR, by Prof. dr. Martin Kuijer, 28 February 2013, Cracow, Poland, EJTN Seminar “Effective Remedies, Lengthy Proceedings and Access to Justice in the EU).

Thus, one question is: when is the duration of proceedings deemed unreasonably long and what kind of compensation may be available to the applicant in case a violation is found. Of course, the Court can rule that Kosovo is obliged to organize its legal system so as to ensure compliance with the requirements of the Constitution and the ECHR. However, the question is, what compensation could be offered to the applicant. (Footnote: The ECtHR has established scales for the equitable assessment of the non-pecuniary damage sustained as a result of the length of proceedings and considered that a sum varying between 1.000 and 1.500 Euro per year’s duration of the proceedings is a base for the relevant calculation as mentioned by Prof dr. Martin Kuijer).

As to the number of referrals in which applicants complain about the length of proceedings, it may well be that this issue accounts for more judgments of the ECtHR than any other, but this is certainly not the case for the number of such referrals submitted to the Court. In Kosovo it seems to be an exception rather than the rule, that a party complains to the courts about the length of proceedings. It is no exception that the proceedings before each instance without any obvious reason may take years.

In Case No. KI 23/10, Jovica Gadzic, Constitutional Review of Decision No. 04/4-351-114 of the Municipality of Prizren dated 23 March 2001, in which the Applicant complained that there had been an excessive length of proceedings since

the District Court in Prizren had not reached a decision for 2 years. The Court, however, concluded that the Applicant had not exhausted all legal remedies available to him under applicable law.⁶⁰² In a further referral, Case 26/10, Emin Behrami, Constitutional Review of Decision nr. 14/2008 of the Municipal Court of Vushtri,⁶⁰³ the Applicant also explicitly alleged that the duration of the court proceedings had been excessive, but the Court rejected the referral for non-exhaustion.

So far, cases like the cited Case are an exception, but it is to be expected that more applicants will find their way to the Court to complain about the excessive length of the proceedings before the different courts and other authorities.

A further exception to the requirement under Article 47.2, that an applicant has to exhaust all effective remedies before the Court can consider the referral, is a case in which the applicant is able to show that adhering to the exhaustion rule would cause irreparable damage, exhaustion of remedies should usually not be required. In the ECtHR's case law, this may be the case, if the applicant would be exposed to a risk of reprisals or other measures by the authorities, if he/she would attempt to submit his/her human rights complaints to the competent authorities.⁶⁰⁴

Furthermore, if the applicant has certain doubts as to the effectiveness or the prospects of success of a legal remedy, which he/she is supposed to exhaust. However, this would not absolve him/her from making use of such a remedy, unless he/she can show to the Court that the remedy is indeed not effective and, therefore, does not need to be exhausted.⁶⁰⁵

In order to play safe, the applicant may attempt to exhaust the allegedly ineffective remedy before submitting a referral to the Court. After the attempt has failed and the applicant indeed submits the referral to the Court, the latter may hold that the remedy has to be considered as ineffective and did not need to be exhausted. However, in the meantime, the four months period has continued to run from the date of the last decision or judgment of the instance against which there was no effective remedy and has now expired.⁶⁰⁶ As a consequence, the Court would have no other choice than to reject the referral under Article 49 of the Law for being out of time (see, detailed comments on Article 49 [Deadlines] of the Law hereafter).

In similar cases, for instance in the above AAB-RIINVEST University Case, the Court confirmed, that “*Where an applicant has tried a remedy that the Court considers inappropriate, the time taken to do so will not interrupt the running of the four-month time limit (Article 49 [Deadlines] of the Law), which may lead to the complaint being rejected as out of time (see, mutatis mutandis, ECHR, Prystavka, Rezgui v. France, no. 49859/99, decision of 7 November 2000).*”

⁶⁰² See, Resolution on Inadmissibility, dated 19 September 2013 on the Court's webpage.

⁶⁰³ Bulletin of Case Law 2012 I, page 200.

⁶⁰⁴ See, for instance, *Akdivar and Others v. Turkey*, [GC], 16 September 1996, Reports of Judgments and Decisions 1996-IV.

⁶⁰⁵ See, for instance, Case No. KI 108/10, Fadil Selmanaj, Constitutional Review of Judgment of the Supreme Court of Kosovo A.no. 170/2009 of 25 September 2009, Judgment of 5 December 2011, Bulletin of Case Law 2011, page 579; and also on the Court's Webpage.

⁶⁰⁶ See, for instance, Case No. KI 23/10, Ahmet Arifaj vs. Municipality of Klina, Resolution of Inadmissibility of 20 April 2010; also published on the Court's Webpage.

In cases, where a responding party alleged that the applicant should have exhausted a specific legal remedy, the ECtHR held that, in the reply to the referral, the responding party must: “[...] *satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government (the responding party) was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him from the requirement [...]*”⁶⁰⁷.

In the above mentioned Case No. KI 06/10, Valon Bislimi vs. Ministry of Internal Affairs (the Passport Case), the Court confirmed that “The Opposing Parties, as it was already mentioned above, explained the current practice in detail but none of them show that there are remedies that are available to the Applicant’s situation and that they were effective.”⁶⁰⁸

Thus, the Court can ask the public authorities to prove the existence of available and effective remedies in a particular case. At the same time, the Court can ask the applicant to substantiate his/her allegation that the contested remedies are insufficient to afford redress or that remedies are unavailable and, thus, do not need to be exhausted or there is no remedy to exhaust,⁶⁰⁹ for instance, by providing examples of similar cases, where the contested remedy has proven to be ineffective or show in any other manner that the remedy concerned could not be effective in his/her situation and, thus, would exempt him/her from the exhaustion requirement. After having obtained the opinions of both parties, the Court could draw its conclusion.

In one of its first cases, Case No. KI 11/09, Krasniqi vs. RTK et Al, the Applicant, without exhausting any legal remedies, filed a referral directly with the Court requesting it to impose an interim measure during the time that the Court would be dealing with the referral for the reason that the alleged violation concerned the public interest as foreseen in Article 27 [Interim Measures], paragraph 1, of the Law on the Constitutional Court. In the Court’s view, although the applicant requested, in abstracto, review of the constitutionality of some provisions regulating the work of Radio and Television of Kosovo (RTK), his request for an interim measure was not an *actio popularis*, as it might look at first instance, since the case did not only concern an individual interest, but a public one as well. The question whether or not the Applicant should have exhausted available legal remedies, if any, was, however, not touched by the Court.⁶¹⁰

⁶⁰⁷ See, for instance, *Akdivar and Others v. Turkey*, [GC], 16 September 1996, Reports of Judgments and Decisions 1996-IV.

⁶⁰⁸ Case No. KI 06/10, Valon Bislimi vs. Ministry of Internal affairs, Kosovo Judicial Council and Ministry of Justice, Judgment of 30 October 2010, Bulletin of Case Law 2009-2010, page 344; and on the Court’s Webpage.

⁶⁰⁹ See, the above Case No. KI. 06/10, Valon Bislimi vs. Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice.

⁶¹⁰ See, Case KI. 11/09, Tome Krasniqi vs. RTK et Al, Decision on Interim Measures of 16 October 2009, Bulletin of Case Law 2009-2010, page 11; and published on the Court’s Webpage.

Another possibility, in case the complainant has serious doubts about the effectiveness of a legal remedy, is to submit a referral to the Court without having (yet) exhausted that remedy, but at the same time to continue to exhaust it in order to have a second chance before the Court, if the latter would reject his/her arguments that the contested remedy was ineffective and, therefore, did not need to be exhausted. In that case, the applicant could submit a new application to the Court after having eventually exhausted the contested remedy. For instance, in Case.... The Court declared the referral inadmissible for the reason that the Applicant had not exhausted all legal remedies. However, at the same time, the Court indicated to the Applicant that he could file a new referral after having exhausted the necessary remedies.⁶¹¹

In connection with the exhaustion of remedies rule, it may be appropriate to dwell on the different judicial levels a case should pass before a party would normally be able to submit a referral to the Court under Article 113.7 of the Constitution. Thus, whenever a court in the judicial chain violates any right of an individual or legal person, the party must appeal to the next level in the chain, including a revision (appeal on points of law) before the Supreme Court. If it is the Supreme Court itself which allegedly violates a right or if it rejects the complainant's claim that a lower court has violated his/her/its constitutional rights, the complainant can file a referral with the Constitutional Court.

The laws on the constitutional courts of the countries in the region contain similar provisions as mentioned in Article 47 (and Articles 48 and 49 commented on hereafter). For instance, Chapter V. [Protection of Human Rights and Fundamental Freedoms] of the Croatian Law on the Constitutional Court⁶¹²; Chapter V. [Filing and Preliminary Review of Complaints] of the Albanian Law on the Constitutional Court (apparently the Chapter does not mention that applicants are obliged to indicate in their request which constitutional rights have been violated); Chapter 2) [Rules of Proceedings] of the Rules of Procedure of the Constitutional Court of Bosnia & Herzegovina.

Furthermore, Sub-Chapter 2. [Procedure for Examining a Petition] of Chapter IV. [Review of the Constitutionality and Legality of Regulations and General Acts issued for the Exercise of Public Authority of Slovenia] of the Slovenian Constitutional Court Act, however, tasks the judge rapporteur to collect information and to obtain clarifications necessary for the Constitutional Court to decide whether to initiate a procedure; and also, Fifteenth Section Procedure in Cases pursuant to Article 13(8a)⁶¹³ (Constitutional complaints) of the German Law

⁶¹¹ See, Resolution on Inadmissibility.

⁶¹² However Article 63 of the Croatian Law provides for an exception to the exhaustion of remedies requirement, stipulating that: "The Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant, if the Constitutional Court proceedings are not initiated."

⁶¹³ Article 13(8a) of the German Law on the Federal Constitutional Court provides: *[The Federal Constitutional Court shall decide in the cases determined by the Basis Law, to wit [...] 8a. on constitutional complaints (Article 93(1)(4a) and (4)(b) of the Basis Law).*

on the Federal Constitutional Court (however, according to Article 90(2), the Federal Constitutional Court may disregard the exhaustion of remedies requirement, and “*decide immediately on a constitutional complaint lodged before all legal remedies have been exhausted, if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.*”

Article 47.1 is not supplemented by a specific Rule, whereas Article 47.2 is supplemented by Rule 36(1)(a) (reading: “[*The Court may only deal with Referrals if: a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or [...]*”). The Rule has already been extensively commented on under Article 22 of the Law and the reader is, therefore, kindly referred to these comments.

Article 48 [Accuracy of the Referral]

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of a public authority is subject to challenge.

The contents of the Article have already been extensively discussed and commented on above under Rule 29 [Filing of Referrals and Replies] which supplements Article 22 [Processing of Referrals], paragraph 1, second sentence of the Law as well as under Rule 36 supplementing Article 22.3, first sentence. Nevertheless, in order to be comprehensive, Article 48 will be commented on in similar terms.

In the submissions to the Court, the claimant should provide details of the alleged violations of the rights and freedoms laid down in the Constitution and indicate the concrete acts (or omissions) of the public authorities which caused such violations by attaching to the referral all relevant administrative decisions and ordinary court judgments in order to provide the Court with a clear picture of the facts of the case and the issues raised. In this way the Court will be able to determine whether the case is admissible and, if so, whether or not the applicant has been the victim of a violation of the rights and freedoms guaranteed by the Constitution, as alleged by the claimant. It is interesting to note that neither the Constitution nor the Law refers to the notion of victim; only Rule 36(2)(c) does so, providing that “*when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution.*”⁶¹⁴

In contrast, Article 34 [Individual applications] ECHR requires that applicants must claim to be the victim of one of the rights set forth in the Convention and the Protocols thereto, so only applicants who consider themselves victims of a breach of the ECHR can complain to the ECtHR.⁶¹⁵ The relevant Strasbourg case law is summarized as follows: the question whether an applicant can claim to be a victim of the alleged violation is relevant at all stages of the proceedings before the Court.⁶¹⁶ Moreover, the

⁶¹⁴ See, also the comments on Rule 36(2)(c).

⁶¹⁵ See, the above mentioned Practical Guide on Admissibility Criteria published by the ECtHR, which provides detailed information on the notion of victim, pages 12 to 14.

⁶¹⁶ See, for instance, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V, para. 179.

notion of “victim” is interpreted autonomously⁶¹⁷ and does not imply the existence of a prejudice; an act by a public authority which has only temporary legal effects may suffice.⁶¹⁸ Also the interpretation of the term “victim” may evolve in the light of conditions in contemporary society and must be applied without excessive formalism.⁶¹⁹ The ECtHR has further held that the issue of victim status may be linked to the merits of the case.⁶²⁰ Although the act or omission complained of should directly affect the applicant, the ECtHR has not applied this criterion in a mechanical and inflexible way,⁶²¹ but it also accepted applications from potential victims who could not complain of a direct violation, for instance, in a case of phone tapping⁶²² and an extradition case.⁶²³ Furthermore, applicants may contend that a law violates their rights in the absence of an individual measure of implementation, if it obliges them to either modify their conduct or face prosecution,⁶²⁴ or if they are members of a class of people who risk being directly affected by the legislation.⁶²⁵

The ECtHR may also accept a case from an applicant considered to be an indirect victim, where there is a personal and specific link between the direct victim and the applicant, for instance, under Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) an application from the mother of a man who disappeared while in custody,⁶²⁶ or a case concerning the widow of a defendant who was the victim of a breach of his right to be presumed innocent.⁶²⁷ According to the ECtHR, applications can be brought only by living persons or on their behalf; thus, a deceased person or his/her representative cannot lodge an application.⁶²⁸ However, the family of a deceased applicant may pursue the application if they have a sufficient interest in doing so.⁶²⁹ Moreover, if the applicant dies, the ECtHR has powers to assess whether it is appropriate to continue the examination of the application for the purpose of protecting human rights,⁶³⁰ or because of the existence of a question of general interest,⁶³¹ in particular, where the application concerns legislation or a legal system or practice in the country against which the application was lodged.⁶³²

As to the wording of Article 48 of the Law, it may be more logical to first mention the contested acts of the public authority and thereafter the alleged violation to which the contested act amounts. By reversing the order, the Article would read as follows: “In his/her referral, the claimant should accurately clarify what concrete act of a public authority is subject to challenge and what rights and freedoms he/she claims to have

⁶¹⁷ See, for instance, *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, ECHR 2004-III, para 35.

⁶¹⁸ See, for instance, *Monnat v. Switzerland*, no. 73604/01, ECHR, 2006-X, para. 33.

⁶¹⁹ See, for instance, *Stukus and Others v. Poland*, no. 12534/03, 1 April 2008, para 35.; and *Zietal v. Poland*, no. 64972/01, 12 May 2009, paras. 54 to 59.

⁶²⁰ See, for instance, *Siliadin v. France*, no.73316/01, ECHR 2005-VII, para 63.

⁶²¹ See, for instance, *Karner v. Austria*, no. 40016/98, ECHR 2003-IX, para 25.

⁶²² See, for instance, *Klass and Others v. Germany*, 6 September 1978, Series A no. 28, para. 34.

⁶²³ See, for instance, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

⁶²⁴ See, for instance, *Norris v. Ireland*, 26 October 1988, Series A no. 142.

⁶²⁵ See, for instance, *Burden v. the United Kingdom* [GC], no. 13378/05, ECHR 2008, para. 34.

⁶²⁶ See *Kurt v. Turkey*, 25 May 1998, Reports 1998-III.

⁶²⁷ See *Noelkenbockhoff v. Germany*, 25 Augustus 1987, Series A no. 123, para. 33.

⁶²⁸ See, for instance, *Kaya and Polat v. Turkey* (dec), no. 2794/05 and 40345/05, 21 October 2008.

⁶²⁹ See, for instance, *Raimondo v. Italy*, 22 February 1994, Series A no. 281-A, para. 2.

⁶³⁰ See, for instance, *Karner v. Austria*, no. 40016/98, ECHR 2003-IX, paras. 25 et seq.

⁶³¹ See, for instance, *Marie-Louise Loven and Bruneel v. France*, no. 55929/00, 5 July 2005, para. 29.

⁶³² See, for instance, *Karner v. Austria*, no. 40016/98, ECHR 2003-IX, paras. 26 and 28.

been violated by such act”. Concrete acts of a public authority are, for instance, the rejection by the courts of the applicant’s property claim, or the refusal to hear a witness on behalf of the applicant, constituting a procedural flaw amounting to a violation of the right to a fair trial, in particular, the “equality of arms” principle.⁶³³

When submitting the referral, it is therefore imperative for the applicant to build the case, that means: (1) to give clear details about the public authority, who has allegedly caused the violation; (2) to indicate the contested act(s) of that public authority; (3) in what way those acts have interfered with one or more of the applicant’s fundamental rights and freedoms guaranteed by the Constitution; and, (4) to show to the Court that, while exhausting all legal remedies available under Kosovo law, he/she has made the relevant public authority (including the relevant courts) aware of the alleged violation⁶³⁴. As a minimum, the applicant should produce sufficient *prima facie* evidence⁶³⁵ in support of his/her allegations in order to avoid the risk that the Court would declare the referral inadmissible as manifestly ill-founded.⁶³⁶ It is certainly not the task of the Judge Rapporteur, the Review Panel or the Court to build the applicant’s case, although additional information could be requested, but it remains the responsibility of the applicant to produce the necessary documents when submitting the referral.

It may well be that a public authority did not violate the applicant’s constitutional rights or freedoms because it acted wrongly, but because it did not act where it should have acted or was under a legal obligation to act. In other words, it infringed one or more of the applicant’s guaranteed rights by omission. When confronted with such a situation for the first time in Case No. KI 14/09, the Court did not go so far as to find a violation, but it reminded the Kosovo authorities of the obligation “*to establish an independent mechanism to formulate the policy, legislative and institutional framework for addressing property restitution issues, as required by Annex VII, Article 6(1) of the Comprehensive Proposal for the Kosovo Status Settlement, and the Assembly to adopt a Law on Restitution, pursuant to Article 143 of the Constitution in conjunction with Article 2(1)3 of Annex XII (Legislative Agenda) of the Comprehensive Proposal.*”⁶³⁷

As mentioned earlier, the rationale behind Article 48 is that the Court must be able to easily understand what the referral is about and should not need to guess what kind of case the applicant is trying to make, since it cannot itself build a case. It is repeated here that, in order to properly prepare the referral, prospective applicants can make use of the “Referral Form”⁶³⁸ and “Guidelines” for the submission of a referral,⁶³⁹ both

⁶³³ Procedural flaws are to be found in the judicial records of the relevant courts.

⁶³⁴ See, for instance, Case No. KI 11/10, Feti Islami, Constitutional Review of Decision Rev. 395/2008 of the Supreme Court of Kosovo and Decision Ac.No. 306/06 of the District Court in the Municipality of Peja, Resolution on Inadmissibility of 25 January 2011, Bulletin of Case Law 2011; and on the Court’s webpage.

⁶³⁵ *Prima facie* evidence is similar to “a beginning of proof”.

⁶³⁶ See comments on Rule 36(1)(c) above.

⁶³⁷ Case No. KI 14/09, Heirs of Ymer Loxha and Sehit Loxha, Constitutional Review of Decision No. PKL.Nr 21107 of the Supreme Court, dated 17 December 2008, Resolution of Inadmissibility of 15 October 2010, Bulletin of Case Law 2009-2010, page 276; and on the Court’s Webpage.

⁶³⁸ “Referral Form for the submission of a referral under Article 113.7 of the Constitution of the Republic of Kosovo and Articles 46, 47, 48, 49 and 50 of the Law on the Constitutional Court of the Republic of Kosovo.”

developed by the Court and containing questions to be answered and a detailed description of the manner in which a referral should be submitted. Further relevant information may be obtained from the above mentioned “Practical Guide on Admissibility Criteria”,⁶⁴⁰ developed by the ECtHR, containing comprehensive and objective information on its case law regarding the admissibility criteria which, pursuant to Article 53 [Interpretation of Human Rights Provisions]⁶⁴¹ of the Constitution, the Court is held to apply. Obviously, prospective applicants should also search the Court’s case law – published, so far, in its Bulletins of Case Law 2009-2010 and 2011 as well as on its Webpage and in the Official Gazette of the Republic of Kosovo - for similar cases as the ones they are intending to submit to the Court. Furthermore, applicants should pay close attention to the Court’s Rules of Procedure. For instance, if they are not in the possession of a certain document, because the authority concerned has never released it to them, they should mention this in the referral. As a result, pursuant to Rule 51 of the Rules of Procedure, the Judge Rapporteur, the Review Panel or the Court may find the document concerned important enough to request it from the withholding authority.⁶⁴²

Although Article 48 stipulates that claimants should accurately clarify what rights and freedoms are allegedly violated, they do not need to indicate the exact Article(s) of the Constitution or the ECHR, if they have at least mentioned them implicitly or in substance (as already set out above in detail in the comments on Article 47 and in the case law of both the Court and the ECtHR mentioned there⁶⁴³). In any case, it is difficult for an applicant to overlook the requirement to indicate which constitutional rights have allegedly been violated, since the Referral Form contains a specific question to that effect.⁶⁴⁴

As mentioned in the comments on Article 47.1 above, the laws on the constitutional courts of the countries in the region contain similar provisions to Article 48. Also Article 34 [Individual Applications] ECHR⁶⁴⁵ contains a similar provision.

Finally, “[I]t is, however, possible that the Court not only decides on an individual claim of the claimant, but also simultaneously rules *in abstracto* on a certain matter that has a direct relevance with the violation presumed to have been caused in the individual case being judged. *Krasniqi v. RTK et Al* is an illustration of the practice

⁶³⁹ “Guidelines to assist a party or parties in submitting a referral to the Constitutional Court of the Republic of Kosovo under Article 133.7 of the Constitution of the Republic of Kosovo and Articles 46, 47, 48, 49 and 50 of the Law on the Constitutional Court of the Republic of Kosovo.”

⁶⁴⁰ The Practical Guide on Admissibility Criteria is aimed principally at legal practitioners and in particular at lawyers who may be called upon to represent applicants before the ECtHR.

⁶⁴¹ “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted [by the Court] consistent with the court decisions of the European Court of Human Rights.”

⁶⁴² See, in particular, the comments on Rule 51 [Documents] of the Rules of Procedure.

⁶⁴³ See detailed comments on Article 47 [Individual Requests] above.

⁶⁴⁴ In the Referral Form, the question is formulated as follows: “III. Justification of the Referral and Alleged Breaches of the Constitution: Please, explain what your complaints under the Constitution are. Pleas, indicate precisely which Article(s) of the Constitution has(have) been breached and, in particular, why you think that the act(s) of the public authorities has(have) violated your rights and freedoms guaranteed by this(these) Articles.”

⁶⁴⁵ Article 34 [Individual applications] ECHR provides: “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

where the Court is asked to rule on an individual claim, however, in order to repair the violation the Court must *ultra petitem* rule on the law which is supposed to cause the violation.”⁶⁴⁶ In this case the Court held that “*The application of Mr. Tome Krasniqi [...] deals with the national laws and administrative practices based on them. In his application, MR Tome Krasniqi requests in abstracto control of the constitutionality of some provisions regulating the work of the RTK. However, the Court notes that the request for an interim measure by Mr. Tome Krasniqi is not an actio popularis, as it might look at first instance. [...]*” The Court concluded, referring to relevant ECtHR case law, that “[...]the procedure instituted by the applicant as an individual in its nature as said in Article 113.7 of the Constitution and Article 47 of the Law take an objective character afterwards. The Court considers therefore that here we are not dealing with an actio popularis, although we have to do not only with an individual interest but also with a public one. All the more, the Court considers that the case “involves consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely” (cf. *James and Others v. the United Kingdom*, Series A No. 98, par. 46, 22 February 1986)”⁶⁴⁷.

Thus, a constitutional complaint against a law affecting the applicant directly is not similar to an “*actio popularis*” implying that every person is entitled to request a constitutional review of a normative act after its entry into force, without needing to prove that he/she is currently and directly affected by it.⁶⁴⁸

Article 48 is supplemented by Rules 29 [Filing of Referrals and Replies] and 36 [Admissibility Criteria] of the Rules of Procedure. Since, as mentioned above, both Rules have been extensively commented on under Article 22 [Processing Referrals] of the Law, they will not be dealt with any further under Article 48 of the Law.

Article 49 [Deadlines]

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.

The wording of the Article seems to be inaccurate, when it mentions “*a court decision*”. In fact, it is not just “*a court decision*”, but “*the decision of a court of last instance*,” (meaning a decision taken by the highest judicial instance to which the applicant could appeal the case) in order to show to the Court, that he/she has exhausted all the available remedies available under Kosovo law, as discussed above.

⁶⁴⁶ See, the publication “Individual Complaint Mechanism as a Means to Protecting Fundamental Human Rights and Freedoms: The Case of the Constitutional Court of Kosovo, Enver Hasani, Dren Doli and Fisnik Korenica, page 15.

⁶⁴⁷ See, Case No. KI. 11/09, Tome Krasniqi v. RTK et Al, Decision on Interim Measures, 16 October 2009.

⁶⁴⁸ See, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, Adopted by the Venice Commission at its 86th Plenary Session, Venice, 25-26 March 2011.

In the referral, the applicant needs to indicate on which date he was actually served with the final court decision and submit evidence to that effect (for instance, a copy of the receipt).⁶⁴⁹ The date is crucial for the Court to be able to determine whether the applicant has observed the 4-month period. In case of doubt, as occurred on several occasions,⁶⁵⁰ the Court could ask the ordinary court concerned to submit a copy of the receipt containing the date on which the judgment was served upon the applicant and, in most cases,⁶⁵¹ the latter's signature.

As determined by the second sentence of the Article, "*in all other cases, the deadline shall be counted from the day, when the decision or act is publicly announced.*" Apparently, the sentence deals with cases where, after a public authority has taken a "*decision or act*" contested by the complainant, court proceedings are not available to him/her and, as a consequence, the only possibility is to submit the constitutional complaint directly to the Court, that is to say, within a period of 4 months after the day when the decision or act is publicly announced. However, in this respect, Article 48 apparently overlooks an important issue, namely, the number of months or days the complainant will have at his/her disposal to prepare the referral for the Court, once having received the decision or having obtained details about the "publicly announced" act. Under the first sentence, it is clear that, for the preparation of the referral, the claimant disposes of a period of 4 full months from the day he/she was served with the court decision, while, under the second sentence, the claimant has no idea when he will finally get a copy of the decision which he certainly needs in order to be able to prepare the referral or details about the publicly announced act, while the 4-months period has already started to run on the day when that "decision" or "act" was publicly pronounced. This would create a discrepancy in the treatment of claimants under Article 48 and clearly amount to discrimination of the claimant falling under the second sentence of the Article.

Moreover, there may be cases, where the decision or act concerned was not publicly announced (by mistake or by omission). Such cases may be covered by Article 50 [Return to the previous situation] of the Law, commented on hereafter, which provides, inter alia, that a claimant who without his/her fault has not been able to submit the referral within the set deadline (of 4 months), the Constitutional Court, based on such a request, is obliged to return it to the previous situation.

As mentioned above, Article 35(1) ECHR contains a time-limit of 6 months. According to the ECtHR case law,⁶⁵² the applicant needs only to make normal use of domestic remedies which are likely to be effective and sufficient.⁶⁵³ Where it is clear from the outset that the applicant has no effective remedy, the ECtHR ruled that the six-month period runs from the date on which the act complained of took place or the date on which the applicant was directly affected by or became aware of such an act or had knowledge of its adverse effects.⁶⁵⁴ Where an applicant avails himself of an

⁶⁴⁹ The Referral Form contains a specific question to that effect.

⁶⁵⁰ In IV. [Exhaustion of Legal Remedies] of the Referral Form, the prospective applicant has to indicate the "Date of service of the Decision upon you."

⁶⁵¹ It may happen that the applicant, unhappy about the judgment, refused to sign the receipt.

⁶⁵² See, the information contained in the ECtHR Practical Guide to Admissibility Criteria, Council of Europe, December 2010, quoted here.

⁶⁵³ See, *Moreira Barbosa v. Portugal*, no.65681/01, ECHR 2004-V.

⁶⁵⁴ See, *Dennis and Others v. United Kingdom*, dec., no. 76573/01, 2 July 2002.

apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate to count the start of the 6-months period from the date when the applicant first became or ought to have become aware of those circumstances.⁶⁵⁵

Furthermore, the ECtHR also held⁶⁵⁶ that an applicant cannot extend the strict time limit imposed by the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint at issue under the Convention⁶⁵⁷. The ECtHR further stressed that the exhaustion rule does not require the applicant to have applied for the reopening of proceedings or to have used similar extraordinary remedies and does not allow the 6-months period to be extended on the grounds that such remedies have been exercised.⁶⁵⁸ However, if an extraordinary remedy is the only judicial remedy available to the applicant, the 6-months time-limit may be calculated from the date of the decision given regarding that remedy.⁶⁵⁹

Prospective applicants who intend to seize the Constitutional Court should also be aware of the ECtHR rule that, in cases where proceedings are reopened or a final decision is reviewed, the running of the time limit in respect of the initial proceedings or the final decision will be interrupted only in relation to those ECHR issues (or constitutional issues) which served as a ground for such a review or reopening of the case and were subject of examination before the extraordinary appeal body.⁶⁶⁰

Finally, it is important to mention the notion of “*continuing situations*”,⁶⁶¹ where the 4-months time-limit is not applied. According to the ECtHR case law, a continuing situation arises, when there is no remedy at all or no effective remedy to put an end to the situation which constitutes the alleged violation. Only when the continuing situation has come to an end, will the 6-months time-limit start to run. According to the ECtHR: “The purpose of the [6-months] rule is to promote security of the law, to ensure that cases raising Convention issues are dealt with within a reasonable time and to protect the authorities and other persons concerned from being under uncertainty for a prolonged period of time. The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised.”⁶⁶² Thus, in the ECHR context it refers to a state of affairs which operates by continuous activities on the part of the State to render the applicants victims. As a result, as long as the situation continues, the 6-month rule is not applicable⁶⁶³. However, according to the ECtHR, the fact that an event has significant

⁶⁵⁵ See, *Varnava and Others v. Turkey* [GC], nos. 16064/90 to 16066/90 and 16068/90 to 16073/90, ECHR 2009.

⁶⁵⁶ See, the ECtHR Practical Guide on Admissibility Criteria.

⁶⁵⁷ See, *Fernie v. United Kingdom*, (dec.), no. 14881/04, 5 January 2006.

⁶⁵⁸ See, *Berdzenichvili v. Russia*, (dec.), no. 31687/03, ECHR 2004-II.

⁶⁵⁹ See, *Ahtinen v. Finland*, (dec.), no. 48907/99, 31 May 2005.

⁶⁶⁰ See, *Sapayan v. Armenia*, no. 35738/03, 13 January 2009.

⁶⁶¹ See, also the comments on Rule 36.3(h).

⁶⁶² See, for instance, *O’Loughlin and Others v. United Kingdom*, no. 23274/04, Decision of 25 August 2005.

⁶⁶³ See, for instance, *Varnava and Others v. Turkey*, nos. 16064/90 to 16066/90, 16068/90 to 16073/90, ECtHR Judgment of 14 April 1998.

consequences over time, does not mean that the event has produced a “continuing situation”⁶⁶⁴.

The Court has applied this notion in a number of cases before it, for instance, in Case No. KI 40/09, Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation⁶⁶⁵, where the Court held that “*the time limit as prescribed by the ECHR does not start to run, if the Convention complaint stems from a continuing situation. Examples of continuing situations include complaints concerning length of domestic court proceedings, detention, and an inability to enjoy possessions.*” The Court found that, since the Applicants still suffer from the unilateral annulment of their Agreements signed by KEK (by which the payment stipulated by the Agreements was terminated without any notification), there is a continuing situation, which would exclude the legal deadlines for filing referrals.

As to the time limits within which a constitutional complaint has to be lodged with the constitutional courts of the countries in the region, they vary considerably: from 30 days to 2 years. For instance, Article 64 of the Croatian Law on the Constitutional Court prescribes a term of 30 days⁶⁶⁶; according to Article 52(1) of the Slovenian Law on the Constitutional Court, a constitutional complaint must be lodged within 60 days of the day the individual act against which the constitutional complaint is served; Article 30 [Time limits for filing complaints] of the Albanian Law provides that individual complaints concerning violations of constitutional rights shall be filed no later than two (2) years⁶⁶⁷; Article 15 of the Rules of Procedure of the Constitutional Court of Bosnia & Herzegovina, establishes a time limit of 60 days⁶⁶⁸. Finally, Article 93(1) of the German Law on the Federal Constitutional Court (BGVerfGG) stipulates that a constitutional complaint shall be lodged and substantiated within a month.⁶⁶⁹

In view of the different periods mentioned above, the question may arise whether or not a period of 4-months as determined by Article 49 is reasonable and sufficient for a prospective applicant or his lawyer to prepare the referral in a proper and timely manner. Much will depend on the circumstances of each case, but given, on the one hand, the ECHR time-limit of 6 months and, on the other hand, the time-limit of Article 93(1) BVerfGG of one month, the period of 4 months determined by Article 49 does not seem to be unreasonable.

⁶⁶⁴ See, “From de Becker to Varnava: the state of continuing situation in the Strasbourg Case Law”, Yves Haecck and A van. Pachtenbeke, Ghent University, Human Rights Law Review.

⁶⁶⁵ Case No. KI 40/09, Imer Ibrahim and 48 Other Former Employees of the Kosovo Energy Corporation vs. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo, Judgment of 23 June 2010, Bulletin of Case Law 2009-2010, page 188; and on the Court’s webpage.

⁶⁶⁶ “The constitutional complaint may be submitted during the term of 30 days from the day the decision was received”.

⁶⁶⁷ Article 30.2 provides: “*Individual complaints concerning violations of constitutional rights shall be filed no later than two years from the finding of a violation. If the law provides that the individual may address another authority, the individual may file a complaint with the Constitutional Court only after all legal means for the protection of his rights have been exhausted. In that case, the time limit for filing a complaint shall be two years from the date that the authority reached the decision.*”

⁶⁶⁸ Article 15 stipulates: “*The Court may examine an appeal only if all effective legal remedies which are available under the law against the judgment or decision challenged by the appeal have been exhausted and it is filed within a time limit of 60 days from the date on which the applicant received the decision of the last legal remedy that he/she used.*”

⁶⁶⁹ Article 93(1) BVerfGG provides, inter alia.: “*A constitutional complaint shall be lodged and substantiated within one month. [...]*”

As to the issue mentioned in the last sentence of Article 49 that, “[I]f a claim is made against a law, then the deadline shall be counted from the day when the law entered into force,” it will not occur very often that an applicant can submit a constitutional complaint about a law directly to the Court⁶⁷⁰ without having exhausted any legal remedies. In such a case, the applicant will have to show that (1) he/she has become a victim of a violation of his/her rights and freedoms under the Constitution since the entry into force of the contested law, and (2) he/she has no legal remedy to seek redress. However, in the above mentioned Case No. KI. 11/09, Tome Krasniqi vs RTK et All,⁶⁷¹ the issue of the 4-months rule was not explicitly raised by any of the parties or the Court which in its Decision [on Interim Measures], inter alia, decided that “[...] III. Following December 1, 2009 and thereafter, the Court decides the merits of the referral [...].” One could draw the conclusion that, by so deciding, the Court concluded that the referral complied with all admissibility requirements, including the 4-months rule.

Furthermore, as mentioned earlier in the comments on Article 48, according to the ECtHR case law, applicants may contest that a law violates their rights in the absence of an individual measure of implementation, if they are required to either modify their conduct or face prosecution (see e.g. *Burden v. United Kingdom* [GC], no. 13378/05, ECHR 2008, para. 34) or if they are member of a class of people who risk being affected by this (see e.g. *Norris v. Ireland*, 26 October 1988, Series A. no. 142).

In most circumstances, however, an applicant would not be able to directly complain against a law, but rather against an individual act, applied in his/her case and based on a law which is allegedly unconstitutional. In that case, the exhaustion rule as well as the 4-months rule apply.

That a direct complaint made against a law constitutes the exception rather than the rule, is confirmed by the Publication ”Instructions on lodging a complaint with the [German] Federal Constitutional Court”⁶⁷²: “*Laws, statutory provisions or statutes can only in exceptional cases be directly affected by a complaint, if they cause direct and immediate disadvantage to the complainant himself. In this case the complaint must be lodged within a year of the entry into force of the law, etc. As a rule, however, such laws and provisions must be enforced, i.e. applied in an individual case by means of an administrative or court decision against which the complainant must exhaust all remedies before the competent courts. Therefore, in all cases, a constitutional complaint is not admissible, until the court of last instance has passed down its decision (Article 90(2) BVerfGG*⁶⁷³)”.

Thus, although the German BVerfGG also recognizes the possibility of lodging a constitutional complaint against a law directly with the Federal Constitutional Court,

⁶⁷⁰ See, also the comments on Article 48 above.

⁶⁷¹ Decision of 16 October 2009, Bulletin of Case Law 2009-2010; and also in the Court’s Webpage.

⁶⁷² Published by Inter Nationes as part of the Law on the Federal Constitutional Court, ed. By Sigrid Born.

⁶⁷³ Article 90(2) BVerfGG stipulates: “*If legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted. However, the Federal Constitutional Court may decide immediately on a constitutional complaint lodged before all remedies have been exhausted, if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant*”.

its Article 92(4)⁶⁷⁴ provides, however, for a different and much longer deadline of one year, unlike Article 49 which does not distinguish between the two complaints. Article 49 (as well as the relevant Articles of the Constitution, the Law and the Rules of Procedure containing a deadline) is supplemented by Rule 27 [Calculation of Time Periods] of the Rules of Procedure which establishes in detail how the time periods prescribed by the Constitution, the Law or these Rules shall be calculated.

Rule 27 [Calculation of Time Periods] of the Rules of Procedure

A time period prescribed by the Constitution, the law or these Rules of Procedures shall be calculated as follows:

- 3. When a period is expressed in months, the period shall end at the close of the same day of the month as the day during which the event or action from which the period to be calculated occurred or when appropriate, the first day of the following month.**
- 5. When a period is to be calculated, periods shall include Saturdays, Sundays and official holidays.**
- 6. When a time period would otherwise end on a Saturday, Sunday or official holiday, the period shall be extended until the end of the first following working day.**

Rule 27 clearly sets out how the different time periods should be calculated. As to the application of the Rule to the deadline contained in the first sentence of Article 49, it appears that, so far, no controversy has arisen. The Rule, therefore, does not call for further comments.

Article 50 [Return to the Previous Situation]

If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to the previous situation. The claimant should submit the request for returning to the previous situation within 15 days from the removal of the obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired.

As mentioned under Article 49 [Deadlines] of the Law above, the rationale of deadlines is to promote legal certainty by ensuring that cases raising issues under the Constitution are examined within a certain time-limit and that final decisions are not continuously open to challenge⁶⁷⁵. However, there may be situations, in which the 4-months time-limit, within which the referral should have been submitted to the Court, has expired

⁶⁷⁴ Article 92(4) BGVerfGG provides: “If the complaint is directed against a law or some sovereign act against which legal action is not admissible, the complaint may be lodged only within one year of the law entering into force or the sovereign act being announced”.

⁶⁷⁵ See, *mutatis mutandis*, *Finucane v. UK*, no. 29178/95, 2 July 2002.

without the applicant having been able to comply with the time limit through no fault of his own.

For instance, this may happen (see also comments on Article 49 of the Law), if the decision or act has not been publicly announced (by mistake or by omission) and the applicant had no knowledge thereof, until he/she became aware, that such decision or act existed, thereby removing the obstacle. In such a case, the applicant should prove to have shown sufficient interest, diligence and initiative in his/her case by attempting to find out about the whereabouts of the decision or the act through regular communication with the authorities or institutions concerned.

In such a case, the applicant should request the Court, at the latest 15 days after the removal of the obstacle, for a return to the previous situation and, if the reasons showing that he/she had been unable to submit a referral within the set deadline of 4 months, the Court will be obliged to return the case to the previous situation. However, according to the Article, the Court is not allowed to return to the previous situation, if one year or more has passed since the day that the 4-months period has expired after the contested decision or act was taken.

Although the provision is silent on the issue, it is assumed that, after the decision of the Court to return to the previous situation has been served upon the applicant, the applicant will have 4 months to substantiate his/her referral.

Furthermore, a similar situation may occur, for instance, when the applicant falls seriously ill, before or shortly after the final court decision in his/her case, while he/she had the intention to submit a referral or was in the process of preparing a constitutional complaint within the 4-months time-limit after the final decision was taken. In that case, it is assumed that the applicant would have a maximum of one year after the 4-months time-limit expired to recover from his illness and a period of 15 days after his/her recovery to submit a request for return to the previous situation, accompanied by the necessary justification, like all medical records.

In another example, the final court decision may indeed have been served upon the applicant, but has gone lost without the applicant's fault, before he/she was able to file a referral with the Court. While the applicant was still trying to obtain a new copy, the 4-months time-limit expired. Also in this example, the applicant should be entitled to submit the request under Article 50 to the Court within 15 days after having obtained a new copy of the final court decision (of course, on the condition that the return to the previous situation would not be allowed, if one year had passed after the expiration of the 4-months time-limit after the final decision in his/her case).

Article 93(2) BGVerfGG provides for a similar rule in the following terms: *“If a claimant was unable to comply with this time limit⁶⁷⁶ through no fault of his own, he shall on request be granted restitutio in integrum. This request shall be made within two weeks of the hindrance's disappearance. The reasons for the request shall be substantiated when making the request or during the request proceedings. The omitted legal action must be carried out within the time-limit for the request; if this is done the complainant may be granted a reversal without need for a formal request. The request shall be invalid if made later than one year after the expiry of the time-limit. The fault*

⁶⁷⁶ That means: the time limit of Article 93(1) providing: *“A constitutional complaint shall be lodged and substantiated within a month [...]”*.

of the complainant's attorney shall be seen as equal to that of the complainant himself".

Also Article 66 of the Croatian Constitutional Court Act⁶⁷⁷ contains a similar rule, while Article 52(3) of the Slovenian Constitutional Court Act leaves it to the Constitutional Court to decide whether or not to deal with the constitutional complaint without mentioning any deadline⁶⁷⁸.

Although the ECtHR does not contain a similar rule, the ECtHR has developed certain criteria in its case law, for instance, in disappearance cases, where it has ruled that it is indispensable that the relatives of the missing person do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. Where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must demonstrate a certain amount of diligence and initiative and introduce their complaints without undue delay⁶⁷⁹.

Legal effects of Court decisions taken under Article 113.7 of the Constitution

Although the issue of the legal effects of the Court's decisions has been dealt with under Article 20 [Decisions] of the Law and Rules 63 [Enforcement of Decisions], 65 [Judgment] and 66 [Legal Effects of Judgment] of the Rules of Procedure,⁶⁸⁰ it would be appropriate to comment separately on the legal effects of the Court's decisions taken under Article 113.7 of the Constitution. Thus, once the request for constitutional protection has been granted by the Court, one may ask what the legal effect of its ruling will be. In principle, it would only resolve the specific case (in concreto jurisdiction of the Court) and would become effective primarily *inter partes*. In contrast, if a law or regulation is found to violate a right guaranteed by the Constitution (in abstracto jurisdiction of the Court) and the provision(s) or law are declared void or invalid, the Court's ruling would be applicable *erga omnes*.⁶⁸¹ However, Article 116 [Legal Effect of Decisions], paragraph 1, of the Constitution, providing that "*Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo*," does not distinguish between the two categories of rulings,

⁶⁷⁷ Article 66 of the Croatian Constitutional Court Act stipulates: "(1) *The Constitutional Court shall permit restitution into the previous state to the person who for justified reasons has omitted the term for submission of the constitutional complaint, if during the term of 15 days after the cessation of the reason which had caused the omission he submits the proposal for restitution into the previous state and at the same time submits the constitutional complaint.* (2) *After the expiration of three months from the day of omission, the restitution into the previous state may not be sought.* (3) *Restitution into the previous state shall not be permitted if the term for submission of the proposal for permission of restitution into the previous state has been omitted*".

⁶⁷⁸ Article 52(3) of the Slovenian Constitutional Court Act provides: "*In especially well founded cases the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of the time limit referred to in the first paragraph of this Article*". The first paragraph of the Article provides: "*A constitutional complaint is lodged within 60 days of the day the individual act against which a constitutional complaint is admissible is served*".

⁶⁷⁹ See, for instance, *Varnava and Others v. Turkey* [GC], nos. 16064/90 to 16066/90 and 16068/90 to 16073/90, ECHR 2009-, para. 165, and on the "undue delay" issue: paras. 162-166.

⁶⁸⁰ See, comments on Article 20 and Rules 63, 65 and 66 above.

⁶⁸¹ See, CDL-STD(1993)002, Models of Constitutional Jurisdiction by Helmut Steinberger, Venice Commission.

but simply stipulates that all decisions of the Court are binding on parties and non-parties alike, i.e. have an “erga omnes” effect. Thus, by means of an individual constitutional complaint, “the Court would be able to guide the action of the judicial, executive and legislative powers in all matters concerning fundamental rights. The constitutional complaint could, therefore, provide the Court with the opportunity for judicial creativity by means of constitutional interpretation.”⁶⁸²

Sub-chapter 10. [Procedure for cases defined in Article 113, Paragraph 7 of the Constitution] of the Law does not contain any specific provision (“lex specialis”) as to the legal effects of the Court’s decisions on individual constitutional complaints. Apparently, only Rule 74 [Judgment] of the Rules of Procedure provides details regarding the effect of decisions taken under Article 113.7.

Rule 74 [Judgment] of the Rules of Procedure]

- 1. In the case of a Referral made pursuant to Article 113.7 of the Constitution, if the Court determines that a court has issued a decision in violation of the Constitution, it shall declare such decision invalid and remand the decision to the issuing court for reconsideration in conformity with the Judgment of the Court.**
 - 2. If the Court considers that a law has violated the Constitution, it shall declare the law invalid in accordance with the provisions of Rule 64 and 65 of the Rules of Procedure.**
- I.** It is unclear for what reason the Rule only refers to court decisions and not to decisions of other public authorities or simply to individual acts. In any case, as to court decisions, in most cases it will be a decision of the Supreme Court as the last instance court which the Court will review in constitutional complaint proceedings initiated by a natural or legal person under Article 113.7 of the Constitution. For instance, applicants may complain that the courts have violated their constitutional rights by:
- (1) applying a norm, which is unconstitutional;
 - (2) applying a constitutional norm in a way, which infringes their constitutional rights;
 - (3) upholding an individual act issued by the administration which violates their constitutional rights;
 - (4) applying a procedure, which is based on an unconstitutional norm;
 - (5) applying the wrong procedure or applying a procedure wrongly, thereby infringing their constitutional rights;
 - (6) taking a decision which in any other way violates their constitutional rights.
- This list does not pretend to be exhaustive, but only shows some examples of the legal basis for claims under Article 113.7 of the Constitution. As to the application of an unconstitutional norm by the courts, the applicant must claim that the violation of his/her rights results from an administrative or judicial act applying or implementing the unconstitutional norm. As a result, the Court may review the

⁶⁸² See, The role of the constitutional court in the consolidation of the rule of law, Bucharest, 8-10 June, 1994, Venice Commission, CDL-STD (1994) 010.

constitutionality of the norm itself and, if it finds it unconstitutional, declare the norm void or repeal or invalidate it, or part of it, as unconstitutional (see Rule 74(2) hereafter).

Rule 74(1), however, only concerns the case that an applicant has submitted a constitutional complaint to the Court alleging that an ordinary court as last instance has issued a decision which violated his/her constitutional rights and requesting the Court to abrogate that decision. According to the Rule, if the Court finds that the ordinary court's ruling violates the Constitution, it shall declare the contested judgment invalid and remand to the relevant court to reconsider the case in conformity with the Court's decision.⁶⁸³ Thus, the Court is not competent to rule itself on the substance of the case, as is the case, for example, in Slovenia.⁶⁸⁴

However, the Rule does not mention referrals where the contested decision does not stem from a court, but from a different public authority without there being a possibility to initiate court proceedings. Also in such cases, it is assumed that the Court shall declare the contested decision invalid and remand the decision to the issuing authority for reconsideration in conformity with the judgment of the Court. For the sake of transparency and legal certainty, it is suggested to elaborate the Rule in that respect.

In connection with Rule 74(1), it is interesting to refer to the following statement by Professor Luis Lopez Guerra⁶⁸⁵, Judge of the Spanish Constitutional Court: "it is not the constitutionality of a law applied by a judge or by the administration which is under consideration, but rather the question whether the fundamental rights of one or more individuals have been violated by such application. Thus, it is the act of a judge which is being judged, rather than a norm. By remedying the violations of these rights, the Court [the Spanish Constitutional Court] may hand down instructions *pro futuro* to all powers of the State as to how they should orient their actions in the application and respect for fundamental rights. To be certain, the rulings handed down in cases of constitutional complaints only resolve the specific case as raised. But the reasoning in the judgment gives rise to a general ruling which, as such, has a value *erga omnes*. By means of the individual's constitutional complaint, the Court may guide the action of the judicial, executive and legislative powers in all matters concerning fundamental rights. This has special significance in those cases in which determination of the scope of the fundamental right requires a consideration of the opposing social interests involved, such as the case of balancing freedom of expression and information with the right to privacy or to a good name. "

In line with the above citation, decisions of the Court on constitutional complaints have, in the Kosovo context, not only an *inter partes* legal effect, but also an *erga omnes* legal effect, since, pursuant to Article 116 [Legal Effect of Decisions] and Rule 63 [Enforcement of Decisions], paragraph 1, of the Constitution "*Decisions*

⁶⁸³ See, for instance, Case KI 58/09 [and others], Gani Prokshi and 15 Other Former Employees of Kosovo Electricity Corporation vs. 16 Individual Judgments of the Supreme Court of the Republic of Kosovo, Judgment of 18 October 2010, Bulletin of Case Law 2009-2010, page 312; and on the Court's webpage.

⁶⁸⁴ See, Article 60 of the Slovenian Constitutional Court Act.

⁶⁸⁵ See, The Role and Competence of the Constitutional Court, Report by Professor Luis Lopez Guerra, Spain, The role of the constitutional court in the consolidation of the rule of law, Proceedings of the UniDem Seminar, Bukarest 8-10 June 1994, Venice Commission 1994.

of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo, “ meaning that the effect of the decisions extends to all private third persons and public entities not having been parties in the proceedings concerned.

In neighboring countries, the contents of Rule 74(1) have not been laid down in rules of procedure of the respective constitutional courts, but in constitutional court acts, for instance, Article 77 [Legal effects of court decisions] of the Albanian Constitutional Court Act which contains a similar provision as Rule 74(1), stating: *“Decisions of courts of every instance that are dismissed by the Constitutional Court shall cease having legal authority from the moment a decision on them is reached [by the Constitutional Court].”*

Unlike Rule 74(1), Articles 76(1) and (2) and 77(2) of the Croatian Constitutional Court Act are not limited to decisions of the courts. Article 76(1) and (2) provide: *“(1) By its decision to accept a constitutional complaint, the Constitutional Court shall repeal the disputed act by which a constitutional right has been violated. (2) If the competent judicial or administrative body, body or unit of local and regional self-government, or legal person with public authority, are obliged to pass a new act to replace the act that was repealed by the decision in paragraph 1 of this Article, the Constitutional Court shall return the matter to the body that passed the repealed act for renewed proceedings. [...]”*. Article 77(2) stipulates: *“When passing the new act from Article 76(2) of this Constitutional Act, the competent judicial or administrative body, body of a unit of local and regional self-government, or legal person with public authority, is obliged to obey the legal opinion of the Constitutional Court expressed in the decision repealing the act whereby the applicant’s constitutional right was violated.”*

Also Article 59(1) of the Constitutional Court Act of Slovenia contains similar wording as Rule 74(1), but does not mention “a court”, but uses the proper term “the competent authority” which includes courts and other public authorities. It states: *“By a decision the Constitutional Court either dismisses the constitutional complaint as unfounded or grants such and in whole or in part annuls or abrogates the individual act, and remands the case to the authority competent to decide thereon.”*

Also, Article 64, paragraph 5, of the Rules of Procedure of Bosnia and Herzegovina includes both courts and other authorities: *“The court or the authority whose decision has been annulled is obliged to adopt another decision whereby it is bound to observe the legal opinion of the Court concerning the violation of the rights guaranteed under the Constitution and the fundamental freedoms of the appellant.”*

Furthermore, Article 95(2) BGverfGG also mentions a competent “court”, stating: *“If a complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the First sentence of Article 90(2) above it shall refer the matter back to the competent court.”*

- II. It is assumed that the term “law” used in Rule 74(2) means “normative instrument” as employed in Rules 64 [Interim Measures]⁶⁸⁶ and 65 [Judgment]⁶⁸⁷, paragraph 1, and includes: “laws, decrees, regulations or municipal statutes”, as laid down in Rule 65(2).

Furthermore, the reference in Rule 74(2) to Rule 64 [Interim Measures] does not seem to be clear, since Rule 64 only provides for a temporary suspension by the Court of the normative instrument, “until it issues a judgment”. As mentioned earlier, the Court may suspend the implementation of a contested individual or normative act, if the implementation could result in further damages or violations which are irreparable once the unconstitutionality of the contested act has been established. Thus, the reference in Rule 74(2) to a temporary suspension of a law of which the Court has already determined that it has violated the Constitution, does not make much sense. It is true that in certain cases the Court, in its judgment, decides that the temporary suspension of the implementation of (certain provisions of) a contested normative instrument which was declared incompatible with the Constitution becomes a permanent order of the Court, until the competent authority has adopted a new normative instrument. But it is not clear from the wording of Rule 74(2) whether the reference to Rule 64 was meant to cover these cases.

It may be interesting to give an example of such a permanent order to suspend a normative instrument which the Court has found unconstitutional, although it did not occur in an individual complaint case under Article 113.7 of the Constitution, but in a case concerning abstract control (Article 113.2(1) of the Constitution). It concerns Case No. KO 119/10,⁶⁸⁸ already mentioned earlier, where the Ombudsperson challenged certain provisions of the Law on Rights and Responsibilities of the Deputy which allegedly provided for a lucrative pension system for the Deputies in violation of Articles 3.2, 7 and 74 of the Constitution. In the operative provisions of the Judgment, the Court held that the provisions of the Court’s interim order of 18 October 2011 suspending the implementation of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111 of 4 June 2010, and most recently extended on 20 October 2011, becomes a permanent order of the Court.

As to the reference in Rule 74(2) to Rule 65 [Judgment], it is clear that this reference would not have been necessary if the wording of Rule 65 would simply have been repeated in Rule 74(2). Thus, in the same way as under Rule 65, the Court, in the adjudication of a constitutional complaint under Article 113.7 of the

⁶⁸⁶ Rule 64 provides: “*The Court may order ex officio or upon the request of a party, as an interim measure, that the effects of the normative instrument that is being challenged, or any of its parts, be suspended until the Court issues a Judgment on the referral, in accordance with Part IV of these Rules*”.

⁶⁸⁷ Rule 65 provides: “*(1) If the Court establishes that certain provisions of the normative instrument are not in compliance with the Constitution, it shall declare the respective provisions to be invalid. (2) The Court shall declare that the entire law, decree, regulation or municipal statute to be invalid, if the Court determines that the normative instrument does not achieve its legislative purpose or is otherwise meaningless without the provisions, which are determined to be incompatible with the Constitution*”.

⁶⁸⁸ Case No. KO 119/10, Ombudsperson of the Republic of Kosovo re. Constitutional Review of Article 14, paragraph 1.6, Article 22, Article 24, Article 25 and Article 27 of the Law on Rights and Responsibilities of the Deputy, No. 03/L-111 of 4 June 2010, Judgment of 8 December 2011, Bulletin of Case Law 2011, page 556; and on the Court’s webpage.

Constitution, may declare certain provisions of the normative instrument invalid (Rule 65(1)) or may declare the entire normative instrument invalid, if the instrument does not achieve its legislative purpose or is otherwise meaningless without the unconstitutional provisions (Rule 65(2)).

However, none of the above Articles of the Law or Rules of the Rules of Procedure deal with the question whether the provisions of the law or the law as a whole which the Court found unconstitutional are invalidated *ex tunc* (the unconstitutional normative act is considered as never having been part of the Kosovo legal order) or *ex nunc* (the validity of acts based on the derogated normative act prior to the entry into force of the Court's decision continues). As mentioned in the Study on Individual Access to Constitutional Justice adopted by the Venice Commission, it is obvious that the annulment (*ex tunc*) of an important normative act could have vast consequences. The choice [for the Court] between annulment and derogation also has effects on the individual's readiness to file a complaint against a normative act. If the [Court] invalidates the norm with prospective effect (*ex nunc*), the applicant's case will not be solved by the removal of the unconstitutional general norm, unless a retroactive effect of the decision is applied only to the applicant's case (the so-called "premium for the catcher").⁶⁸⁹

The Study also mentions that *ex tunc* decisions do not affect final court decisions and that legal certainty concerning final court decisions has been given priority in the majority of states with retroactive constitutional court decisions (e.g. Italy and Portugal). Apparently, no such express rule exists in Kosovo law.

However, Rule 66 [Legal effects of Judgment] of the Rules of Procedure provides an answer to this question solely for "secondary legislation and administrative acts that have been issued based on a provision of law, decree, regulation or municipal statute that has been invalidated by the Court" which, according to the Rule, "shall not be applied from the date the Court's Judgment becomes effective." The Rule, therefore, clearly refers to the invalidation of the relevant legal instruments by the Court *ex nunc*.

Moreover, Rule 74(2) does not indicate what will happen to the challenged decision of the ordinary court after the Court has declared the law, on which that decision was based, invalid. In practice, the Court quashes that decision and remands the case to the ordinary court for reconsideration in conformity with the Court's judgment in the same way as laid down in Rule 74(1). However, it is possible that the Court's decision declaring the contested provisions of the law unconstitutional is such that the ordinary judge, who is under the obligation to reconsider his decision in conformity with that judgment, has difficulties in taking a new decision on the basis of the remaining provisions of the law which would satisfy the Court's finding.⁶⁹⁰ In these circumstances, the ordinary court may feel incapable to reconsider the case, as long as the legislature has not filled the legal

⁶⁸⁹ See, Study on Individual Access to Constitutional Justice, Venice Commission, CDL-AD(2010)039rev, page 50.

⁶⁹⁰ See, The Relations of the Constitutional Court with the Ordinary Courts and other Public Authorities, Report by Prof. Michel Melchior, President of the Belgian Court of Arbitration, Proceedings of the UniDem Seminar "The role of the constitutional court in the consolidation of the rule of law", organized in Bucharest, 8-10 June 1994 by the Venice Commission, Council of Europe Press, 1994.

gap caused by the Court's declaration that certain provisions of the law to be applied to the case were invalid. As a consequence, the case to be reconsidered and similar pending cases could not be settled until the legislature's intervention.

Once more, Rule 66 [Legal Effects of Judgment] of the Rules of Procedure comes to the rescue, providing: "*If a court has issued a decision in a criminal case that is based upon a provision of law, decree, or regulation that the Court has declared unconstitutional, the person against whom the decision was issued may have proceedings reopened in the criminal case.*" Although the terms of Rule 66(2) do not specify that it concerns the Special Procedure under 113.7 of the Constitution, it clearly deals with the situation in which an applicant, who has been the subject of criminal proceedings, has submitted a referral to the Court complaining about the ordinary court decision based on a provision of a law, decree or regulation that the Court has declared unconstitutional (*ex tunc* effect for criminal cases). In such a situation, the judgments rendered by criminal courts based on such unconstitutional law, decree or regulation have to be reviewed at the request of the applicant by reopening the criminal case. In fact, the Court decision has an *ex tunc* effect and is applicable *erga omnes*, allowing all persons who have been convicted on the basis of the same provision of the law, decree or regulation declared unconstitutional to request the reopening of their criminal case, which may lead to the immediate release of those persons. In case a deceased person's good name is at stake, relevant proceedings may be initiated by family members.

A similar rule is contained in Article 79(2) BGVerfGG, stipulating: "*New proceedings may be instituted in accordance with the provisions of the Code of Criminal Procedure against a final conviction based on a rule which has been declared incompatible with the Basic Law or null and void in accordance with Article 78 above or on the interpretation of a rule which the Federal Constitutional Court has declared incompatible with the Basic Law*".

Also Article 58(1) of the Croatian Constitutional Court Act contains a similar rule as Rule 66, stating: "*The final sentence for a criminal offence grounded on a legal provision that has been repealed because it is not in accordance with the Constitution does not produce legal effects from the date when the Constitutional Court decision repealing the provision of the law on the basis of which the sentence was passed enters into force, and the final sentence may be changed by the appropriate application of the provisions on renewing criminal proceedings*".

As to the invalidation by the Court of an entire law, none of the above Rules apparently deal with the situation where the ordinary court is bound to implement the decision of the Court by which the entire law, which the judge had applied in its judgment, was declared null and void. In the absence of the unconstitutional law and without a new law having been adopted by the legislature, it will be difficult not only for the ordinary court to reconsider the case, but also for other ordinary courts dealing with similar issues to come to an appropriate decision. As questioned by Prof. Michel Melchior in his Report cited above: "*But how are pending or new cases to be settled, while waiting for a new law to be passed?*"

The ordinary court will certainly have difficulties to find a substitute regulation on the basis of which it would reconsider the case to satisfy the Court's decision. Since, pursuant to Article 116 [Legal Effect of Decisions], decisions of the

Constitutional Court are binding on the judiciary and all persons and institutions of Kosovo, the legislature would be bound to adopt a new law which would be in line with the Constitution and the Court's judgment. In its judgment, the Court may even indicate a specific period of time within which the legislature has to do so. However, so far, the Court has not dealt with a referral under Article 113.7 of the Constitution, in which it ordered the legislature to adopt new legislation within a specified period of time which the ordinary court would then be able to apply in a new decision replacing the one quashed by the Court.

Although there is not yet an example of such a case under Article 113.7 of the Constitution, the Court has used its powers indeed in a case brought before it under Article 62.4 of the Constitution. In Case No. KO. 01/09, Cemailj Kurtisi and The Municipal Assembly of Prizren, where the Court "[ordered] the Municipality of Prizren to amend its Statute and its emblem within a period of three months from the delivery of this Judgment in order to bring them into conformity with the Constitution and to not exclude the non-majority Communities; " and required "the Municipality of Prizren to report to the Court on progress in relation to compliance with that Order prior to the expiry of the period of three months from the delivery of this Judgment; "and remained seized of the matter pending compliance with that Order."⁶⁹¹ So far, the Court has not given a similar order to the Assembly, when it found that a law, or part of a law, was unconstitutional.

As to the legal effect of decisions taken by constitutional courts on individual applications in some of the neighboring countries, Article 58 of the Croatian Constitutional Court Act contains a solution, where an applicant has to return to the body which issued a final individual act based on the repealed provision and submit a request to change such act in accordance with the Constitutional Court's judgment. Article 58(2) provides: *"Every individual or legal person who lodged with the Constitutional Court a proposal to review the constitutionality of the provision of a law, or the constitutionality and legality of the provision of another regulation, and the Constitutional Court accepted the proposal and repealed the provision of the law, or the provision of another regulation, has the right to submit a request to the competent body to change the final individual act whereby his/her right was violated, and which was passed on the basis of the repealed provision of the law, or the repealed provision of the other regulation, by the appropriate application of the provisions on renewing proceedings."*

The wording of Article 67 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina is similar to that of Article 58 of the Croatian Constitutional Court Act, since it also refers the applicant back to the authority which issued the individual act based on provisions declared unconstitutional by the Constitutional Court. Article 67 provides: *"Everyone whose right is violated by a final or null and void individual act, which was adopted in accordance with provisions that ceased to be in force in accordance with Article 63 of the Rules of Procedure, shall have the right to request the competent authority to alter that individual act while the competent authority is obliged to renew the proceedings and put the act in conformity with the decision of the Court."*

⁶⁹¹ See the Court's Judgment of 18 March 2010, Bulletin of Case Law 2009-2010; and on the Court's Webpage.

Article 76 [Legal effects of Constitutional Court decisions] of the Albanian Constitutional Court Act is of a more general nature, stipulating: “1. A decision of the Constitutional Court that has repealed a law or normative act as incompatible with the Constitution or with an international agreement, as a rule, brings legal effects from the date it enters into force. 2. The decision has retroactive effects only [in the following cases]: [...] b. for cases under review by a court of law, unless its decision is not final; [...]”

Also Article 95(2) and (3) of the German Constitutional Court Act has a similar content, stating: “ (2) If a complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence of Article 90(2) above it shall refer the matter back to the competent court. (3) If a complaint against a law is upheld, the law shall be declared null and void. The same shall apply if a complaint pursuant to paragraph 2 above is upheld because the quashed decision is based on an unconstitutional law. [...]”

11. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 8 of the Constitution of the Republic of Kosovo

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.

The Special Procedure for cases defined under Article 113.8 of the Constitution is also known as “concrete or incidental constitutional review or control”. A further expression is: “preliminary question or request” referred to the Court by the ordinary courts⁶⁹², as opposed to “abstract control” which has been commented on above under Article 113.2 of the Constitution⁶⁹³ and Articles 29 and 30 of the Law. Thus, an ordinary court is empowered to submit a referral to the Court, (1) when the question of compatibility of a law with the Constitution is raised in the judicial proceedings before it; (2) when it is uncertain whether or not the contested law is in conformity with the Constitution; and, finally, (3) when the decision of the referring court in the case under consideration depends on the compatibility of the contested law with the Constitution.

As to requirement (1), from the wording of Article 113.8 it is not sufficiently clear who has the right to raise the compatibility question: a party to the proceedings or the ordinary court itself? In this connection, requirement (2) could be helpful, since it refers to the “contested law”, which can only mean that a party must have contested the

⁶⁹² The possibility of raising questions of incidental control before the constitutional courts exist in many countries, for instance, in Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, the Czech Republic, Germany, Italy, Slovakia, Slovenia and Spain. For details re. neighboring countries, see hereafter.

⁶⁹³ Article 113.2(1) of the Constitution stipulates: “The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court: (1) the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;”

constitutionality of the relevant law. Without doubt, also the ordinary court could raise the compatibility question in the proceedings before it, but Article 113.8 is not clear enough in that respect. So, one may look for guidance at the implementing Articles 51 to 53 of the Law. But also there, no clear explanation is to be found. Only paragraph 1 of Rule 75 [Filing of referral] of the Rules of Procedure which supplements Article 51 of the Law is unambiguous in providing that the referring court can refer a preliminary question to the Court at the request of a party or *ex officio*.⁶⁹⁴ Thus, the referring court or a party must have raised the compatibility question at the judicial proceedings, before it was submitted to the Court.

As to requirements (2) and (3), they imply that the referring court must be uncertain whether the contested law is compatible with the Constitution and that its decision on the case pending before it would depend on the compatibility of the contested law. Thus, as long as the ordinary court is certain that the law concerned is compatible with the Constitution, despite the question having been raised by a party to the proceedings, it apparently does not need to refer the question of constitutional incompatibility to the Court, but must continue with the case pending before it. However, the ordinary court may not easily ignore the question raised by a party, unless, of course, the decision, in the court's view, does not depend on the law contested by the party, but on a different law which it considers compatible with the Constitution.

But even if an ordinary court is uncertain about the compatibility of the relevant law with the Constitution, it may be hesitant to submit a "preliminary question" to the Court *ex officio* i.e. without a party having raised the issue. This may be the reason why only a few preliminary questions under Article 113.8 of the Constitution have reached the Court so far.

The adjudication of a referral under Article 113.8 touches upon one of the core competences of the Court laid down in Article 112.1⁶⁹⁵ of the Constitution, providing that the Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution. It is, therefore, of utmost importance that ordinary courts, including the Supreme Court of Kosovo, whenever they have any doubt about the incompatibility of a law upon which their decision would depend or whenever the issue is raised by one of the parties, refer the question to the Court for a concrete review under Article 113.8 of the Constitution.

As set out in the Study on Individual Access to Constitutional Justice adopted by the Venice Commission: *"Incidental review takes place at any stage of the ordinary proceedings by an ordinary judge. Contrary to specific constitutional complaints, contesting the constitutionality of norms by way of incidental review is therefore open to any person who has standing in ordinary proceedings. The effectiveness of this type of review relies both on the individual knowledge of their rights and on the ordinary judge's capacity and willingness to investigate violations of fundamental rights. Both conditions are not entirely obvious."*⁶⁹⁶

⁶⁹⁴ Rule 75(1) provides: "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."

⁶⁹⁵ Article 112.1 of the Constitution stipulates: "The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution."

⁶⁹⁶ The Study was adopted at the 85th Plenary Session (Venice, 17-18 December 2010) on the basis of comments by Mr Gagik Harutyunyan (Member, Armenia), Ms Angelika Nussberger (Substitute Member,

Detailed comments on the Special Procedure defined under Article 113.8 of the Constitution are made, when dealing with (1) Articles 51 [Accuracy of referral], 52 [Procedure before a court] and 53 [Decision] of the Law which implement Article 113.8, as well as with (2) Rules 64 [Interim Measures], 65 [Judgment], 75 [Filing of Referral], 76 [Notification] and 77 [Judgment] of the Rules of Procedure which supplement these Articles.

As to the situation in other countries of the region, Article 37 of Chapter IV [Review of the Constitutionality of Laws and the Constitutionality and Legality of Other Regulations] of the Croatian Constitutional Court Act provides for an incidental control procedure and requires the Constitutional Court to inform the Supreme Court of such requests lodged by other ordinary courts. Article 134.1(e) in conjunction with Article 145, paragraph 2, of the Albanian Constitution and Article 68 et seq. of the Chapter on Procedures for the Review of the Constitutionality of Laws requested by the Courts of the Albanian Constitutional Court Act regulate the issue of incidental control by the Constitutional Court. Furthermore, Article VI.3(c) of the Constitution of Bosnia and Herzegovina provides for a similar procedure.

Also Article 156 [Constitutional Review] of the Slovenian Constitution contains an incidental control procedure to be initiated by an ordinary court, while Article 23 of Chapter IV [Review of the Constitutionality and Legality of Regulations and General Acts Issued for the Exercise of Public Authority, 1. Requests and Petitions to Initiate the Review Procedure] of the Slovenian Constitutional Court Act, provides for the same procedure and expressly regulates the situation in which it is the Supreme Court which submits the question of the constitutionality of a law or part thereof to the Constitutional Court.⁶⁹⁷ Finally, Article 100 [Concrete judicial review] of the German Federal Basic Law provides for a similar procedure, while Articles 80 to 82 of the Eleventh Section Procedure in cases pursuant to Article 13(11) [Review of specific laws] of the German Federal Constitutional Court Act⁶⁹⁸ set out further details regarding the incidental control procedure.

Article 51 [Accuracy of Referral]

- 51.1 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.**
- 51.2 A referral shall specify which provisions of the law are considered incompatible with the Constitution.**

Germany) and Mr Peter Paczolay (Member, Hungary), CDL-AD(2010)039rev, Study No. 538/2009, Strasbourg, 27 January 2011

⁶⁹⁷ Article 23(2) and (3).

⁶⁹⁸ Article 13.11 of the German Law on the Federal Constitutional Court stipulates: “*The Federal Constitutional Court shall decide [...] on the compatibility of a Federal or Land law with the Basic Law or the compatibility of a Land statute or other Land law with a Federal law, when such decision is requested by a court (Article 100(1) of the Basic Law).*”

- 1 As a preliminary remark, it needs to be mentioned that the term “lawfulness” in the fourth line of the Article seems to be incorrect. It is not the “lawfulness” of the contested law, which is at stake in this Special Procedure, but its “constitutional compatibility”, as mentioned in Article 113.8 of the Constitution. Thus, in the following comments the term constitutional compatibility or constitutionality instead of lawfulness will be used.

The wording of Article 51 seems to be somewhat different than the one of Article 113.8 of the Constitution, which it implements. At first sight, Article 51.1 does not seem to explicitly provide that the compatibility question must have been raised in the proceedings. However, it uses the term “contested law” which must be seen to mean that a party to the proceedings must have contested the constitutionality of a law by raising the question. Thus, under Article 51.1, only when the ordinary court has to directly apply the law contested by a party to the case and only when the constitutionality of that contested law is a precondition for its decision, “shall” the ordinary court file a referral with the Court.

It follows that, if the ordinary court is of the opinion that the contested law is not to be directly applied to the pending case and its constitutionality is, therefore, not a precondition for its decision on the case, it could decide not to file a preliminary question with the Court. This would mean that in these circumstances the ordinary court could ignore the question of constitutional compatibility raised by a party, simply for the reason that the party contests a law which is not applicable in the pending case. However, if a party raises the incompatibility question regarding a law which the ordinary court indeed intends to apply to the case before it, the ordinary court does not appear to be able to refuse to refer the question to the Court, even if it would prefer not to do so. However, since neither Article 113.8 of the Constitution, nor Articles 51 to 53 of the Law or Rules 75 to 77 mention explicitly the possibility for the ordinary court to refuse the request of a party to refer the compatibility question to the Court, an ordinary court would probably not easily refuse such a request (called in the Study on Individual Access to Constitutional Justice: “exception of unconstitutionality”)⁶⁹⁹, unless the party was completely wrong or his/her request clearly unfounded. In any case, even if an ordinary court would refuse the “exception of constitutionality” raised by a party, the latter could raise it again in the appeal proceedings and, if unsuccessful in all instances, before the Court in a referral submitted under Article 113.7 of the Constitution.

In any case, if a party does not raise the compatibility question at all, the ordinary court is apparently totally free, pursuant to Rule 75(2), not to request the Court for a preliminary ruling under Article 113.8 of the Constitution, even when it has doubts itself about the constitutionality of a law which it intends to apply to the case pending before it.

Only recently, requests for a preliminary ruling have been filed with the Court⁷⁰⁰. This may not mean, however, that, so far, no ordinary court has ever had any doubts about the constitutionality of a normative act applicable in a concrete case pending before it or that no party has ever had similar doubts, but did not raise the

⁶⁹⁹ Page 17 of the Study.

⁷⁰⁰ See Case No. KO 04/11, Applicant Supreme Court, Judgment of 1 March 2012.

compatibility question before the ordinary court. As mentioned earlier, it may well be that ordinary courts are still hesitant to take the initiative and to make use of the possibility of concrete judicial review, probably, because of unfamiliarity with the procedure and the requirement to reason its request to the Court.

According to the above Study on Individual Access to Constitutional Justice, “the effectiveness of preliminary ruling procedures heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and to submit preliminary questions to the constitutional court.”⁷⁰¹

Therefore, it is certainly not an easy task for a referring court to formulate legitimate grounds for its request for a preliminary ruling, but it will, hopefully, only be a question of time, before ordinary courts at all levels may find the way to the Constitutional Court more easily *ex officio* or because parties raise the issue (more often) in court proceedings.

- 2 In its request for a concrete constitutional review of the law to be applied to the pending case, the referring court needs to specify pursuant to Article 51.2, which provisions of the contested law (or the law as a whole) are considered to be unconstitutional. If the referral is submitted to the Court upon the request of a party in the proceedings before the referring court, that party should specify the contested provisions and, if not done properly, be asked by the referring court to substantiate its request.

But the referring court should not only ask the requesting party to give details for its request, but should also enable the other party in the proceedings before it to submit comments, if any, to be attached together with the requesting party’s opinion to the referral. Thus, the Court will obtain greater insight into the various opinions on the constitutional questions referred to it.

In case it submits the referral *ex officio* (see the comments on Rule 75(1) hereafter), the referring court must itself specify the unconstitutional provisions and give reasons for its view. At the same time, it could ask the parties to give comments on the referral. Article 51.2 does not explicitly stipulate that the referring court may communicate with the Court during the concrete constitutional review proceedings or appear as a party in the proceedings (see also the comments on Rule 75(3) hereafter).

this connection, Prof. Michel Melchior in his Report on Relations of the Constitutional Court with Ordinary Courts and other Public Authorities⁷⁰² raises a important and interesting point. In his view, for many European countries it is important to take account of the fact that the institutions of the European Convention on Human Rights are likely to confirm the solution adopted by the European Court in the Ruiz Mateos judgment⁷⁰³ according to which the guarantees of Article 6 of the Convention are applicable to the preliminary procedure before a

⁷⁰¹ Page 17 of the Study.

⁷⁰² See, The Relations of the Constitutional Court with the Ordinary Courts and other Public Authorities, Report by Prof. Michel Melchior, President of the Belgian Court of Arbitration, Proceedings of the UniDem Seminar “The role of the constitutional court in the consolidation of the rule of law”, organized in Bucharest, 8-10 June 1994 by the Venice Commission, Council of Europe Press, 1994.

⁷⁰³ See, *Ruiz-Mateos v. Spain*, ECtHR Judgment of 23 June 1993, Aeries A no. 262.

constitutional court⁷⁰⁴, since this procedure may be decisive for litigation concerning the determination of civil rights or obligations or of a criminal charge which the referring judge has to decide upon.

In his opinion “it seems desirable (and even necessary, in application of Article 6(1) ECHR) that the parties to the case before the referring judge are able to give their point of view to the constitutional court according to procedures determined by law. This may be by the submission of written memorials or by observations at a public hearing or by a combination of the two. This seems to be the minimum implied by the ECHR. This means that, in a criminal case, the prosecution will also be able to give its point of view. Similarly, any parties claiming damages or the individual who has brought a private prosecution will be entitled to be heard. It may also be desirable for various public authorities which have an interest in the law at issue also to be able to become involved, for example the author or authors of the law under review, i.e. the assemblies which passed the Act or the executive responsible for its sanctioning, promulgation or application.”⁷⁰⁵ [...] One might also consider giving any private or public individual with an interest in the case the possibility of involvement. This could extend, for example, to organizations and charities whose activity is closely concerned with the law under review.⁷⁰⁶ In addition, persons who are parties to an identical or comparable case to the one which gave rise to the referral may be involved. [...] Such a possibility is likely to engender serious difficulties for the constitutional court in the handling of cases referred to it because of the potentially very great number of people involved.”⁷⁰⁷

These interesting suggestions, proposed in 1994 by Professor Melchior, at the time President of the Belgian Court of Arbitration (presently, the Belgian Constitutional Court), may be very useful to be considered in connection with referrals requesting a preliminary ruling in the Kosovo context. Apart from the public authorities mentioned in the above Report, it may be envisaged to also invite the Ombudsperson to participate in the proceedings.

Further comments are contained in Rule 75 [Filing of Referral] of the Rules of Procedure, which supplement Article 51 of the Law.

Rule 75 [Filing of Referral] of the Rules of Procedure

- 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.**

⁷⁰⁴ By “preliminary procedure before a constitutional court” the incidental norm control procedure is meant.

⁷⁰⁵ For instance, Article 82 of the Law on the Federal Constitutional Court provides that the constitutional organs named in Article 77 (Bundestag, Bundesrat, Federal Government) may join the proceedings at any stage.

⁷⁰⁶ In the capacity of “*amicus curiae*”.

⁷⁰⁷ Footnote of the original text: “In Belgium the provision of the Special Law on the Court of Arbitration which allows any person able to show that he has an interest in the case before the referring court to submit a memorial to the Court was the subject of a very restrictive interpretation despite the fact that the judgment given on the preliminary point of law may have an indirect effect on cases comparable to the one during which the point was submitted. It is indeed quite probable that the constitutional court will uphold its previous case-law when dealing with a legal problem analogous to the one already decided.”

2. **The referral shall state why a decision of the court depends on the question of the compatibility of the law with 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.**

- I. Unlike Article 113.8 of the Constitution and Article 51.1 of the Law, Rule 75(1) clearly states that any ordinary court in Kosovo may not only submit a referral under Article 113.8 of the Constitution upon the request of one of the parties, but also *ex officio*. However, the legitimate question could be raised whether an ordinary court which, pursuant to Article 113.8 of the Constitution and Article 51.1 of the Law, is authorized by law to submit a referral to the Court when the compatibility issue is raised in the proceedings pending before it, could be entitled to do so *ex officio* by the Rules of Procedure of the Court. It may well be that an ordinary court would need to be empowered by law to do so.

As mentioned above, a further problem may arise when a party raises the “exception of constitutionality” with an ordinary court, whereas the other party may precisely be against the submission of a referral to the Court, since this might considerably delay the adjudication of the pending case. Thus, in case the ordinary court decides to seize the Court with a referral, the latter party may try to appeal against this decision, if possible.

According to Prof. Michel Melchior⁷⁰⁸, “In principle, it is not desirable that an appeal be lodged against the decision of the judge who refers a preliminary point of law⁷⁰⁹. Such an appeal is likely, in itself, to lead to the law at issue escaping constitutional review. Generally, and in principle, it is not desirable for a “suspect” law to figure in the judicial system. This is a point of view which seems beyond criticism. But one cannot help imagining a situation in which the preliminary point of law was referred by the judge only because he was bound to do so – without being able to assess the relevance of the point. One can also imagine the case where a “normal” judge would never have referred the point, as it appears so obvious that there can be no – valid – doubt as to the constitutionality of the provision at issue. The fundamental question is the following: who within the internal legal system is best qualified – even – exclusively qualified – to decide such constitutional question? The answer is obvious: it is the constitutional judge. In this respect, it is not unusual for a provision, [which] everyone agrees to be constitutional, to be held invalid by the constitutional judge! But it is true that “crazy” points can be referred by judges on their own initiative or, again, because they have referred points raised before them by the parties to the case without exercising any review. Lastly, there is reason to fear that parties whom the judge cannot, or believes he cannot, oppose (for whatever reason) to refer preliminary

⁷⁰⁸ See, his Report on the Relations of the Constitutional Court with the Ordinary Courts and other Public Authorities mentioned above.

⁷⁰⁹ Instead of the term “concrete or incidental norm control” Prof. Melchior uses the term “preliminary point of law or preliminary procedure.”

points of law only as a delaying tactic. Here the requirements of the satisfactory administration of justice come into play. Two solutions are possible: either allowing an ordinary higher court to dismiss the preliminary point of law (although it could have been the subject of constitutional review), or giving the constitutional court the possibility of giving a negative reply to such a question on the presupposition of absurdity, by a simplified and almost immediate procedure.”

In the above circumstances, the best solution might be, as suggested above, that the ordinary court decides to simply refer the compatibility question to the Court and to attach to the referral the opinions of both parties.

- II.** Rule 75.2 more or less repeats the contents of Article 51.1 of the Law, though in a more concise way. The comments on Article 51.1 are, therefore, equally valid here.

The question of the compatibility of the law with the Constitution may arise if, in a hypothetical case, for instance in civil proceedings before the ordinary court, a party is not allowed to have a counter expertise made, because the applicable provision of the law to be applied by the ordinary court does not provide for such a counter expertise. The party could then complain to the ordinary court that it should not apply the contested law which, allegedly, does not respect his/her right to a fair trial and is, therefore, incompatible with the Constitution. Under Article 51.1 of the Law, the ordinary court may then file a referral with the Constitutional Court, explaining that it would need the Court’s opinion on the compatibility with the Constitution of that contested provision, before applying it to the case before it. In case the referring court is the Supreme Court⁷¹⁰, the latter may inform the Constitutional Court that it is of the view that the contested provision is indeed unconstitutional. It will be the task of the Constitutional Court to assess whether or not to agree with the Supreme Court’s interpretation. If it does not agree with the Supreme Court’s opinion, a conflict between the two courts may arise, since it will not be easy for the Supreme Court to apply to the case pending before it an interpretation of the law which it considers itself unconstitutional.

As to the second sentence of Rule 75.2, it is not sufficient to only attach the case file under consideration to the referral, as mentioned by the Rule, but also the opinions of the parties should be attached, even if the referring court submits the referral *ex officio*. If the ordinary court does not do so, the Court could ask both parties to the case for their opinion as well as third parties as suggested by Prof. Melchior, for instance, if it concerns a criminal case, the public prosecutor.

- III.** The meaning of Rule 75(3) is actually identical to the notion of filing a referral “*ex officio*” used in Rule 75(1). The comments made on the latter Rule are, therefore, equally applicable to Rule 75(3).

The question raised above whether, during the suspension of the case before the referring court, the latter could communicate with the Court during the concrete constitutional review proceedings or appear as a party in those proceedings, in particular, if the referral has been submitted *ex officio*, could be considered here. In

⁷¹⁰ An important competence of the Supreme Court is the interpretation of laws and to ensure the uniformity of that interpretation in the lower courts.

the opinion of Prof. Melchior, “in many state systems which regulate the procedure on preliminary points of law, the involvement of at least (and, necessarily, according to the implications of the Ruiz-Mateos judgment of the ECtHR judgment [cited above]) the parties to the case before the referring judge is provided for.”⁷¹¹ But what is the situation of the judge who refers the preliminary point? Can he too communicate with the constitutional court? It seems not, because this would alter the relationship of reciprocal independence which must exist between the two sets of courts. [...]. There seems to be only one solution to this problem: that the ordinary judge states in his decision to refer either the reasons why he questions the constitutionality of the law at issue, or – when the question is not raised by him, but is imposed on him by one of the parties – his own feeling as to its constitutionality.”⁷¹²

In other countries, the law may expressly provide for the possibility that the referring court be present at the proceedings before the constitutional court, for instance, in Article 15.1 of Sub-Chapter 1 [Participants in the Proceedings] of Chapter II [General Rules of Procedure] of the Rules of the Bosnian Constitutional Court it is foreseen that “*The participants to the proceedings shall be as follows: [...] (d) the court which referred the issue to the Constitutional Court and the enactor of the law on whose validity the court’s decision depends (Article VI.3(c) of the Constitution).*”

Article 52 [Procedure before a court]

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

Article 52 stipulates that, once the referring court has seized the Constitutional Court, the procedure before it shall be suspended. From its wording it is not clear whether the referring court is held to suspend the proceedings pending before it on its own motion (*ex officio*) or whether the Constitutional Court needs to instruct it to do so. Rule 76 [Notification] of the Rules of Procedure confirms that it is the Court which orders the ordinary 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*” (see comments on Rule 76 hereafter).

Rule 76 [Notification] of the Rules of Procedure supplements Article 52.

⁷¹¹ For instance, Article 82(3) of the Law on the Federal Constitutional Court stipulates: “*The Federal Constitutional Court shall also give the parties to the proceedings before the court making the application an opportunity to make a statement; it shall summon them to the oral pleading and permit the agents for the case to speak.*”

⁷¹² See the above Report of Prof. Melchior.

Rule 76 [Notification] of the Rules of Procedure

The Court, following the 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.

According to Rule 76, it is the Court, which following the filing of the referral instructs the referring court to suspend the proceedings pending before it, although it may not be excluded that the referring court has already done so *ex officio* in its decision to submit the referral to the Court. However, since Article 52 of the Law as such is not sufficiently clear, an amendment to it, in the sense of Rule 76, should bring the necessary clarity.

In this connection, it is interesting to make reference to Article 23 of the Slovenian Constitutional Court Act which regulates the case when the Supreme Court initiates the constitutional review procedure before the Constitutional Court. It stipulates: “(1) *When in the process of deciding, a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of constitutionality;* (2) *If the Supreme Court deems a law or part thereof which it should apply to be constitutional, it stays the proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies and by a request initiates proceedings for the review of its constitutionality;* (3) *If by a request the Supreme Court initiates proceedings for the review of constitutionality of a law or part thereof, a court which should apply such law or part thereof in deciding may stay proceedings until the final decision of the Constitutional Court without having to initiate proceedings for the review of the constitutionality of such law or part thereof by a separate request.*”

The Slovenian legislature has apparently opted for a different rule, where it is the Supreme Court which initiates the review of constitutionality proceedings regarding a law or part thereof which it deems unconstitutional. In that case, all ordinary courts which should apply the same law in similar cases pending at that moment before them, may stay the proceedings and, once the Constitutional Court has ruled on the constitutional review, apply its judgment to the pending cases.

Article 53 [Decision]

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

According to the wording of the Article, the Court is not allowed to extend the scope of the preliminary ruling by deciding on the compliance with the Constitution of other legal provisions than the ones mentioned in the referral by the referring court. One can wonder whether such an interpretation is not too narrow, in particular, since under Article 4.6 of the Constitution: “The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution,” while according to Article 112.1 of the Constitution, the Court is to be: “... the final authority

for the interpretation of the Constitution and the compliance of laws with the Constitution". The Court could interpret these Articles to the extent that it would consider itself competent to check the compliance with the Constitution of other provisions than the ones raised in the referral. Such an issue may arise, when the ordinary court has mistakenly requested a preliminary ruling regarding the wrong legal provisions or only some "suspected" legal provisions, but not all. If the Court would feel restrained to do so *ex officio*, may be, the Court could draw the referring court's attention to the issue, enabling it to submit an additional request for review.

Another remedy to be used is the one mentioned in Rule 65(2) of the Rules of Procedure,⁷¹³ where the Court may determine that the normative instrument (as a whole) does not achieve its legislative purpose or is otherwise meaningless without the provisions which are determined to be incompatible with the Constitution. So, instead of only declaring the contested provisions of the normative act unconstitutional and leaving other unconstitutional provisions in place, since the referral did not mention them, the Court could declare the entire normative instrument invalid (see, also, additional comments on Rule 65(2) hereafter).

Thus, through interpretation of the relevant Articles of the Constitution and the Law, may the Court be able not to ignore unconstitutional legal provisions for the reason that the referring court has not included them in its referral.

For instance, Article 78 of the German Federal Constitutional Court Act which, by virtue of Article 82(1)⁷¹⁴ of the same Act, is equally applicable in cases of incidental control, empowers the Federal Constitutional Court to review further provisions of the law not mentioned in the referral, by stipulating: "*If the Federal Constitutional Court comes to the conclusion that Federal Law is incompatible with the Basic Law or that Land law is incompatible with the Basic Law or other federal law, it shall declare the law to be null and void. If further provisions of the same law are incompatible with the Basic Law or other Federal law for the same reasons, the Federal Constitutional Court may also declare them to be null and void.*"

As to the provision of Article 53 stipulating that the Court shall not decide on other factual or legal matters related to the dispute before the referring court, it may stem from the fact that the Court, like all European constitutional courts, belongs to the Kelsian system, meaning that it is outside the judicial or administrative organization of the ordinary courts as mentioned in the beginning of this Commentary. Therefore, the Court can only decide on factual or legal matters which are necessary in order to be able to rule on the compliance of the legal provision with the Constitution. All other factual or legal matters related to the dispute have to be decided by the referring court. At the same time, the latter is bound to apply the Court's compatibility review to the case pending before it. However, although the Court can nullify the work of the legislator as a "negative legislator", it cannot interfere with the competence of a court

⁷¹³ Rule 65(2) of the Rules of Procedure provides that the Court shall declare the entire law, decree, regulation or municipal statute to be invalid, if it determines that the normative instrument does not achieve its legislative purpose or is otherwise meaningless without the provisions, which are determined to be incompatible with the Constitution.

⁷¹⁴ Article 82(1) reads: "*The provisions of Articles 77 to 79 above shall apply mutatis mutandis.*"

which is not subordinate to it.⁷¹⁵ The Court has, therefore, no influence on the way in which the referring court would apply its decision.

It may well be that, when the referring court applies the decision of the Court to the case pending before it, the party unhappy with the ordinary court's ruling, submits a constitutional complaint to the Court under Article 113.7 of the Constitution against that ruling (after having exhausted all judicial remedies, or directly, if the referring court was the Supreme Court), complaining that the referring court applied the Court's decision wrongly or in such a way that it violated his/her fundamental rights guaranteed by the Constitution. The Court would thus have to adjudicate, whether the ordinary court's decision violated the complainant's constitutional rights due to the alleged wrong application of the Court's interpretation of the law or for any other reason.

As mentioned above, the referring court may indeed have difficulties to apply a law to the case pending before it, when the Court has declared some of the provisions of the law, or the law as a whole, invalid, but the referring court does not know how to apply the remaining provisions of the law or how to adjudicate the case in the absence of a law which has been declared null and void. In such cases the referring court may prefer to wait until the legislature has replaced the invalid provisions by new ones or has adopted an entirely new law instead of having recourse to a substitute law, for instance, an earlier law. This lack of action of the ordinary court could lead a party to complain about a violation of his/her right to effective access to a court as well as the right to have his/her case dealt with by a court within a reasonable period of time.⁷¹⁶

In connection with the "reasonable period of time issue", reference is made to the Study on Individual Access to Constitutional Justice,⁷¹⁷ according to which "in cases of alleged excessive procedural length, an individual appeal to the constitutional court should enable it to effectively order the speedy resumption and termination of the proceedings before the ordinary courts or to settle the matter itself on its merits. In this type of cases, the constitutional court should be able to provide compensation⁷¹⁸ equivalent to what the applicant would receive at the Strasbourg Court."

Article 53 of the Law is supplemented by Rules 77 [Judgment], 78 [Acceptance for Review] and 79 [Review by the Court] of the Rules of Procedure.

Rule 77 [Judgment] of the Rules of Procedure

Rules 64 and 65 shall apply in like manner to Referrals initiated pursuant to Article 113.8 of the Constitution.

The comments on Rules 64 [Interim Measures] and 65 [Judgment] made above under Rule 62 [Request for Review] dealing with the Special Procedure specified in Article

⁷¹⁵ See, Study on Individual access to Constitutional Justice adopted by the Venice Commission at its 85th Plenary Session, Venice, 18-20 December 2010, CDL-AD(2010)039rev.

⁷¹⁶ Article 31 [Right to Fair and Impartial Tribunal] of the Constitution and Article 6 [Right to Fair trial] ECHR.

⁷¹⁷ See Study on Individual access to Constitutional Justice adopted by the Venice Commission at its 85th Plenary Session, Venice, 18-20 December 2010, para. 194, page 51, CDL-AD(2010)039rev referred to above.

⁷¹⁸ See, *Cocchiarella v. Italy*, ECtHR judgment dated 29 March 2006, paras. 76-80 and 93-97.

113.2(1) and (2) of the Constitution are equally valid here. Only some additional comments on these Rules will be made hereafter in the context of the Special Procedure under Article 113.8 of the Constitution. For a better understanding, the wording of Rules 64 and 65 is repeated here:

Rule 64 [Interim Measures] of the Rules of Procedure

The Court may order *ex officio* or upon the request of a party, as an interim measure, that the effects of the normative instrument that is being challenged, or any of its parts, be suspended until the Court issues a Judgment on the referral, in accordance with Part VI of these Rules.

The normative instrument or any parts thereof, the constitutionality of which is being challenged before the Court by the referring court, may well have undesirable effects for a party in the proceedings before the referring court, for instance, if the effects of the normative instrument would lead to irreparable damage. Therefore, the Court may find it justified to suspend the effects of the contested provisions of the law or the entire law, until it has ruled on the issue raised. According to the Rule, the Court can do so *ex officio* or upon the request of a party. Thus, in the context of the Special Procedure of Article 113.8 of the Constitution, it is a party to the proceedings before the referring court, not the referring court itself which could submit the request for interim measures to the Court and give detailed reasons for that..

According to Rule 64, the procedure for the issuance of an order by the Court to suspend the effects of the normative instrument that is being challenged or any of its parts will follow the rules laid down in Part VI [Interim Measures] of the Rules of Procedure, Articles 54 [Request for Interim Measures] and 55 [Decision on Interim Measures], commented on above..

Rule 65 [Judgment] of the Rules of Procedure

- 1. If the Court establishes that certain provisions of the normative instrument are not in compliance with the Constitution, it shall declare the respective provisions to be invalid.**
 - 2. The Court shall declare the entire law, decree, regulation or municipal statute to be invalid, if the Court determines that the normative instrument does not achieve its legislative purpose or is otherwise meaningless without the provisions, which are determined to be incompatible with the Constitution.**
- I.** As mentioned above, it appears that Article 113.8 of the Constitution as well as Articles 51 to 53 of the Law do not allow the Court to consider *ex officio* the question of the constitutionality of other or additional provisions of the contested law than the ones challenged by the referring court. Even if the referring court was right in holding that certain provisions were unconstitutional and, therefore, requested the Court to declare them unconstitutional and, therefore, invalid, it may well be that the same referring court (including the requesting party) – not having

great expertise in constitutional matters - overlooked additional unconstitutional provisions, which, since they were not mentioned in the request to the Court by the referring court, the Court was not allowed to review. According to Article 113.8 of the Convention the Court has the power to consider questions of constitutional compatibility of a law raised by the referring court. The Article does not seem to restrict the power of the Court to the extent that it would only be allowed to review those provisions of the contested law mentioned in the request of the referring court. Also the above Article 51.2, providing that “[A] referral shall specify which provisions of the law are considered incompatible with the Constitution”, only requires the referring court to indicate such provisions.

However, this does not seem to exclude the possibility that, if the Court is of the view that not “such provisions”, but other or additional provisions or the law as a whole are unconstitutional, it can simply do so *ex officio*. Moreover, pursuant to Article 112.1 of the Constitution, the Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution, thus, the Court can declare itself competent *proprio motu* to review other or additional provisions of the contested law (or the law as a whole, see Article 65.2 hereafter) as to their compatibility with the Constitution. It is suggested that the Law be amended accordingly in order to read in a similar way as Article 78 of the German Law on the Federal Constitutional Court, cited above.

A further issue needs to be mentioned here, namely, Articles 51 to 53 of the Law as well as Rules 75 to 77 of the Rule are silent on the question on which date the contested provisions of the normative instruments (or the normative instrument as a whole) which the Court has found to be unconstitutional, will become invalid. Pursuant to Article 20.5 of the Law, a decision of the Court enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined otherwise in its decision (see comments on Article 20.5 above). Thus, it is up to the Court to decide from which date onwards the provisions of the law or the entire law, found unconstitutional, will become invalid and what the effect of that decision will be.⁷¹⁹ The Court may decide that its preliminary ruling becomes effective: (1) from the date of the enactment of the law declared null and void (*ex tunc*); (2) from the date of the decision of the Court’s decision (*ex nunc*); or (3) from the date of publication of the ruling in the Official Gazette; and (4) from a certain date as determined by the Court. For the referring court it is important to know whether the contested law can be continued to be applied, except for the provisions declared invalid, or whether the law as a whole has been eliminated from the Kosovo legal system altogether and if so, from which date onwards.

However, if the Court has found some provisions or the law as a whole unconstitutional, its judgment does not only create effects for the referring court. Since, pursuant to Article 116 of the Constitution, decisions of the Court are

⁷¹⁹ Also Rule 66 [Legal effects of Judgment] which supplements Article 113.2(1) and (2) of the Constitution and Articles 29 and 30 of the Law, does not seem to be of any assistance here, since it also refers solely to the date of the entry into force of the judgment, not the date of the invalidation of the law. It provides as follows: “(1) Secondary legislation and administrative acts which have been issued based on a provision of a law, decree, regulation or municipal statute that has been invalidated by the Court shall not be applied from the date the Court’s judgment becomes effective.”

binding on the judiciary and all persons and institutions of the Republic of Kosovo, the Court's judgment has an *erga omnes* effect. Thus, also the legislature which adopted the unconstitutional provisions or law is bound by the judgment. However, in view of the principle of the separation of powers, the legislature is independent in deciding whether or not to adopt new provisions or even a new law or to amend the provisions found unconstitutional in a way suggested by the Court, like in the "Prizren Logo" Case, where the Court considered that this [the proposal of the non-majority Communities in Prizren] was a reasonable proposal that would have met the legitimate concerns of the Communities.⁷²⁰ As to the referring court, it is not certain, in the absence of new provisions or a new law, in what manner it will implement the Court's judgment (see comments above).

Only if the Court declares that the contested provisions or law are constitutional, it will be clear for the referring court that it can continue with the proceedings and apply the provisions or law as they are, but, as mentioned above, if the contested provisions or law are unconstitutional, the referring court may not be certain how to implement the Court's decision or wait for the legislature to adopt new legislation. Or it may apply the ruling in a way contrary to the expectations of the requesting party to the proceedings. In any case, the unsatisfied party could appeal to the court of appeal and, if unsuccessful, to the Supreme Court and, thereafter, the Constitutional Court or, if the referring court was the Supreme Court, submit a referral directly to the Court under Article 113.7 of the Constitution.

In order to respect as much as possible the principle of legal certainty, the Court will not easily declare provisions of a normative act null and void (*ex tunc*), since in that case all legal effects of the unconstitutional provisions will have to be undone, which may cause major damage to third parties and undermine the principle of legal certainty. Of course, in cases where criminal provisions have been declared unconstitutional, it would be relevant to abolish the unconstitutional provisions with retroactive effect, so that not only the party concerned, but also all those in a similar position could take advantage of the new situation from the moment the unconstitutional norm was initially enacted. As mentioned above, Rule 66.2 of the Rules of Procedure expressly deals with this situation⁷²¹ as well as the relevant laws of European countries.⁷²²

The Court may rather decide that the declaration of unconstitutionality of the relevant provisions or the normative act as a whole will take effect on the day that the judgment was taken (*ex nunc*). Thus, in the interest of legal certainty, previous legal acts concluded under the provisions of the norm or the norm as a whole, before they were declared unconstitutional by the Court, will continue to be valid. In fact, this is the Court's practice so far. Without mentioning one of such decisions in particular, the phrase used by the Court is the following: "This decision is effective immediately."

⁷²⁰ Case No. KO. 01/09, Cemal Kurtisi vs. The Municipal Assembly of Prizren, Judgment of 18 March 2010, Bulletin of Case Law 2009-2010; and on the Court's Webpage.

⁷²¹ Rule 66(2) provides: "If a court has issued a decision in a criminal case that is based upon a provision of a law, Decree, or regulation that the Court has declared unconstitutional, the person against whom the decision was issued may have proceedings reopened in the criminal case."

⁷²² See Study on Individual access to Constitutional Justice adopted by the Venice Commission at its 85th Plenary Session, Venice, 18-20 December 2010, para. 194, page 51, CDL-AD(2010)039rev.

The Court may use the third option, i.e. the effects of its declaration of unconstitutionality will take place on a date determined by the Court, with prudence. As mentioned above, it may do so, in particular, when it wishes to leave the legislature or other relevant authority or institution sufficient time to replace the unconstitutional provisions of a normative act with new provisions, which, this time, would be expected to be in compliance with the constitutional rights violated by the provisions found unconstitutional.

- II. Although, by virtue of Article 53 of the Law, the Court shall decide only on “the compliance of the legal provision with the Constitution” (which, supposedly, means: the legal provision submitted to it by the referring court) and shall not decide on other factual or legal matters related to the dispute before the referring court, Rule 65(2) seems to extend the Court’s restricted review considerably, by stipulating that it shall declare the entire law, decree, regulation or municipal statute to be invalid, if the Court determines that the normative act (1) does not achieve its legislative purpose or (2) is otherwise meaningless without the (invalid) provisions, which are determined to be unconstitutional. As already been set out above, Rules of Procedure may not regulate issues which should be regulated by normative act adopted by the legislature.

According to its practice, when seized with a request from an ordinary court under Article 113.8 of the Constitution, the Court informs on its own account, without being forced to do so by law, the relevant authorities (Supreme Court, Assembly, Government and Ombudsperson) of the submission of the referral. Consequently, once it has decided (depending on the circumstances, after a hearing of the parties) whether or not to invalidate the relevant law or its contested provisions, the Court informs the same institutions of its judgment.⁷²³

12. Procedure in the case defined under Article 113 [Jurisdiction and Authorized Parties], Paragraph 9 of the Constitution of the Republic of Kosovo

The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.

Whenever the Assembly envisages to adopt an amendment to the Constitution, it needs to be aware that the proposed amendment may diminish the rights and freedoms guaranteed by Chapter II [Fundamental Rights and Freedoms] of the Constitution, containing a catalogue of human rights and fundamental freedoms, which, pursuant to its Article 21 [General Principles], paragraph 1, are: “... *indivisible, inalienable and*

⁷²³ Article 71.3 of the Albanian Constitutional Court Act stipulates expressly: “*If the Constitutional Court repeals the law as unconstitutional, it shall inform the Assembly and the Council of Ministers of its decision.*”

*inviolable and are the basis of the legal order of Kosovo.”*⁷²⁴ Moreover, by virtue of Article 21 [General Principles], paragraph 2, of the Constitution “*The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.*”

These Articles clearly show how untouchable human rights and freedoms, guaranteed by the Constitution, are and in which manner they must be respected by all institutions which form part of the Republic of Kosovo, including the Assembly. Thus, before the Assembly would be able to approve any such amendment, the Court is tasked to confirm first whether the proposed amendment would diminish the human rights and freedoms of Chapter II of the Constitution.

It is, however, unclear why Article 113.9 of the Constitution only mentions that a proposed constitutional amendment should not diminish the rights and freedoms of Chapter II of the Constitution. It would be equally important that proposed amendments should not diminish the rights of Communities, laid down in Chapter III [Rights of Communities and Their Members] or elsewhere mentioned in the Constitution. For instance, as set out in paragraph 1 of Article 57 [General Principles] of Chapter III [Rights of Communities and Their Members] of the Constitution, “*Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in Chapter II of this Constitution.*” For what reason this provision has apparently been overlooked by the drafters and the Assembly when adopting Article 113.9 of the draft Constitution, is a question which is difficult to answer.

However, in the meantime, this omission has been rectified by the Court itself in Cases K.O. 29/12 and K.O. 48/12, Proposed Amendments of the Constitution, submitted by the President of the Assembly of the Republic of Kosovo on 23 March and 4 May 2012, respectively, where the Court stated that:

“[...]

61. *In this regard, the Court considers that, as to the constitutional review of any proposed amendment to the Constitution under Article 144.3, such amendment must be considered in light of Chapter II [Fundamental Rights and Freedoms] of the Constitution, which by virtue of its Article 21 [General Principles], consists of the human rights and fundamental freedoms which are the basis of the legal order of the Republic of Kosovo.*

62. *Moreover, the Court considers that Chapter III [Rights of Communities and Their Members] and other rights may be applicable in this process since the specific rights set forth therein are an extension of the human rights and freedoms provided in Chapter II of the Constitution, in particular, of those laid down in Article 24 [Equality before the Law].*

63. *This is particularly so, also, in light of the provisions of Article 21.2 of the Constitution which provides that the Republic of Kosovo shall protect and guarantee*

⁷²⁴ Article 21 of the Constitution reads as follows: (1) *Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of Kosovo;* and (2) *The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.*

human rights and fundamental freedoms as provided by the Constitution, not necessarily those contained in Chapter II alone.

64. Therefore, the evaluation of the constitutionality of the proposed amendments by this Court will not only be made taking into account the human rights and freedoms contained in Chapter II, but also all human rights and freedoms guaranteed by the Constitution and contemplated by the letter and spirit of the constitutional order of the Republic of Kosovo.

[...].”⁷²⁵

Thus, the Court provided a thorough interpretation of the notion of “rights and freedoms guaranteed by Chapter II of the Constitution” of Article 113.9 of the Constitution by incorporating into it “all human rights and freedoms guaranteed by the Constitution and contemplated by the letter and spirit of the constitutional order of the Republic of Kosovo.” In this way, it firmly established the scope of Article 113.9.

Article 113.9 of the Constitution is implemented by Article 54 of Sub-Chapter 12 [Procedure for cases defined under Article 113.9 of the Constitution] of the Law.

Article 54 [Deadline]

A decision of the Constitutional Court shall, to the extent possible, be rendered within sixty (60) days after receipt of the request.

Apparently, in order not to delay for an unnecessarily long period of time the legislative process of a proposed constitutional amendment by the Assembly, the Court is held by the Article to render a decision within a period of sixty (60) days. It goes without saying, however, that in case of a proposed amendment which concerns only a particular Article of the Constitution or even a paragraph of an Article, the Court would certainly take less time to render a decision than if the referral would contain proposed amendments of 10 or more Articles, let alone of 35 Articles, including an even greater number of paragraphs as occurred in the above Cases KO 29/12 and K.O. 48/12. The wording “*to the extent possible*” shows already that the drafters had foreseen such situations and, therefore, had softened the deadline by adding these words, thus allowing the Court to render a decision later than the required period of 60 days, if need be. In the above Cases, it took the Court some 120 days to render its decision which seems very reasonable in comparison with the immense task of the Court to carefully check the proposed amendments against Chapter II of the Constitution as interpreted by it.

Further examples of direct access to the Constitutional Court by public authorities under the Constitution, not mentioned in Chapter III [Special Procedures] of the Law on the Constitutional Court

As mentioned above in the comments on Article 22.1, first and second sentence, of the Law, parties authorized to refer matters to the Court in a legal manner are not only those mentioned in Article 113 of the Constitution, but also elsewhere in the

⁷²⁵ Cases 29/12 and 48/12, Judgment of 20 July 2012, Bulletin of Case Law 2012, page; and on the Court’s web page.

Constitution. However, Chapter III [Special Procedures] does not provide for any special procedures which should be followed in such cases. These further examples of authorizes parties having direct access to the Court under other Articles of the Constitution are, therefore, commented on separately.

(1) The President

Article 84 [Competencies of the President], paragraph 9, of the Constitution provides that the President of the Republic of Kosovo is empowered to “*refer constitutional questions to the Constitutional Court*”. This competence is repeated also in the Law on the President.⁷²⁶ It allows the President to refer whatever question to the Court, as long as it has anything to do with the Constitution. The Article apparently does not contain any time restriction for bringing a referral to the Court.

For instance, on 27 August 2010, the President of Kosovo, through his legal representatives, submitted a Referral to the Court⁷²⁷ requesting it to clarify “*Which institution in the Republic of Kosovo is responsible for assessing the effectiveness and validity of a resignation and for confirming the eventual expiry of a mayor’s term of office, based on a communiqué addressed to the public, the uncertainty of which has prevented further actions by the President in compliance with the constitutional principle of free and equal elections.*” According to the President, he is the authorized party to submit this constitutional matter to the Court and, considering that he is obliged according to the Constitution to ensure compliance with the constitutional principle of free and fair elections, he has to clarify as to what are the further steps that he should undertake following a resignation of a given mayor.

The Court ruled that the Referral was admissible, since the “[...] *mentioned facts at the outset appeared to raise a constitutional question based on the authorizations of the President in the Constitution to raise such constitutional issues before the Court. That is in particular because it relates to two constitutional provisions, i.e. Article 123 [General Principles of Local Government and Territorial Organization] and Article 45 [Freedom of Election and Participation] of the Constitution.*”

As to the merits, the Court decided that, based on the Law on Self-governance, the resignation of a given mayor is final and definitive and marks the termination of his/her mandate, and that the constitutional consequences of such an action are the announcement of new elections by the president in order to ensure that citizens enjoy the right to free and fair elections when establishing their local self-governance.⁷²⁸

Another example is Case No. KO 97/10, submitted by Acting President, Dr. Jakup Krasniqi, concerning the holding of the office of Acting President of the Republic of Kosovo and at the same time the position of Secretary General of the Democratic Party of Kosovo.⁷²⁹ The Court held, in particular, that a referral under Article 84.9 does not prescribe a time limit within which constitutional questions may be referred to it.

⁷²⁶ Law 2008/03-L-094, promulgated on 7 January 2009.

⁷²⁷ Case No. KO 80/10, The Referral of the President of the Republic of Kosovo, His Excellency, Dr. Fatmir Sejdiu, for Explanations Regarding Jurisdiction over the Case of Rahovec Mayor, Mr. Qazim Qeska, Judgment of 7 October 2010, Bulletin of Case Law 2009 – 2010, page 257; and on the Court’s web page.

⁷²⁸ Idem

⁷²⁹ Case No. KO 97/10 In the matter of the Referral submitted by Acting President of the Republic of Kosovo, Dr. Jakup Krasniqi, concerning the holding of the office of Acting President and at the same time

(2) The Government

Article 93 [Competencies of the Government], paragraph 10, of the Constitution, grants the Government of Kosovo powers identical to those of the President of Kosovo under the above Article 84.9, stipulating that it “*may refer constitutional questions to the Constitutional Court.*” For instance, on 20 July 2011, the Prime Minister of Kosovo, Mr. Hashim Thaqi, on behalf of the Government of the Republic of Kosovo, lodged a referral⁷³⁰ with the Court, containing three separate questions relating to the immunities of different state bodies of Kosovo, namely, the deputies of the Assembly, the President, and the members of the Government. In the Government’s opinion, “*this issue has a direct impact on the democratic functioning of the institutions of the Republic of Kosovo, pursuant to the Constitution of the Republic of Kosovo.*”

The Court considered that the questions raised by the Government were of a constitutional nature as they were linked to the form of governance of the State and concerned the mechanisms of the exercise of the division of power in the Republic of Kosovo. The Court also held that there were no time restrictions in the bringing of a Referral under Article 93.10 of the Constitution.⁷³¹

(3) The Ombudsperson

Article 135 [Ombudsperson Reporting], paragraph 4, of Chapter II [Independent Institutions] of the Constitution provides that the Ombudsperson is empowered to “*refer matters to the Constitutional Court in accordance with the provisions of this Constitution* “. Unlike the powers of the President of Kosovo and the Government under (1) and (2) above, the Ombudsperson’s powers seem to be limited by the wording “*in accordance with the provisions of the Constitution.* However, the only other provision of the Constitution where the Ombudsperson is mentioned is Article 113.2 of the Constitution, according to which the Assembly, the President of Kosovo, the Government and the Ombudsperson are authorized to submit to the Court the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government as well as the compatibility with the Constitution of municipal statutes (see the detailed comments on Article 113.2 of the Constitution above).

the position of Secretary General of the Democratic Party of Kosovo, Judgment of 22 December 2010, Bulletin of Case Law 2009 – 2010, page 438; and on the Court’s web page.

⁷³⁰ Case No. KO 98/11, The Government of the Republic of Kosovo concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo, Judgment of 20 September 2011, Bulletin of Case Law 2011, page 340; and on the Court’s webpage.

⁷³¹ The Government had submitted the Referral under both Article 93.10 and Article 113.3.1 of the Constitution. The Court concluded that the questions raised were constitutional questions as contemplated by Article 93.10 of the Constitution and it was therefore not necessary to consider the Referral in the context of Article 113.3.1. In this respect the Court held that whereas there are time restrictions provided for in Chapter III, Special procedures, of the Law on the Constitutional Court for bringing Referrals under Article 113 of the Constitution, there are no time restrictions in the bringing of such Referrals under Article 93.10.

However, Article 15 [Competencies], paragraph 7, of the Law on the Ombudsperson⁷³² providing that “The Ombudsperson may initiate matters to the Constitutional Court in accordance with the Constitution and Law on the Constitutional Court.”, grant the latter additional powers to the effect that it empowers him/her to initiate the constitutional review of a normative act on his/her own motion or following a complaint by an individual in relation to that act.

For an individual, access to the Court via the Ombudsperson only implies indirect access to it, which can, though, not replace his/her direct access to the Court under Article 113.7 of the Constitution. A referral submitted by the Ombudsperson may, however, through his/her legal expertise, help to improve the quality of petitions.⁷³³ As to the time limit and other admissibility requirements which have to be fulfilled by the individual in case of constitutional review, it is logical that the Ombudsperson will have to observe the same requirements as the individual(s) he/she is representing before the Court.

(4) The Vice President of the Municipal Assembly for Communities

Article 62 [Representation in the Institutions of Local Government] of Chapter III [Rights of Communities and Their Members] of the Constitution empowers the Vice President of the Municipal Assembly for Communities to submit directly to the Court matters laid down in paragraphs 3 and 4 of the Article. The pertinent paragraphs of the Article read as follows:

Article 62.3: “*The Vice President for Communities shall promote inter-Community dialogue and serve as formal focal point for addressing non-majority Communities’ concerns and interests in meetings of the Assembly and its work. The Vice President shall also be responsible for reviewing claims by Communities or their members that the acts or decisions of the Municipal Assembly violate their constitutionally guaranteed rights. The Vice President shall refer such matters to the Municipal Assembly for its reconsideration of the act or decision.*”

Article 62.4: “*In the event the Municipal Assembly chooses not to reconsider its act or decision, or the Vice President deems the result, upon reconsideration, to still present a violation of a constitutional guaranteed right, the Vice President may submit the matter directly to the Constitutional Court, which may decide whether or not to accept the matter for review.*”

The matters to which Articles 62.3 and 62.4 refer fall within the scope of Chapter III [Rights of Communities and Their Members] of the Constitution which stipulates, in its Article 57 [General Principles], that inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in Chapter II of this Constitution. The right to representation in the Institutions of Local Government laid down in the Article 62 is one of these specific rights and includes the reservation of the post of Vice President of the Municipal Assembly for Communities in municipalities where at least ten per cent (10%) of the residents belong to

⁷³² Law No. 03/L-195 promulgated on 9 August 2010.

⁷³³ Study on Individual Access to Constitutional Justice, Venice Commission, CDL-AD(2010)039 rev.

Communities not in the majority in those municipalities. According to Article 62.2, the position of Vice President shall be held by the non-majority candidate who received the most votes on the open list of candidates for election to the Municipal Assembly.

Articles 62.3 and 62.4 carefully spell out the circumstances in which the Vice President for Communities has direct access to the Court. It is up to the Court, however, to decide whether or not to accept the matter for review. Article 62 does not contain any time limit which the Vice President for Communities has to observe for submitting a referral to the Court. It must be assumed that, in normal circumstances, he/she would seize the Court promptly after his/her request for reconsideration of the contested act or decision of the Municipal Assembly has been denied or the Municipal Assembly has indeed reconsidered the contested act or decision, but refused to alter it or altered it in such a way that, in the Vice President's view, the result still presents a violation of constitutionally guaranteed rights of Communities or their members.

According to Article 62.4, the Court may decide whether or not to accept the referral for review, without elaborating. Rule 78 of the Rules of Procedure contains further details.

N.B. Article 62, paragraphs 1 to 4, of the Constitution is not implemented by any provision of the Law, but by Articles 54 and 55 of the Law on Local Self-Government,⁷³⁴ containing the literal text of paragraphs 1 to 4 of Article 62 of the Constitution. The above comments on these paragraphs are, therefore, equally valid for Articles 54 and 55 of the Law on Local Self-Government. Article 62 is supplemented by Rules 78 and 79 of the Rules of Procedure.

Rule 78 [Acceptance for Review] of the Rules of Procedure

Even when a matter is admissible, the Court may determine whether to accept for review a matter submitted by the Vice President of a Municipal Assembly in accordance with Article 62, paragraph 4, of the Constitution. The Vice President of a Municipal Assembly submitting a matter shall state precisely the constitutionally guaranteed rights that have been violated. The Court shall determine whether to accept a matter for review by majority vote of the Judges present and voting.

Although Rule 78, in its opening words, refers to the requirement that the matter should first be admissible, before the Court may determine whether or not to accept the matter for review, it does not specifically mention any grounds for admissibility of the referral. No doubt, the Court will decide not to accept the referral for review, if the Vice President cannot show that he has referred the relevant matter to the Municipal Assembly for reconsideration. Furthermore, although no specific time limit is mentioned anywhere in Article 62 or Rule 78, the Court may decide not to accept the referral for review, for the reason that so much time has passed since the contested act or decision, that the claim has become moot or does not otherwise present a case of controversy.⁷³⁵ The Court will certainly also not consider the complaint admissible if it is frivolous or manifestly ill-founded or inadmissible for any other valid reason.

⁷³⁴ Law No 2008/03-L-040, promulgated on 15 June 2008..

⁷³⁵ See Rule 32 [Withdrawal of Referrals and Replies] of the Rules of Procedure.

Finally, the Vice President should have to show that the result of the reconsideration by the Municipal Assembly still presents a violation of constitutionally guaranteed rights of Communities or their members.

When the matter is admissible, Rule 78 provides that the Court will determine whether or not to accept a matter submitted for review by the Vice President (the Rule has left out the words “for Communities” behind the word “Vice-President”) of the Municipal Assembly. Once it has done so, the Court will consider the merits of the case and rule whether or not the act or decision of the Municipal Assembly violates the constitutionally guaranteed rights of Communities or their members. The Court has already had the opportunity to rule on such a case.

On 22 April 2009, the Vice President for Communities of the Municipal Assembly of the Municipality of Prizren filed a referral with the Court (Case No. KO 01/09⁷³⁶), challenging Article 7 of the Municipal Statute on the Municipal Emblem providing that the emblem of the Municipality is “the House of the League of Prizren”, circled by the following wording “1878 – Prizren”. The Vice President alleged that proceedings foreseen under the law had not been respected, that requests and remarks of communities related to the emblem were not taken into account, and that this emblem did not reflect the multi-ethnicity of the Municipality. He further claimed that constitutional rights of other non-majority communities in the Municipality were violated for equality before the law, protection, preservation and development of their identity and that there was a violation of the Law on Local Self-Government, and of the Law on Protection and Promotion of Community Rights.

The Court held that it was satisfied that the Vice President had the proper legal standing and authority to bring his referral to the Constitutional Court. It ruled that, when the Municipality decided to proclaim the emblem with the House of the Prizren League associated with the year 1878, they promoted Albanian heritage and tradition, without due regard to other communities, thereby violating the rights of non-majority communities in Prizren to protect, maintain and promote their identity. The Court concluded that Article 7 of the Statute of the Municipality was not compatible with the Constitution, and ordered the Municipality of Prizren to amend it in order to ensure compliance with the Constitution.

Rule 79 [Review by the Court] of the Rules of Procedure

If the Court accepts for review a matter referred under Article 62.4 of the Constitution, the Court shall handle the referral in the manner provided under these Rules for all referrals. Rules 64 and 65 shall apply in like manner to Referrals initiated pursuant to Article 62.4 of the Constitution.

The first sentence of the Rule can only mean that, once the Court has accepted a matter for review, it will consider it on the merits “*in the manner provided under these Rules for all referrals.*” Thus, interim measures may be imposed by the Court under Rule 64 (as mentioned in the second sentence of Rule 79), further evidence may be requested from the parties and the Court may hold a hearing, including the examination of

⁷³⁶ See, Case No. KO 01/09, Cemal Kurtisi vs. The Municipal Assembly of Prizren, Judgment of 18 March 2010, Bulletin of Case Law 2009-2010, Page 73; and on the Court’s webpage.

witnesses and experts as well as oral submissions by an *amicus curiae*, if invited by the Court.

Pursuant to the second sentence of Rule 79, the Court may impose *ex officio* or upon the request of a party interim measures at any stage of the proceedings before it, in accordance with Rule 64 [Interim Measures]. According to Rule 79, the Court may also declare certain provisions of the normative instrument concerned (in this case the contested act or decision of the Municipal Assembly) or the normative instrument as a whole invalid in accordance with Rule 65 [Judgment]. For instance, in the above Case No. KO 01/09, the Court declared the contested Article 7 of the Municipal Statute incompatible with the Constitution.

Chapter IV: Final and Transitional Provisions

Old Article 55 [Provisional Composition of the Constitutional Court]

1. The Constitutional Court shall be composed as set forth in Article 152 of the Constitution during the period prescribed therein.
2. Nothing in this Law, including provisions regulating eligibility criteria, professional qualifications and remuneration of judges, shall not apply to, restrict or otherwise limit the competences and responsibilities of competent authorities for the appointment of international judges foreseen by the Constitution and the Comprehensive Proposal for the Republic of Kosovo Status Settlement of 26 March 2007. These responsibilities and competences shall be exercised in accordance with applicable instruments notwithstanding any provision of this Law.

On 31 August 2012, the Assembly adopted Law No. 04/L-115 [Amending and Supplementing Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo], which proposed a number of Amendments to the Constitution, forming part of a package of constitutional amendments necessary to acknowledge the end of the supervised independence as proclaimed by the International Civil Representative (ICR) on July 2012, when he declared the Comprehensive Proposal for the Republic of Kosovo Status Settlement (hereinafter: “Comprehensive Proposal”) of 26 March 2007 to have been fully implemented by the Kosovo Government. Also other laws were amended.

Article 2 of Law 04/L-115 amends Article 55 [Provisional Composition of the Constitutional Court] of the Law on the Constitutional Court considerably by deleting the original paragraphs and replacing them by a new text. For a better understanding of the background and context of the appointment of the international judges, it appears to be appropriate to first comment on the original text of the Article, followed by comments on the new text.

- 1 As stipulated by the Article, details of the provisional composition of the Court were laid down in Article 152 [Temporary Composition of the Constitutional Court] of the Constitution (now deleted), reading:
“Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement, dated 26 March 2007, the Constitutional Court shall be composed as follows:
 1. Six (6) out of nine (9) judges shall be appointed by the President of the Republic of Kosovo on the proposal of the Assembly.
 2. Of the six (6) judges two (2) judges shall serve for a non-renewable term of three (3) years, two (2) shall serve for a non-renewable term of six (6) years, and two (2) judges shall serve for a non-renewable term of nine (9) years. Mandates of initial period judges shall be chosen by lot by the President of the Republic immediately after their appointment.

3. *Of the six (6) judges, four (4) shall be elected by a two-thirds (2/3) vote of the deputies of the Assembly present and voting. Two (2) shall be elected by majority of the deputies of the Assembly present and voting including the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of Communities that are not in the majority in Kosovo.*
4. *Three (3) international judges shall be appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights. The three (3) international judges shall not be citizens of Kosovo or any neighboring country.*
5. *The International Civilian Representative shall determine when the mandates of the international judges expire and the judges shall be replaced as set forth by the Constitution.”*

Before being deleted by the Assembly, Article 152 of the Constitution not only dealt with the temporary composition of the Court, but also with the procedure, according to which the six (Kosovar) judges mentioned therein (i.e. four judges and two judges representing Communities that were not in the majority in Kosovo), were elected by the Assembly. In fact, the procedure of Article 152.3, according to which the six (Kosovar) judges were elected by the Assembly, was identical to the (normal) procedure for the election of judges laid down in Article 114 [Composition and Mandate of the Constitutional Court], paragraph 3, of the Constitution. Although Article 152.3 did not contain any reference to Article 114, it was evident that paragraphs 4⁷³⁷ and 5⁷³⁸ of that Article were equally valid, dealing with the mandate of a judge and the election of the President and Vice-President, respectively.

Furthermore, for the Assembly to propose the six judges for appointment to the President of Kosovo, the procedure laid down in Article 6 [Procedure for Review of Candidates for Appointment to the Constitutional Court] of the Law, whereby a Special Committee would prepare a shortlist of qualified candidates to be submitted to the Assembly, had first to be followed. The appointment of the six (6) judges, whom the Assembly proposed to the President of the Republic of Kosovo, took place on 26 June 2009.

The three (3) international judges (of American, Bulgarian and Portuguese nationality) were appointed by the International Civilian Representative (ICR), pursuant to Article 152.4 (now deleted) of the Constitution for an initial period of 3 years, which expired in June 2012. However, as to the authorities competent for the appointment of the international judges, there appeared to be a difference in approach in the Constitution and the Comprehensive Proposal. In this respect, Article 152.4 stipulated that “*Three international judges shall be appointed by the*

⁷³⁷ Article 114.4 of the Constitution provides: *If the mandate of a judge ends before the end of the regular mandate, the appointment of the replacement judge shall be made in compliance with this Article for a full mandate without the right to re-appointment.*

⁷³⁸ Article 114.5 of the Constitution provides: *The President and Deputy President of the Constitutional Court shall be elected from the judges of the Constitutional Court by a secret ballot of the judges of the Court for a term of three (3) years. Election to these offices shall not extend the regular mandate of a judge.*

*International Civilian Representative*⁷³⁹, upon consultation with the President of the European Court of Human Rights”, whereas Article 6 [The Constitutional Court and Justice System], paragraph 1.3, of Annex I [Constitutional Provisions] to the Comprehensive Proposal, provided that “*Three international judges shall be appointed by the President of the European Court of Human Rights, upon consultation with the International Civilian Representative*”. It was clear from Article 152.4 that its drafters had opted for a different appointment procedure than was originally foreseen in Article 6.1.3 of Annex I to the Comprehensive Proposal, since the appointing authority in Article 152.4 was no longer the President of the European Court of Human Rights, but the International Civilian Representative.

Article 152.4 of the Constitution differed in another aspect from Article 6.1.3 of Annex I to the Comprehensive Proposal, since the drafters of the Constitution added a second sentence to the paragraph, providing that “The three international judges shall not be citizens of Kosovo or any neighboring country”. This must have been done with the obvious purpose that the choice of international judges by the ICR could not be criticized or compromised by the slightest suspicion of partiality or lack of independence, if the candidates were citizens of Kosovo or of any neighboring country, if appointed.

Then the non-renewable mandate of three years of two Kosovar judges of the Court came to an end on 26 June 2012. Since their mandate could not be extended, as stipulated by the original Article 152 of the Constitution, the procedure provided for in Article 8 [Termination of Mandate] of the Law, was put in motion, to the effect that “*6-months before the mandate of a judge of the Constitutional Court terminates, pursuant to Paragraph 1.1 of this Article, the President of the Court shall inform the Assembly of the Republic of Kosovo in order for the Assembly to initiate the procedure for proposing a new judge.*” After the President had done so, in December 2011, the procedure for proposing and electing a new judge, as laid down in Article 6 [Procedure for Review of Candidates for Appointment to the Constitutional Court] of the Law, commenced, pursuant to Article 7 [Appointment and commencement of mandate] of the Law, at least three (3) months before the expiry of the mandate of the previous judge.

- 2 Article 55.2 seems to contain an error at the end of the second line of the first sentence. The word “not” in between the words “shall” and “apply” should have been deleted, since the use thereof in connection with the word “Nothing” at the beginning of the sentence was incorrect. The sentence should, presumably, have read “Nothing in this Law [...] shall apply to, restrict or otherwise limit the competences [...]”. Furthermore, by using the wording “competent authorities for the appointment of international judges foreseen by the Constitution and the Comprehensive Proposal” the drafters of the Law might have assumed that the authorities foreseen in both texts were the same, whereas, as commented above, the appointing authority under the Comprehensive Proposal was the President of

⁷³⁹ See Articles 146 [International Civilian Representative] and 147 [Final Authority of the International Civilian Representative] of Chapter XIV [Transitional Provisions] of the Constitution (both deleted) and Annex IX [International Civilian Representative] of the Comprehensive Proposal] to the Comprehensive Proposal for the Kosovo Status Settlement (no longer in force).

the European Court of Human Rights, whereas the appointing authority under the Constitution was the ICR. Such inconsistencies between the Constitution and the Comprehensive Proposal fell within the scope of Article 143.3 of the Constitution (now deleted), which provided that: “[...] If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the said Settlement, the latter will prevail and should be solved accordingly.”

New Article 55

The mandate of the international judges appointed in accordance with the Constitution shall continue under the terms and conditions specified in the appointment decision.

The new text of Article 55 makes reference to the mandate of the international judges “appointed in accordance with the Constitution”. However, when a curious student reads this text and wishes to look up the relevant provisions of the Constitution regarding the appointment of the international judges, he/she will be disappointed to find out that there are no such provisions, since every reference to the mandate and appointment of the international judges as well as to the Comprehensive Proposal and the ICR has been deleted by the Assembly.

Moreover, the appointment decision of the ICR has not been published in the Official Gazette or on the webpage of the Court, since the ICR may have considered the terms of the appointment as confidential. Taking into account that the ICR, before stepping down, has extended their appointment until 31 August 2014, the terms of the extension are certainly also kept confidential.

Furthermore, pursuant to Article 2 of Law No. 04/L-115 [Amending and Supplementing Law No. L/03-121 on the Constitutional Court of the Republic of Kosovo] of 31 August 2012, the Assembly added a second paragraph to Article 15 [Remuneration of Judges] of Law No. 03/L-121 (see comments on Article 15 on the Law on the Court above).

In the absence of any other official document containing the details regarding the mandate and appointment of the international judges, no further comments on Article 55 will be made.

Article 56 [Earlier Cases]

The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force.

It is not easy to immediately grasp the full meaning of the Article. Its intention must be understood to entitle authorized parties to submit referrals to the Court regarding judicial matters that were already ongoing before the entry into force of the Constitution on 15 June 2008, but the final outcome of which occurred on or after this

date. Thus, although the Constitution had already defined the jurisdiction of the Court, the Assembly still needed to adopt a law to implement the constitutional provisions concerned and to establish the Constitutional Court. To file a referral was, therefore, only possible after the Law on the Constitutional Court had entered into force on 16 January 2009 and an Interim Secretariat had been established to receive such referrals.

As a consequence, all deadlines for the submission of matters falling under the jurisdiction of the Court would start to run on 16 January 2009. For instance, an applicant who would have liked to initiate proceedings before the Court under Article 113.7 of the Constitution in order to complain about a violation of his/her constitutional rights by the final instance court, which was taken before or shortly after the entry into force of the Constitution and served upon him/her on or after 15 June 2008, could only do so, after the Law had entered into force on 16 January 2009, although the Court itself had not been established yet.

By virtue of Article 56, the time limit of 4 months within which the prospective applicant had to submit the referral (see Article 49 [Deadlines] of the Law) would, thus, not begin to be counted on the day upon which the applicant was served with the judgment, as is the case under Article 49 of the Law, but would start to run only on 16 January 2009⁷⁴⁰ and expire on 16 May 2009.

As the Constitution cannot be applied retroactively, the Court has, therefore, no competence “*ratione temporis*” to deal with violations of human rights and fundamental freedoms, which occurred prior to the entry into force of the Constitution. However, there are circumstances, where the Court may make an exception to the rule and takes into account situations that occurred before the entry into force of the Constitution, but the effects of which continued afterwards, the so-called “continuing situations”, amounting to a violation of constitutional rights, without the applicant having any effective remedy at his/her disposal to put an end to that situation (see also the comments on Article 49 [Deadlines] of the Law and Rule 36(3)(h) above).⁷⁴¹ For instance, in Case No. KI. 08/09, The Independent Union of Workers of IMK Steel Factory in Ferizaj, Constitutional Review of the Decision of the Municipal Court of Ferizaj, Decision C No. 340/2001 of 11 January 2002,⁷⁴² where the judgment of the Municipal Court in favor of the Applicant had become *res judicata* on 11 March 2001, the Court held that the workers were still waiting for the implementation of that court decision and that, “[T]he situation of non-implementation of the judgment of 11 January 2002 is, therefore, continuing until to date.” Also in the Cases Nos. KI 76-2010, KI 82-2010, KI 83-2010, KI 102/2010, KI 111-2010, KI 122-2010, KI 127 - 2010, KI 11-2011, KI 15-2011, KI 18-2011, KI 45-2011, KI 47-2011, KI 48-2011, KI 50 2011, KI 57-2011, KI 60-2011, KI 69-2011, KI 71 2011, KI 73 -2011, KI 75-2011, KI 79-2011, *Ilaz Halili and 20 other former employees of Kosovo Energy Corporation*, Judgment of 27 December 2011, the Court found that “there is a continuing situation. As the circumstance of which the Applicants complain continued, the four months period as prescribed in Article 49 of the Law is inapplicable to these cases.”

⁷⁴⁰ The Law was adopted by the Assembly on 16 December 2008 and entered into force on 16 January 2009.

⁷⁴¹ See case law of the Court mentioned there.

⁷⁴² Judgment of 17 December 2010, Bulletin of Case Law 2009-2010; and on the Court’s Webpage.

The ECtHR has been confronted with similar situations, when it had to adjudicate applications in which the applicant complained that the facts amounting to a violation of his/her human rights and fundamental freedoms dated back to a period prior to the ratification of the ECHR by the State concerned.⁷⁴³ In such cases, the ECHR 6-months time limit would start to run only on the date when the situation had come to an end.⁷⁴⁴

Article 57 [Interim Secretariat of the Constitutional Court]

An Interim Secretariat is hereby established. The Interterm Secretariat shall be established until such time as the Secretariat of the Constitutional Court referred to in Article 12 of this Law is functional. The Interim Secretariat shall exercise its responsibilities in accordance with applicable instruments until such time as the Secretary General appointed in accordance with Article 12 of this Law decides that the Secretariat is functional.

Article 57 does not specify which responsibilities the Interim Secretariat would exercise and through which recruitment mechanism the Head of the Interim Secretariat (and other staff) would be appointed. Furthermore, the Article does not indicate whether all powers, responsibilities and contractual obligations of the Interim Secretariat would be transferred to the Court's Secretariat, once the Secretary General would decide that the Secretariat was functional. It would also have been much clearer for prospective applicants, if Article 57 had unambiguously provided that the Interim Secretariat would be mandated to provisionally register referrals.

This would have been particularly important for applicants covered by Article 56 [Earlier Cases] of the Law whose referral concerned matters falling under the jurisdiction of the Court and which had arisen before the entry into force of the Law (16 January 2009). For instance, in the case of applicants under Article 113.7 of the Constitution, the deadline was 16 May 2009, i.e. four months after the Law on the Constitutional Court had entered into force. In the absence of any detailed instructions laid down in the Law, the individuals concerned may not have understood that their referral should be submitted before 16 May 2009, but may have thought that they could wait with the submission of their referral until the Court would have become operational.

Be that as it may, the Interim Secretariat of the Court,⁷⁴⁵ was effectively established on 2 February 2009 in order to begin to serve Kosovar Institutions and citizens by providing them with a legal course to bring complaints before the Constitutional Court of the Republic of Kosovo which was formally established in January 2009, as announced by a press release of the same date.

⁷⁴³ See, *De Becker v. Belgium*, App. no. 214/56, Decision of 9 June 1958.

⁷⁴⁴ See, *Antonov v. Ukraine*, Appl. no. 14183/02, ECtHR Judgment of 22 November 2005.

⁷⁴⁵ East West Management Institute (EWMI), a US based not for profit organization, with a grant from UK DFID, provided key technical assistance to a Kosovo government working group charged with establishing the Court. President Sejdiu, in a letter to EWMI, applauded this major accomplishment and offered his and Kosovar institutions support in the further development of the Court.

The Interim Secretariat indeed received during its existence several referrals submitted under Article 113.7 of the Constitution. The Court itself became operational after all judges had taken the oath by August 2009. After the appointment of the Secretary General by the judges of the Court in accordance with Article 12 [Secretariat] of the Law, the Secretariat of the Court was established replacing the Interim Secretariat at the beginning of September 2009.

Article 58 [Entry into force]

This law shall enter into force upon publication in the Official Gazette of the Republic of Kosovo.

Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo was adopted by the Assembly on 16 December 2008, promulgated on 30 December 2008, and entered into force on 16 January 2009, the date on which it was published in the Official Gazette of the Republic of Kosovo.

Anex 1: Law on Constitutional Court of the Republic of Kosovo

*OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVA / PRISTINA: YEAR IV /
No. 46 / 15 JANUARY 2009*

LAW No. 03/L-121 ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Assembly of Republic of Kosovo,

Pursuant to Article 65, Paragraph 1 of the Constitution of the Republic of Kosovo,

With purpose to further regulate the organization and functioning of the Constitutional Court of the Republic of Kosovo,

hereby adopts the following:

LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

CHAPTER I ORGANIZATION OF THE CONSTITUTIONAL COURT

1. General provisions

Article 1 Scope

This Law further regulates the organization and functioning of the Constitutional Court of the Republic of Kosovo, procedures for submitting and reviewing referrals to the Constitutional Court, terms and procedures for appointment and dismissal of the Constitutional Court judges, basic procedural principles and rules and other organizational issues.

Article 2 Organization of the Work of the Constitutional Court

- 1. The Constitutional Court shall enjoy organizational, administrative and financial independence in performing duties assigned by the Constitution of the Republic of Kosovo ('Constitution') and the Law.*
- 2. The Constitutional Court shall determine its internal organization, rules of procedure, decision-making processes and other organizational issues pursuant to law.*

Article 3 Office and Symbols

- 1. The Office of the Constitutional Court shall be in Pristina.*

2. *The Constitutional Court shall hold its meetings in its Office, but exceptionally, on its decision may hold meetings in other places of the Republic of Kosovo.*
3. *The Constitutional Court shall have its symbol and stamp which shall be determined in the Rules of Procedure.*

2. Judges of the Constitutional Court

Article 4

Additional Conditions for Appointment of Judges

1. Judges of the Constitutional Court shall be:

1.1. citizens of the Republic of Kosovo;

1.2. distinguished jurists with an excellent professional reputation with no less than ten (10) years of professional work experience, particularly in the field of public and constitutional law, which, inter alia, is proved through professional work as judges, prosecutors, lawyers, civil servants or university professors and other relevant working experience in the legal field;

1.3 individuals with excellent moral reputations who can act in full capacity and who have not been convicted of any criminal offence.

Article 5

Incompatibility of function

1. During his/her mandate, a judge of the Constitutional Court shall not have the right to be:

1.1 member of a party, movement or any other political organization;

1.2 member of a steering board of a publicly owned enterprise; trade association or non-governmental organization;

1.3. member of a trade union.

2. In addition to the prohibitions referred to in Paragraph 1 of this Article, a judge of the Constitutional Court shall not hold any other public or professional office with remuneration, except the performance as lecturer of legal sciences in an accredited university. For the purposes of this Law, public or professional office shall not be considered if the judge without payment engages in scientific activities, or if he/she becomes a member of an institute or jurists association, humanitarian, cultural, sports and other organizations without remuneration, provided that such activities are not related to the work of any political party.

3. A judge proposed by the Assembly of Republic of Kosovo shall not be appointed by the President of Republic of Kosovo if he/she does not present the evidence that he/she has resigned from all relevant functions defined in Paragraphs 1 and 2 of this Article.

4. Each judge shall be obliged to inform the President of the Constitutional Court in writing about any activity he/she wish to perform outside the office of judge of the Constitutional Court for which he/she is paid honorariums or any other forms of remuneration. In case the President of the Constitutional Court expresses his/her opposition, the judge is entitled to request that the decision of the President of the Constitutional Court be reconsidered by all judges of the Constitutional Court. The

said decision of the President can be overturned by a majority of all judges of the Constitutional Court.

Article 6

Procedure for Review of Candidates for Appointment to the Constitutional Court

- 1. A Special Committee for the Review of Candidates for Appointment to the Constitutional Court (hereinafter referred to as the "Committee") is hereby established.. The said Committee shall present to the Assembly a shortlist of qualified candidates for Judges of Constitutional Court in accordance with the procedure set forth in this Article.*
- 2. The Committee shall be composed of the following members:*
 - 2.1. The President of the Assembly of the Republic of Kosovo or a member of the Assembly acting as his/her designated representative;*
 - 2.2. Leaders of each Parliamentary Group of the Assembly of the Republic of Kosovo or members of the Assembly acting as their designated representative;*
 - 2.3. President of the Kosovo Republic Judicial Council;*
 - 2.4. Ombudsperson;*
 - 2.5. A representative of the Consultative Committee for Communities;*
 - 2.6. A representative of the Constitutional Court.*
- 3. The Committee shall be summoned and chaired by the President of the Assembly of the Republic of Kosovo or his/her designated representative. The Committee shall have two vice chairs selected from its members, one of which shall be from the deputies of a Community different from the Community of the Chair.*
- 4. The Committee shall decide with simple majority of votes. In case of equal vote, the vote of the President of the Assembly of the Republic of Kosovo or his/her designated representative will be decisive.*
- 5. In case that one of members of the Committee has a conflict of interest in relation to a case, he/she shall not take part or otherwise participate in any aspect of the committee proceedings on that case.*
- 6. The procedure for determining the short list of judges of the Constitutional Court shall be instituted by the Committee. The Committee shall publish an invitation/call published in the written and electronic media including those widely read by the Communities not in the majority in Republic of Kosovo, in the Assembly, in the judicial institutions, law faculties, chamber of attorneys, judges and prosecutors associations, political parties, and other relevant legal persons and individuals to propose candidates for the election of one or more judges of the Constitutional Court (hereinafter: invitation/call). An individual may propose himself as candidate.*
- 7. The invitation/call shall define the conditions for electing a judge of the Constitutional Court determined by the Constitution and this Law, the deadline for proposing a candidate to the Committee, which should not be less than fifteen (15) or longer than twenty (20) days, and the enclosures that shall be delivered with the proposal.*
- 8. After the deadline provided in the previous Paragraph expires, the Committee, within fifteen (15) days, shall investigate whether the candidates comply with the conditions for being elected judge of the Constitutional Court as determined by the*

Constitution and this Law, and shall reject invalid candidacies. In carrying out this responsibility, the Committee shall adopt practices developed for the selection and appointment of other members of the judiciary in Kosovo.

9. The Committee shall conduct an interview with each of the candidates who comply with the conditions for being elected judge of the Constitutional Court and, on the basis of presented data and interview results, shall prepare a short list of qualified candidates for judges of the Constitutional Court.

10. The said short list shall include more candidates than the number of judges, who will be appointed, but not more than five (5) candidates for one vacant position.

11. The Committee shall submit to the Assembly of the Republic of Kosovo, together with its short list, the list of all the candidates who comply with conditions for being elected judge of the Constitutional Court.

12. The proposal of the Committee shall include the reasons showing why the Committee gave a particular candidate priority over the other candidates.

Article 7

Appointment and commencement of mandate

1. Procedure for appointment of a new judge, pursuant to this Law, commences at least three (3) months before the expiry of mandate of previous judge.

2. The mandate of new judge shall begin on the day the mandate of previous judge expires. A new judge shall be appointed by the President and shall take the oath in front of the President before commencement of his/her mandate. In case the mandate of judge expires pursuant to Article 8 of this law, mandate of replacing judge shall begin upon the appointment by the President and taking the oath in front of the President.

3. As exception from paragraphs 1 and 2 of this Article, mandate of first judges of the Constitutional Court shall begin upon the appointment by the President and taking the oath in front of the President.

4. The text of oath of a Constitutional Court judge shall be as follows:

"I solemnly swear that in performing duties as judge of the Constitutional Court of the Republic of Kosovo I shall uphold the Constitution of the Republic of Kosovo and shall perform the function of judge honorably, responsibly and impartially, respecting rules of professional ethics."

Article 8

Termination of mandate

1. The mandate of a judge of the Constitutional Court shall end upon:

1.1. expiry of regular period for which he/she is elected;

1.2. prior termination of the mandate pursuant to Article 9 of this Law.

2. Six (6) months before the mandate of a judge of the Constitutional Court terminates, pursuant to Paragraph 1, 1.1 of this Article, the President of the Court shall inform the Assembly of the Republic of Kosovo in order for the Assembly to initiate the procedure for proposing a new judge.

Article 9
Prior termination of the mandate

1. The mandate of a judge of the Constitutional Court shall end prior to the expiry of regular period for which he/she is elected in case of:

1.1. resignation;

1.2. death;

1.3. permanent loss of ability to act as determined by the competent court;

1.4. illness or any other health problem, which makes it impossible for him/her to exercise his/her functions as a judge of the Constitutional Court;

1.5. dismissal pursuant to Article 118 of the Constitution.

2. The termination of a mandate pursuant to item 1.4. of Paragraph 1 of this Article shall be based upon a decision taken by the judges of the Constitutional Court following the examination of all relevant medical examination and findings. The said decision shall require a two thirds (2/3) majority of the judges of the Constitutional Court excluding the judge whose mandate is under consideration.

Article 10
Duties of judges

1. The judges of the Constitutional Court are obliged to perform their functions with conscience and impartiality, to decide with their own free will in compliance with the Constitution.

2. Judges of the Constitutional Court are obliged to preserve the reputation and dignity of the Constitutional Court.

3. Each judge is obliged to participate in the work and decision-making process of the Court, and to perform any other duties as defined in this Law and Rules of Procedure.

Article 11
President and Deputy President

1. The President of the Constitutional Court shall:

1.1 coordinate activities of the Constitutional Court and the work of judges of the Constitutional Court;

1.2. summon and chair sessions of the Constitutional Court;

1.3. represent the Constitutional Court;

1.4. sign acts of the Constitutional Court;

1.5. perform other duties defined in this Law or in Rules of Procedure of the Constitutional Court.

2. The Deputy President of the Constitutional Court shall perform the duties of the President of Constitutional Court when the latter is absent or for any other reason is unable to perform his/her duties. The President of the Constitutional Court may delegate to the Deputy President certain duties to support the President in performing his/her duties.

3. Administration of the Constitutional Court

Article 12

Secretariat

- 1. The Constitutional Court shall have its Secretariat which shall be chaired by the Secretary General of the Constitutional Court.*
- 2. The Secretariat performs administrative works and is obliged to support the work of the Constitutional Court. The Secretariat:*
 - 2.1. receives and sends all documents and other official communications;*
 - 2.2. maintains the registry of the Court;*
 - 2.3. ensures recording as defined in the Law;*
 - 2.4. prepares transcripts and minutes;*
 - 2.5. performs public information works and replies to requests for information about the work of the Constitutional Court*
 - 2.6. keeps the stamp of the Constitutional Court; and*
 - 2.7. performs other works as defined in the law and Rules of Procedure of the Constitutional Court.*
- 3. The organization and the work of the Secretariat shall be further regulated by the Rules of Procedure of the Constitutional Court.*
- 4. The Secretary General is responsible for the organization and administration of the Secretariat. The Secretary General is elected and appointed by judges of the Constitutional Court with a simple majority vote. Details about election, appointment, terms of work and salary of the Secretary General shall be defined in the Rules of Procedure of the Constitutional Court. The Secretary General reports to the President of the Constitutional Court and shall be accountable for his/her work to all the judges of the Constitutional Court.*
- 5. The Secretary General appoints and dismisses employees of the Secretariat in compliance with the applicable law on civil service. Legal provisions foreseen for civil servants shall apply for employees of the Secretariat.*

Article 13

Legal Advisors

Legal advisors shall support the professional work of the judges of the Constitutional Court. The terms of appointment, dismissal and status of legal advisors shall be defined in the Rules of Procedure of the Constitutional Court. Salaries of legal advisors shall be defined in accordance with applicable legislation.

Article 14

Budget

- 1. The Constitutional Court shall be funded from the Kosovo Republic budget.*
- 2. Notwithstanding provisions of other laws, the Constitutional Court shall prepare its annual budget proposal and forward the said budget proposal to the Assembly of the Republic of Kosovo for adoption. Neither the Government nor any other budget organization shall be entitled to amend or otherwise modify or influence the budget proposal prepared by the Constitutional Court. The budget proposed by the*

Constitutional Court shall be included in its entirety in the Republic of Kosovo Consolidated Budget submitted to the Kosovo Republic Assembly for adoption.

3. The Constitutional Court shall manage its budget independently and shall be subject to internal audit as well as external audit by the General Auditor of Republic of Kosovo.

Article 15

Remuneration of Judges

The remuneration of Constitutional Court judges shall be 1.3 times that of the judges of the Supreme Court of the Republic of Kosovo.

CHAPTER II

PROCEDURE

1. General procedural provisions

Article 16

General Rule

1. Provisions of this chapter shall apply for all court proceedings of the Constitutional Court, except if stated otherwise by this Law.

2. In the event of a lack of procedural provisions, the Court shall apply, in a reasonable and analogue manner relevant provisions of other procedural laws, taking into consideration the nature of each matter and procedural specificities of the Constitutional Court.

Article 17

Principle of Publicity

1. Sessions, including the issuance of judgments are open to public.

2. The Constitutional Court may decide to exclude the public when it deems it necessary to protect:

2.1. national secret, public order or morals;

2.2. secret information which would be put at risk by public hearing;

2.3. private life or business secret of the party to the proceedings.

3. The procedure for exclusion of the public, provided in Paragraph 2, may be initiated upon the request of a party.

4. Only judges participate in the work of the Constitutional Court during consultation and voting when taking a decision.

Article 18

Exclusion of a Judge

1. A judge is excluded from participation in a proceeding ex officio or upon the request of any party when the judge:

- 1.1. is involved in the case that is subject of consideration by the Constitutional Court, or;*
- 1.2. is in marital or extramarital relationship or family relationship with any party in the proceeding, in accordance with applicable law; or*
- 1.3. in his/her official capacity has dealt before with the case before it was referred to the Constitutional Court.*
- 2. Judge is not included in the case, as per paragraph 1, item 1.1., only because he belongs to a certain social or gender group, a profession or political entity, the interest of which may be affected by the outcome of the process in the Constitutional Court.*
- 3. Paragraph 1, item 1.3. does not include participation in legislative procedures and expressions of professional or academic opinion on a legal matter which could be important for the process in the Constitutional Court.*
- 4. The decision for exclusion of a judge should be reasoned.*
- 5. Any judge who is aware that he fulfills at least one of the conditions for exclusion from proceedings should inform the President of the Constitutional Court in writing and should request his/her exclusion from the proceedings. In such a case, Paragraphs 3 and 4 shall apply as appropriate.*

Article 19 *Taking of the decisions*

- 1. The Constitutional Court decides as a court panel consisting of all Constitutional Court judges that are present.*
- 2. The Constitutional Court shall have a quorum if seven (7) judges are present.*
- 3. The Constitutional Court decides with majority of votes of judges present and voting.*
- 4. Each judge is obliged to vote for or against the decision.*

Article 20 *Decisions*

- 1. The Constitutional Court shall decide on a case after completion of the oral session. Parties have the right to waive their right to an oral hearing.*
- 2. Notwithstanding Paragraph 1 of this Article, the Court may decide, at its discretion, the case that is subject of constitutional consideration on the basis of case files.*
- 3. Decisions of the Constitutional Court shall be in writing, justified and shall be signed by the President of the Constitutional Court and the judge reporter. The conclusions reached by the majority of the judges of the Constitutional Court shall determine the decision of the Court. Decisions shall be announced publicly.*
- 4. The Decision is sent to each party ex officio and is published in Official Gazette.*
- 5. A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision.*

Article 21 *Representation*

During the process in the Constitutional Court, parties are either represented in person or by a person authorized by the party.

Article 22 *Processing Referrals*

- 1. The initiation of proceeding before the Constitutional Court is made through a referral to the Court. Referrals are submitted in writing to the Secretariat of the Constitutional Court. The Secretariat immediately registers each referral in the register of the Constitutional Court according to its order of submission. Referrals should be justified and necessary supporting information and documents should be attached.*
- 2. The Secretariat shall send copies of the referral to the opposing party and other party (ies) or participants in the procedure. The opposing party or participant has forty-five (45) days from the reception of the referral to submit to the Secretariat its reply to the referral together with justification and necessary supporting information and documents.*
- 3. The Secretary shall send the referral and the reply to the referral to a judge Rapporteur, who prepares the preliminary report concerning facts, admissibility and grounds of the referral. The Judge Rapporteur is appointed by the President of Constitutional Court pursuant to the procedure established under the Rules of Procedure of the Constitutional Court.*
- 4. If the referral or reply to the referral is not clear or is incomplete, the Judge Rapporteur informs the relevant parties or participants and sets a deadline of not more than fifteen (15) days for clarifying or supplementing the respective referral or reply to the claim. The Judge Rapporteur may request additional facts that are required to assess the admissibility or grounds for the claim.*
- 5. Within thirty (30) days from receiving the referral and the reply to the referral, the Judge Rapporteur submits the preliminary report to the Review Panel. If the reply to the referral was not submitted within the set deadline, or if the nature of a special procedure does not require a reply to the referral, the Judge Rapporteur prepares a preliminary report based only on the referral.*
- 6. The Review Panel assesses the admissibility of the referral. The Review Panel is composed of three judges appointed by the President of the Constitutional Court according to the procedure established in the Rules of Procedure.*
- 7. If the Review Panel unanimously concludes that the referral does not meet formal requirements for further proceeding and is therefore inadmissible, the panel sends to all judges a draft decision that rejects the referral due to the lack of admissibility. The Review Panel shall take all necessary measures to ensure that a copy of the draft decision is effectively sent to judges who may not be on the territory of the Republic of Kosovo.*
- 8. If, within a period of ten (10) days from receiving the draft decision, judges who are not members of Review Panel do not oppose the draft decision, then the President of*

the Constitutional Court signs and issues the decision rejecting the claim on the basis of inadmissibility.

9. If the Review Panel concludes that the claim is admissible, or if one or more of the judges not on the Review Panel opposes the draft decision to reject the claim, the case shall be referred to the Court. The Court during the oral hearing then considers admissibility and the grounds for the claim in its entirety and decides according to the provisions of this law.

Article 23

Withdrawal of a party

The Constitutional Court shall decide on matters referred to it in a legal manner by authorized parties notwithstanding the withdrawal of a party from the proceedings.

Article 24

Oral Hearing

The President of the Constitutional Court presides over the oral hearing. The procedure of the oral hearing shall be defined in the Rules of Procedure of the Constitutional Court.

Article 25

Evidence

The procedure for evidence administration and consideration shall be defined in the Rules of Procedure of the Constitutional Court.

Article 26

Cooperation with other Public Authorities

All courts and public authorities of the Republic of Kosovo are obliged to support the work of the Constitutional Court and to fully cooperate with the Constitutional Court upon request of the Constitutional Court.

Article 27

Interim Measures

1. The Constitutional Court ex-officio or upon the referral of a party may temporarily decide upon interim measures in a case that is a subject of a proceeding, if such measures are necessary to avoid any risk or irreparable damages, or if such an interim measure is in the public interest.

2. The duration of the interim measures shall be reasonable and proportionate.

Article 28
Procedural Costs

- 1. Parties cover their own procedural costs, unless otherwise decided by the Constitutional Court.*
- 2. The party that has made a referral pursuant to Article 113, Paragraph 7 of the Constitution shall be exempted from the obligation to cover procedural costs, if the Constitutional Court decides that such a referral is admissible and grounded.*

CHAPTER III
SPECIAL PROCEDURES

- 1. Procedure for cases defined under Article 113, Paragraph 2, items 1 and 2 of the Constitution.*

Article 29
Accuracy of the Referral

- 1. A referral pursuant to Article 113, Paragraph 2 of the Constitution, shall be filed by either one fourth (¼) of the deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo, the Government or the Ombudsperson.*
- 2. A referral that a contested act by virtue of Article 113, Paragraph 2 of the Constitution shall indicate, inter alia, whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the Constitution;*
- 3. A referral shall specify the objections put forward against the constitutionality of the contested act.*

Article 30
Deadlines

- 1. A referral made pursuant to Article 29 of this Law shall be filed within a period of six (6) months from the day upon which the contested act enters into force.*
- 2. Procedure for cases defined under Article 113, Paragraph 3 item 1 of the Constitution.*

Article 31
Accuracy of referral

A referral made pursuant to Article 113, Paragraph 3 item 1 of the Constitution shall be filed by any authorized party in conflict or from any authorized party directly affected from the said conflict. The referral shall include any relevant information in relation to the alleged conflict as further determined by the Rules of Procedures of the Constitutional Court.

Article 32

Deadline

A referral made pursuant to Article 31 of this Law shall be submitted within six (6) months from the day upon which the alleged conflict started.

3. Procedure for cases arising under Article 113, Paragraph 3 item 2 of the Constitution

Article 33

Accuracy of referral

A referral made pursuant to Article 113, Paragraph 3, item 2 of the Constitution shall be filed by either the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo or the Government. The referral shall include any relevant information in relation to the alleged incompatibility with the Constitution and the proposed referendum as further determined by the Rules of Procedures of the Constitutional Court.

Article 34

Deadline

- 1. The Constitutional Court shall decide on the constitutionality of the proposed referendum within thirty (30) days after receipt of the referral.*
- 2. A referendum that is subject of a referral made pursuant to Article 33 of this Law shall be held only after the Constitutional Court decides on the constitutionality of the proposed referendum.*
- 4. Procedure for cases defined under Article 113, Paragraph 3 item 3 of the Constitution.*

Article 35

Deadline

The Decision of the Constitutional Court rendered pursuant to Article 113, Paragraph 3 item 3 of the Constitution, may be rendered within 24 hours after the entry into force of a declaration or action referred to therein.

- 5. Procedure for cases defined under Article 113, Paragraph 3 item 4 of the Constitution.*

Article 36

Suspension Effect

A referral filed pursuant to Article 113, Paragraph 3 item 4 of the Constitution shall have a suspensive effect. The Assembly of the Republic of Kosovo shall act upon the contested amendment only after a decision of the Constitutional Court has been rendered.

Article 37

Deadline

The Constitutional Court shall decide, pursuant to Article 113, Paragraph 3 item 4 of the Constitution, on the referral filed by authorized parties within thirty (30) days from the day after receipt of a referral. 6. Procedure for cases defined under Article 113, Paragraph 3, item 5 of the Constitution.

Article 38

Accuracy of the Referral

1. In a referral made pursuant to Article 113, Paragraph 3, item 5 of the Constitution the following information shall, inter alia, be submitted:

1.1. description of facts of the alleged violation;

1.2. concrete provisions of the Constitution allegedly violated; and

1.3. presentation of evidence that supports the allegation for violation of the Constitution.

Article 39

Deadlines

The referral should be filed within a period of thirty (30) days from the day when all other legal remedies are exhausted.

7. Procedure in the case defined under Article 113, Paragraph 4 of the Constitution.

Article 40

Accuracy of the Referral

In a referral made pursuant to Article 113, Paragraph 4 of the Constitution, a municipality shall submit, inter alia, relevant information in relation to the law or act of the government contested, which provision of the Constitution is allegedly infringed and which municipality responsibilities or revenues are affected by such law or act.

Article 41

Deadlines

The referral should be submitted within one (1) year following the entry into force of the provision of the law or act of the government being contested by the municipality.

8. Procedure for cases defined under Article 113, Paragraph 5 of the Constitution.

*Article 42
Accuracy of the Referral*

1. In a referral made pursuant to Article 113, Paragraph 5 of the Constitution the following information shall, inter alia, be submitted:

- 1.1. names and signatures of all deputies of the Assembly contesting the constitutionality of a law or decision adopted by the Assembly of the Republic of Kosovo;*
- 1.2. provisions of the Constitution or other act or legislation relevant to this referral; and*
- 1.3. presentation of evidence that supports the contest.*

*Article 43
Deadline*

1. A law or decision adopted by the Assembly of the Republic of Kosovo shall be sent to the President of the Republic of Kosovo for promulgation after the expiry of the deadline prescribed by Article 113, Paragraph 5 of the Constitution.

2. In the event that a law or decision adopted by the Assembly of the Republic of Kosovo is contested in accordance with Article 113, Paragraph 5 of the Constitution, such a law or decision shall be sent to the President of the Republic of Kosovo for promulgation in accordance with modalities determined in the final decision of the Constitutional Court on this contest.

3. In the event that a law or decision adopted by the Assembly is contested in accordance with Article 113, Paragraph 5 of the Constitution, the Constitutional Court shall render a final decision on this contest no later than sixty (60) days following the submission of the referral.

9. Procedure in the case defined under Article 113, Paragraph 6 of the Constitution.

*Article 44
Accuracy of the Referral*

1. In a referral made pursuant to Article 113, paragraph 6 of the Constitution, the following information shall, inter alia, be submitted:

- 1.1. description of facts of the alleged violation;*
- 1.2. concrete provisions of the Constitution allegedly violated by the President; and*
- 1.3. presentation of evidence that supports the allegation for serious violation of the Constitution by the President of the Republic.*

Article 45
Deadlines

The referral should be filed within a period of thirty (30) days starting from the day the alleged violation of the Constitution by the President has been made public.

10. Procedure for cases defined in Article 113, Paragraph 7 of the Constitution.

Article 46
Admissibility

The Constitutional Court receives and processes a referral made in accordance with Article 113, Paragraph 7 of the Constitutional, if it determines that all legal requirements have been met.

Article 47
Individual Requests

- 1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*
- 2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.*

Article 48
Accuracy of the Referral

In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge.

Article 49
Deadlines

The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced. If the claim is made against a law, then the deadline shall be counted from the day when the law entered into force.

Article 50
Return to the Previous Situation

If a claimant without his/her fault has not been able to submit the referral within the set deadline, the Constitutional Court, based on such a request, is obliged to return it to previous situation. The claimant should submit the request for returning to previous

situation within 15 days from the removal of obstacle and should justify such a request. The return to the previous situation is not permitted if one year or more have passed from the day the deadline set in this Law has expired.

11. Procedure for case defined under Article 113, Paragraph 8 of the Constitution.

*Article 51
Accuracy of referral*

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

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

*Article 52
Procedure before a court*

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

*Article 53
Decision*

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

12. Procedure for cases defined under Article 113, Paragraph 9 of the Constitution.

*Article 54
Deadline*

A decision of the Constitutional Court shall, to the extent possible, be rendered within sixty (60) days after receipt of the request.

*CHAPTER IV
FINAL AND TRANSITIONAL PROVISIONS*

*Article 55
Provisional Composition of the Constitutional Court*

1. The Constitutional Court shall be composed as set forth in Article 152 of the Constitution during the period prescribed therein.

2. Nothing in this Law, including provisions regulating eligibility criteria, professional qualifications and remuneration of judges, shall not apply to, restrict or otherwise limit the competences and responsibilities of competent authorities for the appointment of international judges foreseen by the Constitution and the Comprehensive Proposal for the Republic of Kosovo Status Settlement of 26 March 2007. These responsibilities and competences shall be exercised in accordance with applicable instruments notwithstanding any provision of this Law.

*Article 56
Earlier Cases*

The deadlines defined in this Law for the initiation of procedures on matters that fall under the jurisdiction of the Constitutional Court and which have arisen before the entry into force of this Law shall begin to be counted on the day upon which this Law enters into force.

*Article 57
Interim Secretariat of the Constitutional Court*

An Interim Secretariat is hereby established. The Interterm Secretariat shall be established until such time as the Secretariat of the Constitutional Court referred to in Article 12 of this Law is functional. The Interim Secretariat shall exercise its responsibilities in accordance with applicable instruments until such time as the Secretary General appointed in accordance with Article 12 of this Law decides that the Secretariat is functional.

*Article 58
Entry into force*

This law shall enter into force upon publication in the Official Gazette of the Republic of Kosovo. Law

No. 03/L-121 16 December 2008

Promulgated by the Decree No. DL-070-2008, dated 30.12.2008, of the President of Republic of Kosovo, Dr. Fatmir Sejdiu.

Annex II: Rules of Procedure of the Constitutional Court of the Republic of Kosovo, no. 126-3/ 2013, of 17 June 2013

**RULES OF PROCEDURE
OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

I. Organization of the Constitutional Court

Rule 1

General Provisions

The Rules of Procedure shall supplement the relevant provisions of the Constitution of the Republic of Kosovo and the Law on the Constitutional Court of the Republic of Kosovo in governing the organization of the Constitutional Court of the Republic of Kosovo ("Court"), procedures before the Court and other matters related to the functioning of the Court.

Rule 2

Seat of the Court

(1) The Seat of the Court is in Pristina where the Court shall conduct its sessions and hearings; the Court may conduct sessions and hearings in other suitable locations within the Republic of Kosovo.

(2) At the request of the Court, the Secretariat shall prepare and submit to the President of the Constitutional Court ("President") a list of locations which are suitable for conducting sessions and hearings for the Court.

(3) The decision to conduct sessions outside of the Seat of the Court shall be made by majority vote of all Judges of the Court ("Judges") present and voting. The Court shall consider the views of the parties before making the decision.

Rule 3

Symbol and Stamp of the Court

(1) The symbol of the Court shall be decided by 2/3 majority vote of all Judges.

(2) The stamp of the Court shall contain the coat-of-arms of the Republic of Kosovo encircled by the inscription "Gjykata Kushtetuese e Republikës së Kosovës - Ustavni Sud Republike Kosova."

Rule 4

Precedence of Judges

(1) The Court is composed of nine Judges appointed in accordance with Article 114 of the Constitution and Articles 6 and 7 of the Law on the Constitutional Court.

(2) Unless otherwise provided in these Rules, the Judges, in the exercise of their responsibilities, are of equal status, regardless of age, priority of appointment, length of service or duration of mandate.

(3) When determining the order of voting, Judges shall take precedence according to the date and time on which their mandate began, with the most recently appointed voting first. If the Judges have been appointed at the same time, the Judges shall vote in the order of the youngest Judge first.

(4) When determining the assignment or replacement of Judges as Rapporteur and as Presiding Judge of the Review Panel, the precedence of Judges is established by a system of random draw with the President making the resulting appointment.

Rule 5

Resignation of Judges

(1) A Judge shall submit a letter of resignation to the President of the Republic of Kosovo with copies submitted to the President of the Court and to the Secretariat.

(2) The Secretariat shall immediately communicate a copy of the letter of resignation to all other Judges and to other appropriate parties.

(3) The resignation of a Judge is irrevocable and does not depend on acceptance to be effective.

(4) Unless a different date is stated in the letter of resignation, the resignation of a Judge shall become effective on the day it is submitted to the President of the Republic of Kosovo.

Rule 6

Dismissal Procedures

(1) A Judge of the Constitutional Court may be dismissed only on the grounds of:

(a) commission of a serious crime,

(b) serious neglect of duties,

(c) permanent loss of the ability to act, or

(d) illness or any other health problem which makes it impossible to exercise the responsibilities and functions of a Judge.

(2) Dismissal may be proposed in a written document setting forth the grounds for dismissal and signed by one or more Judges and submitted to the President. Documents containing any relevant facts shall be attached to the proposed dismissal. The dismissal proposal shall be confidential and must be provided as soon as possible to all Judges.

(3) The President shall inform in writing the Judge who is proposed to be dismissed regarding the grounds for the proposed dismissal and provide to the Judge the written proposed dismissal and all attached relevant facts. If the President is proposed for dismissal, the Deputy President shall provide the same notice to the President.

(4) The Judges shall convene a confidential meeting to discuss the proposed dismissal. The Judge proposed for dismissal shall have the right to be present at the confidential meeting and shall have the right to respond to the proposed dismissal, furnish any explanations or information and answer questions from the Judges.

(5) The Judges shall convene a subsequent confidential meeting at which the Judge proposed for dismissal shall be excluded. The Judges shall determine at this meeting whether to propose dismissal to the President of the Republic of Kosovo. The President

of the Court shall preside over this meeting and the discussion of the Judges shall remain confidential. To propose dismissal to the President of the Republic of Kosovo, a 2/3 majority vote of all remaining Judges on the Court must vote affirmatively for the dismissal. The Judges shall have the right, also by a 2/3 majority vote, to impose sanctions or discipline that is less severe than dismissal if circumstances warrant.

Rule 7 Recusal Procedures

- (1) As soon as a Judge learns of any of the reasons for recusal as foreseen in Article 18 of the Law on Court or if a Judge believes that other circumstances exist that raise a reasonable suspicion as to his or her impartiality, he or she shall inform in writing the President of the Court. A copy of that information shall be delivered to all Judges.*
- (2) Any party to the proceedings may file a petition for recusal of a Judge as soon as they learn of a reason for recusal, and in any event not later than one week before the oral hearing, if any, or before a decision being taken by the Court.*
- (3) In the information or in the petition, a Judge or party shall set forth the facts and circumstances justifying the recusal. The reasons stated in a previous petition for disqualification that was refused cannot be included in a new petition for recusal. Copies of the petition shall be delivered to all Judges.*
- (4) Before rendering a decision on a recusal requested by any party, a statement shall be taken from the Judge whose disqualification is sought and, if need be, other clarifications shall be obtained. The Judge for whom recusal is requested may not participate in the decision making procedure.*
- (5) The Court, by majority vote of the Judges, shall decide on the recusal, if it concludes that the recusal is well grounded and reasonably founded.*

Rule 8 Appointment of Judge Rapporteur

- (1) The Judge to be assigned a referral shall be chosen by a system of random draw and appointed by the President.*
- (2) If replacement of the Judge assigned as Judge Rapporteur is necessary, another Judge shall be assigned the referral by random draw and appointed by the President.*
- (3) All Judges shall receive, over time, an equal distribution of assignment of referrals as Judge Rapporteur.*

Rule 9 Appointment of Review Panels

- (1) For each referral registered by the Court a Review Panel of three Judges to review the admissibility of the referral shall be chosen by a system of random draw and appointed by the President.*
- (2) The President shall designate one of the Judges assigned to the Review Panel to serve as Presiding Judge of the Review Panel.*

- (3) *All Judges shall receive, over time, an equal distribution of assignments as Judges on Review Panels and as Presiding Judges of Review Panels.*
- (4) *The Judge Rapporteur assigned to prepare a report on the referral to be considered by the Review Panel shall not be a member of the Review Panel.*

Rule 10

Election of President and Deputy President

- (1) *The President and Deputy President of the Court shall be elected by the Judges of the Court and the terms of office shall commence on the effective date stated in the election decision of the Court.*
- (2) *The election for President and the election for Deputy President shall be held one month prior to the expiration of the term of the incumbent President or the incumbent Deputy President. The President of the Court, if still a Judge and when possible, shall continue to exercise the functions of the President until a new President has been elected and has taken office. In case of an immediate vacancy in the office of President, the election for President shall be held as soon as possible, and the Deputy President shall serve as interim President until the effective date of the new President's term. If there is no Deputy President, the most senior Judge on the Court shall serve as interim President. If one or more Judges on the Court have equal seniority with the Court, then the oldest judge shall be considered the most senior Judge for purposes of this Rule.*
- (3) *The President shall conduct the election of a President and Deputy President. If the President is no longer a Judge or is unable to act, the Deputy President shall conduct the elections. If the Deputy President is no longer a Judge or unable to act, the most senior Judge shall conduct the elections.*
- (4) *The elections for President and for Deputy President shall be held separately, in the same manner, and shall be by secret ballot. All Judges must be given sufficient notice of the election in order to participate in the elections. At least seven Judges shall be present at the meeting at which the elections are conducted. A Judge obtaining the majority of all Judges participating and voting in the election shall be declared elected and the Court shall determine the date the Judge assumes the responsibilities of the position.*
- (5) *In case no Judge receives a majority after three ballots, the Judges shall choose between the two Judges receiving the highest number of votes, and the Judge receiving the most votes on the fourth ballot shall be elected. In determining whether a Judge has received a majority of the votes, only the votes for the two final candidates shall be counted. If, on the third ballot, three Judges each receive three votes, the final two candidates shall be determined by drawing lots. If, on the fourth ballot, no Judge receives a majority of the vote, the election shall be determined by drawing lots.*

Rule 11

Resignation of President or Deputy President

- (1) *The President shall submit a letter of resignation as President to the Deputy President and to the Secretariat. The Deputy President shall submit a letter of resignation as Deputy President to the President and to the Secretariat.*

(2) In either case the Secretariat, shall immediately communicate a copy of the letter of resignation to all other Judges and to other appropriate parties.

(3) The resignation shall be effective on the date indicated in the letter of resignation, or if no date is indicated, the resignation shall be effective immediately. The resignation shall not be dependent on acceptance.

(4) The interim administration of the Court and the election of a new President or Deputy President shall occur in accordance with the terms of Rule 10.

Rule 12

Functions of the President

(1) In addition to the functions provided by the Constitution and the Law on the Constitutional Court and other provisions in these Rules, the President shall:

(a) take all necessary and appropriate measures to ensure the efficient and effective functioning of the Court;

(b) coordinate the work of the Judges, and summon judicial and administrative sessions of the Court;

(c) coordinate and supervise the administration of all Court activities;

(d) represent the Court and establish and ensure cooperation with other institutions and public authorities at national and international level;

(e) establish working groups to discuss and make recommendations on subjects which warrant wide or interdisciplinary consideration;

(f) preside over all judicial and administrative meetings of the Court;

(g) ensure compliance with the Code of Conduct and maintain order within the premises and during proceedings of the Court;

(h) inform all Judges of all ongoing and forthcoming issues, processes and actions related to the Court.

(2) The Deputy President shall perform the duties of the President when the President is absent or for any other reason is unable to perform the duties of President.

(3) The President may delegate duties and responsibilities to the Deputy President or to other Judges.

Rule 13

Professional Attire

Judges shall wear professional attire in the form of a judicial robe when publicly performing responsibilities and functions as a Judge. If appropriate, Judges may wear a judicial robe when participating in other public events. The Judges shall approve the design and color of the judicial robe.

Rule 14

Administrative Sessions

(1) The Judges shall meet in administrative session to discuss and decide on matters of policy related to the administration of the Court. When necessary, at the direction of

the President, the Secretariat shall draft policy proposals for review and approval by the Court.

(2) Administrative sessions of the Court shall be called by the President, who shall chair the meetings. The Court shall meet in administrative session at least twice yearly, or upon the written request of any Judge or the Secretariat.

(3) Matters of policy related to the administration of the Court shall include, but are not limited to:

(a) the Court's budget;

(b) personnel;

(c) use and maintenance of the building premises;

(d) national and international cooperation;

(e) fines for infractions committed during proceedings;

(f) internal organization and functioning of the Court;

(g) status and contractual matters involving the Secretariat and Legal Advisors;

(h) employment conditions, working schedules, remuneration and code of ethics for the administrative staff of the Secretariat;

(i) adoption of the Annual Report.

(4) Decisions at administrative sessions shall be made by majority vote of the Judges present and voting, provided that at least five Judges are present.

Rule 15

Secretariat

(1) In addition to the functions required by the Law on the Constitutional Court, the Secretariat of the Constitutional Court ("Secretariat") shall have overall responsibility for the provision of administrative, technical and other related support services to the Court, including, but not limited to:

(a) support services for hearings of the Court;

(b) printing of documents and other materials;

(c) interpretation and translation services;

(d) budgetary, payment, internal auditing, procurement and personnel services;

(e) building management services, technical services, office facilities, vehicle services, post services, fire precaution and other security measures;

(f) support services in drafting and publishing the Annual Report, and

(g) other support services required by the Court.

(2) The organizational structure of the Secretariat shall be determined by the Judges in administrative session upon approval of a written proposal by the Secretary General. The Secretary General, with the approval of the Judges, may establish or eliminate sections or units as necessary for the effective and efficient discharge of the functions and responsibilities of the Secretariat.

Rule 16

Secretary General and Deputy Secretary General

(1) The Secretary General shall be the chief executive officer of the Secretariat, shall report to the President, and shall be responsible for:

- (a) overall administration and management of the Secretariat to ensure that all functions are performed in an effective and efficient manner;*
- (b) issuance of regulations and instructions on matters relating to the functioning of the Secretariat and related administrative matters;*
- (c) implementation in a timely and efficient manner of the decisions of the Court related to administrative matters;*
- (d) efficient and effective management of resources;*
- (e) organization and staffing of the Secretariat, ensuring that recruitment for staff is based on professional qualifications, competence and merit and is undertaken through open and fair competition, and*
- (f) implementation of non-discriminatory personnel policies within the Secretariat, including equitable gender representation and ensuring that the composition of personnel reflects the multi-ethnic character of the Republic of Kosovo.*
- (2) The Secretary General shall be appointed by a majority vote of the Judges present and voting at an administrative session. The appointment must be based on a transparent, open and competitive selection process.*
- (3) Terms and conditions of employment and salary:*
 - (a) The employment term for the Secretary General of the Constitutional Court of the Republic of Kosovo is for 3 years with a possibility of further extension.*
 - (b) The performance evaluation shall be conducted at the end of each year based on the annual plan that is presented by the Secretary General.*
 - (c) The salary of the Secretary General is determined by the decision of the Court.*
- (4) The Secretary General must possess the following minimum qualifications:*
 - (a) an advanced university degree in law, economics, management or administration;*
 - (b) a minimum of five years experience, of which at least two years includes professional leadership experience in administration and management; and*
 - (c) be a person of highest personal and moral integrity.*
- (5) A vacancy in the position of Secretary General shall be advertised in at least three newspapers widely circulated in Kosovo. Applications shall be reviewed by a selection panel consisting of three Judges appointed by the President. The selection panel shall submit to the Judges a list of the persons who have applied and who fulfill the requirements set forth in paragraph (3).*
- (6) The Secretary General may be dismissed or temporarily suspended by majority vote of the Judges present and voting at an administrative session of the Court.*
- (7) The President shall appoint Deputy Secretary General, who will in particular be responsible for logistic, procurement and finance of the Court. The Deputy Secretary General will be one of the Directors of the Secretariat who will in the same time continue to exercise his/her function as the Director. The mandate of the Deputy Secretary General will be three (3) years and his/her income shall be 15% less than the income of the Secretary General.*

Rule 17
Staffing of the Secretariat

- (1) The Secretariat shall have staff that is required to enable the Secretariat to fulfill its functions in an efficient and effective manner within the budgetary resources allocated to the Court.*
- (2) Once employed by the Court, staff of the Secretariat shall be administrative staff. The Secretary General shall ensure that hiring of staff is based upon professional qualifications, competence and merit, and is undertaken through fair and open competition in accordance with the Law.*
- (3) The status of the administrative staff foreseen by Article 12 of the Law shall be applied to the extent such status does not impact the independence of the Court as guaranteed in Article 112.2 of the Constitution and Article 2 of the Law on the Constitutional Court.*
- (4) In order to maintain the Court's constitutional and legal independence, and considering the Court's important role in constitutional interpretation, rules established by the Law on Civil Service for recruitment of staff, salaries, allowances, working hours and holidays, shall not apply.*
- (5) The Secretary General, upon request by the Judges, may enter into contracts with experts and other professionals to perform services for the Court.*
- (6) All staff hired by the Secretariat must take an oath to comply with the Code of Ethics.*

Rule 18
Legal Advisors

- (1) Legal Advisors shall support the professional work of the Judges by conducting legal research and analysis. The Legal Advisors shall assist in drafting decisions, reports and other legal materials produced by the Court. The Judges shall determine the number of Legal Advisors to be employed based upon the Court's needs and available budgetary resources.*
- (2) Legal Advisors shall not be civil servants. The terms of contract of Legal Advisors shall be determined by the Court in accordance with relevant law.*
- (3) For purposes of this rule, the term "law" means the Law on the Constitutional Court, the Labour Law (No. 03/L-212) and decisions of the Court.*
- (4) The salary level for Legal Advisors shall be determined by the decision of the Court in Administrative session.*
- (5) Legal Advisors shall be appointed by majority vote of the Judges present and voting, based upon a transparent, open and competitive selection process. Legal Advisors shall have the status of professional advisors. A Legal Advisor may be appointed only if the following qualifications are met:*
 - (a) An advanced university degree in law, preferably with training or specialization in constitutional law, human rights law, public international law, or any other branch of public law;*
 - (b) A minimum of two years of relevant professional experience in legal affairs; and*
 - (c) A person of highest personal and moral integrity.*

- (6) *Vacancies for Legal Advisor shall be advertised in at least three newspapers widely circulated in the Republic of Kosovo. Applications shall be reviewed by a selection panel consisting of three Judges appointed by the President. The selection panel shall submit to the Judges a list of persons who fulfill the requirements in paragraph (3).*
- (7) *A Legal Advisor may be dismissed or temporarily suspended by a majority of the Judges present and voting in accordance with relevant law.*
- (8) *The Legal Advisors shall be supervised by the Chief Legal Advisor elected by the Judges from the Legal Advisors employed by the Court. He/she will be assisted with two Deputy Chief Legal Advisors appointed by the President of Court.*
- (9) *The Chief Legal Advisor/Deputy Chief Legal Advisors shall be appointed on a rotation basis among the Legal Advisors unless otherwise determined by the Court.*
- (10) *The Chief Legal Advisor/Deputy Chief Legal Advisors shall report to the President. After consultation with the President and the Judges, the Chief Legal Advisor/Deputy Chief Legal Advisors may be dismissed as Chief Legal Advisor/Deputy Chief Legal Advisors at any time by majority vote of the Judges present and voting at an administrative session.*
- (11) *The mandate of the Chief Legal Adviser and Deputy Chief Legal Advisers will be for one (1) year.*
- (12) *The income of the Chief Legal Advisor will be increased for 10% for the time he/she exercise that function; whereas the income of the Deputy Chief Legal Advisors shall be 5 % less than the income of the Chief Legal Advisor.*
- (13) *The Court has established the Legal Unit. The structure and organization of the Legal Unit includes the position of the Legal Advisors and other legal staff will be further regulated with the Practice Direction approved by the Court.*

Rule 19

Confidentiality

All Judges, the Secretary General and staff of the Secretariat, and the Legal Advisors shall not express in public any comments or opinions on matters related to cases that have or may come before the Court, unless otherwise provided for in these Rules.

Rule 20

Budget and Fees

- (1) *The Secretary General shall prepare a budget proposal, in consultation with the President, and submit it to the Judges for review and approval.*
- (2) *The Judges in administrative session shall review, amend if necessary, and approve the final budget proposal. The President shall sign the approved budget proposal and the Secretary General shall submit the budget proposal in accordance with the Law on the Constitutional Court and the Law on Public Financial Management and Accountability.*
- (3) *The Secretary General shall propose to the Judges a schedule of fees for administrative services.*

Rule 21
Domestic and International Cooperation

- (1) The Court, under the direction of the President, shall establish and maintain cooperation with institutions established in Kosovo, with foreign Constitutional Courts, and with domestic and international organizations active in the rule of law.*
- (2) Cooperation shall be conducted in a manner that preserves the independence of the Court as mandated by the Constitution of the Republic of Kosovo.*

Rule 22
Accessibility

- (1) The work of the Court shall be transparent, open and accessible to the public to the greatest extent possible, consistent with the Constitution, the law and confidentiality requirements of the Court, including, but not limited to:*
- (a) informing the public about the date and time of hearings;*
 - (b) providing information on the course of proceedings;*
 - (c) permitting viewing of files and documents;*
 - (d) publication of all Judgments and decisions;*
 - (e) any other form of communication as authorized by the Court.*
- (2) The Secretary General shall publish Judgments and decisions on the Court's webpage immediately following the approval of the final text, and shall ensure regular publication of printed Judgments and decisions.*
- (3) When necessary, the Court may issue press releases or hold press conferences. Press releases issued by the Court shall be issued by the Secretary General only after approval of content by the President. Judges shall receive copies of all press releases as soon as possible.*

Rule 23
Access to Files and Documents

- (1) Parties shall have the right to view official files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court. Parties shall request viewing the document at least 24 hours in advance. The viewing shall be conducted at the Court during regular working hours in the presence of Secretariat staff.*
- (2) Parties shall have the right to obtain copies of files and documents in the case in which they are a party, unless the file or document is confidential as determined by the Court. The Court may charge an administrative fee for such copies.*
- (3) The Report of the Judge Rapporteur, the draft decision by the Review Panel, any information on Judges' discussions or voting, draft decisions, and any notes made by Judges during case proceedings and deliberations, and any other material designated by the Court shall be considered confidential and shall not be accessible to parties or the public. The Court may authorize release of any confidential document if the Court determines that such release is necessary in the public interest.*

Rule 24
Information on Status of Proceedings

Upon a written request by any person, the Secretary General shall provide information on the status of any proceedings before the Court.

II. Service of Documents and Time Periods

Rule 25
Address for Service of Documents

(1) The address for service of documents in any case shall be the address of the party's representative or, if the party is not represented, the home address of the party. The party shall state the address for service of documents in the referral and any opposing party shall state the address for service of documents in the reply.

(2) Any party may agree in writing that service of documents shall be effected by using telefax or other electronic means of communication. Such party shall submit to the Secretariat all information necessary to effect service using telefax or other electronic means of communication.

Rule 26
Effecting Service of Documents

(1) When the law or these Rules require that a document be served on a party, the Secretariat shall ensure that service is effected at the address for service of that party, by either:

(a) sending of a copy of the document by registered mail with acknowledgement of receipt, or

(b) personal service of the copy.

(2) When service is effected by telefax or other electronic means of communication, any document other than a Judgment or a decision of the Court shall be served on the party by such means. If service by electronic means is impractical, the party shall be served with the document in accordance with paragraph (1), and the party shall be so advised by telefax or other electronic means of communication.

(3) Service of a document shall be deemed to have been effected:

(a) when a document is sent by registered mail, the day on which the addressee acknowledged receipt or, if the addressee has refused to accept the document or sign the receipt, on the fifth day following the mailing of the registered letter at the post office;

(b) when a document is personally served, the day on which the addressee acknowledged receipt or, if the addressee has refused to accept the document or sign the receipt, on the day of attempted personal service. The person attempting to serve the document shall record the fact of service or the refusal on the document.

(c) when a document is served by telefax or by other electronic means of communication, the day on which the transmission was successfully completed and documented. If the transmission was unsuccessful due to deliberate fault of the

receiver, service is complete and effective on the day that the attempt to transmit was made and recorded.

Rule 27
Calculation of Time Periods

A time period prescribed by the Constitution, the law or these Rules shall be calculated as follows:

- (1) When a period is expressed in days, the period is to be calculated starting from the day an event takes place, but the day during which the event occurs shall not be counted as falling within the time period;*
- (2) When a period is expressed in weeks, the period shall end at the close of the same day of the week as the day during which the event or action from which the period to be calculated occurred;*
- (3) When a period is expressed in months, the period shall end at the close of the same calendar date of the month as the day during which the event or action from which the period to be calculated occurred;*
- (4) When a period is expressed in months and days, the period shall be first calculated in whole months and then in days;*
- (5) When a period is to be calculated, periods shall include Saturdays, Sundays and official holidays.*
- (6) When a time period would otherwise end on a Saturday, Sunday or official holiday, the period shall be extended until the end of the first following working day.*

III. Initiation of Proceedings

Rule 28
Initiation of proceedings

Proceedings before the Court shall be initiated by the filing of a referral with the Secretariat. When the referral or any initial documents are filed, the referral shall be assigned a registration number by the Secretariat.

Rule 29
Filing of Referrals and Replies

- (1) A referral shall be filed in writing in one of the official languages in the Republic of Kosovo. The referral shall be addressed to the Secretary General, shall include the date of filing, and the signature of the person filing the referral.*
- (2) The referral shall also include:*
 - (a) the name and address of the party filing the referral;*
 - (b) the name and address of representative for service, if any;*
 - (c) a power of Attorney for representative, if any;*
 - (d) the name and address for service of the opposing party or parties, if known;*
 - (e) a statement of the relief sought;*
 - (f) a succinct description of the facts;*

(g) the procedural and substantive justification of the referral; and

(h) the supporting documentation and information.

(3) Copies of any relevant documents submitted in support of the referral shall be attached to the referral when filed. If only parts of a document are relevant, only the relevant parts are necessary to be attached.

(4) Documents may be submitted in either official language of Kosovo or in one of the languages in official use in Kosovo. When a document is not in one of the official languages or the other languages in official use in Kosovo, the document shall be accompanied by a certified translation into one of the languages in use in Kosovo. The translation may be only of relevant parts of a document, but in such case, it must be accompanied by an explanation indicating what parts of the document are translated. The Court may require a more extensive or complete translation to be provided by the party.

(5) The Secretariat shall develop a procedure to check the authenticity of the translations presented.

(6) A referral shall be filed in person at the office of the Secretariat of the Court during regular working hours, or shall be filed by mail or by means of electronic communication.

(7) The Court shall establish referral forms to assist parties in submitting referrals and shall publish such forms on the Court web page.

(8) Replies to referrals shall be filed by opposing parties in the same manner as the filing of referrals under this Rule.

Rule 30

Registration of Referrals and Replies

(1) The Secretary General shall register a referral immediately when the referral or any documents are filed, even when all necessary documents are not contained with the referral. The Secretariat shall maintain a checklist of necessary documents and may assist parties by explaining what is missing from a referral.

(2) If a referral does not contain all necessary documents, the Secretariat shall notify the applicant that the referral should be supplemented with the documents specified in the referral and specify that such documents shall be filed within 30 days.

(3) The Secretariat shall maintain a register in which all filings of referrals and replies are recorded with the following information:

(a) date and time of filing;

(b) name of person or persons filing the referral;

(c) registration number assigned to the referral;

(d) Judge Rapporteur appointed to referral; and (e) Review Panel appointed to the referral.

(4) The Secretariat shall establish a case file for each registered referral, which shall include all documents and materials related to a referral, a reply, if any, and any other documents and materials produced during the proceedings.

Rule 31
Correction of Referrals and Replies

- (1) At any time before the Judge Rapporteur has submitted the report, a party that has filed a referral or a reply, or the Court acting ex officio, may submit to the Secretariat a correction of clerical or numerical errors contained in the materials filed.*
- (2) The Secretariat shall notify all other parties of any corrections that are made.*

Rule 32
Withdrawal of Referrals and Replies

- (1) A party may withdraw a filed referral or a reply at any time before the beginning of a hearing on the referral or at any time before the Court decision is made without a hearing.*
- (2) Notwithstanding a withdrawal of a referral, the Court may determine to decide the referral.*
- (3) The Court shall decide such a referral without a hearing and solely on the basis of the referral, any replies, and the documents attached to the filings.*
- (4) The Court may dismiss a referral when the Court determines a claim to be moot or does not otherwise present a case or controversy.*
- (5) The Secretariat shall inform all parties in writing of any withdrawal, of any decision by the Court to decide the referral despite the withdrawal, and of any decision to dismiss the referral before final decision.*

Rule 33
Appointment of Judge Rapporteur

- (1) When a referral has been registered with the Secretariat, the referral shall be forwarded to the President who shall appoint the Judge Rapporteur in the manner provided in Rule 8. The Secretariat shall notify the person who filed the referral and any opposing party or other interested party of the registration and the registration number.*
- (2) Following appointment of the Judge Rapporteur, the Secretariat shall forward the referral including all attached documents to the Judge Rapporteur. When received by the Secretariat, any reply to the referral, including all attached documents, shall be forwarded to the Judge Rapporteur.*

Rule 34
Report of Judge Rapporteur

- (1) The Report of the Judge Rapporteur shall contain:*
- (a) a description of the facts of the case;*
 - (b) a presentation of facts that are disputed and facts that are undisputed;*
 - (c) an indication of which party bears the burden of proof on disputed facts;*
 - (d) a presentation of the legal arguments presented by all parties;*
 - (e) a tentative assessment of the admissibility of the referral; and*
 - (f) a tentative assessment of the substantive legal aspects of the referral.*

(2) The thirty (30) day time period specified in Article 22.5 of the law for the Judge Rapporteur to submit the Report does not commence until the Judge Rapporteur has received all documents in the file, including a translation, when necessary, of all documents that are required to be translated.

(3) The Judge Rapporteur shall submit the Report to the Secretariat which shall forward to the Review Panel copies of the Report and copies of the case file, which includes the referral and any reply, including attachments. All Judges shall receive a copy of the Report submitted by the Judge Rapporteur.

Rule 35 Review Panels

(1) The Review Panel in each case shall be chaired by the Presiding Judge assigned under the provisions of Rule 9.

(2) The Review Panel may request the party submitting a referral or a party submitting a reply to present additional facts, documents or information if this is necessary to determine the admissibility of the referral.

(3) The Review Panel shall submit its resolution on admissibility within thirty (30) days after receiving the Report of the Judge Rapporteur and the case file. If additional information is requested from the parties, the resolution shall be submitted within thirty (30) days after receiving all the additional information.

(4) If the Review Panel concludes that a referral is inadmissible, the Presiding Judge shall prepare a draft resolution stating the reasons for inadmissibility and forward the resolution to the Secretary General. The Secretary General shall forward the draft resolution to all Judges for further consideration in accordance with Article 22 of the Law on the Constitutional Court.

(6) If the Review Panel concludes that a referral is admissible, the Presiding Judge shall prepare a draft resolution stating the reasons for admissibility and forward the resolution to the Secretary General. The Secretary General shall forward the recommendation to all Judges.

(7) Written dissents by a Judge on the Review Panel to a decision of the Panel concerning admissibility shall not be permitted.

(8) A Judge who objects to the conclusion of the Review Panel that a referral is inadmissible shall submit objections to the Secretary General within the time period established in the Law on the Constitutional Court. The Secretary General shall inform all Judges of the objection.

Rule 36 Admissibility Criteria

(1) The Court may only deal with Referrals if:

(a) all effective remedies that are available under the law against the Judgment or decision challenged have been exhausted, or

(b) the Referral is filed within four months from the date on which the decision on the last effective remedy was served on the Applicant, or

(c) the Referral is not manifestly ill-founded.

(2) The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

(a) the Referral is not prima facie justified, or

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

(c) when the Court is satisfied that the Applicant is not a victim of a violation of rights guaranteed by the Constitution, or

(d) when the Applicant does not sufficiently substantiate his claim;

(3) A Referral may also be deemed inadmissible in any of the following cases:

(a) the Court does not have jurisdiction in the matter;

(b) the Referral is made anonymously;

(c) the Referral was lodged by an unauthorised person;

(d) the Court considers that the Referral is an abuse of the right of petition;

(e) the Court has already issued a Decision on the matter concerned and the Referral does not provide sufficient grounds for a new Decision;

(f) the Referral is incompatible ratione materiae with the Constitution;

(g) the Referral is incompatible ratione personae with the Constitution; or

h) the Referral is incompatible ratione temporis with the Constitution.

(4) In the event that a Referral to the Court is incomplete or it does not contain the information necessary for the conduct of the proceedings, the Court may request that the Applicant make the necessary corrections within 30 days.

(5) If the Applicant fails, without good cause, to make the necessary corrections within the time-limit referred to in paragraph 5 of this Rule, the Referral shall be proceeded with.

Rule 37

Joinder and Severance of Referrals

(1) The Secretariat shall provide notice to the President and the Judge Rapporteur that the referral may be related in subject matter to another referral before the Court and directed against the same act of a public authority. The President, upon the recommendation of the Judge Rapporteur may order the joinder of those separate referrals.

(2) If a referral addresses two or more laws or other acts of public authority, the Judge Rapporteur shall notify the Secretariat and the President. Upon the recommendation of the Judge Rapporteur, the President may order a separate consideration of the respective elements of the referral if joint consideration does not favor a fair and expeditious determination of the issues.

(3) If a party disagrees with the Court's decision to join or sever referrals, it shall request reconsideration of the decision, together with any factual or legal arguments, within fifteen (15) days of the date of the President's Order to join or sever referrals.

Rule 38
Pilot Judgments

(1) When similar or identical referrals are filed that derive from the same challenged action, the Court by majority vote of the Judges may choose one or more of the referrals for priority consideration.

(2) When handling a referral as a pilot Judgment case, the Court may stay examination of all similar or identical cases for a specified period of time. Parties in proceedings that are stayed shall be kept informed of all developments in the pilot Judgment case and the Court may reopen stayed referrals for further examination at any time.

IV. Hearings and Deliberations

Rule 39
Right to Hearing and Waiver

(1) Only referrals determined to be admissible may be granted a hearing before the Court, unless the Court by majority vote decides otherwise for good cause shown.

(2) The Court may order a hearing if it believes a hearing is necessary to clarify issues of fact or of law.

(3) Court hearings shall be public, unless the Court orders otherwise when good cause is shown under law or these Rules.

Rule 40
Schedule of Hearings

(1) The Secretary General, in consultation with the President, shall schedule hearings in a Prompt manner.

(2) The President may, upon request of a party demonstrating why a referral should be given priority, and with the approval of a 2/3 majority of all Judges, order that a hearing be scheduled in a priority manner.

Rule 41
Participation in Hearings

(1) All hearings shall be open to the public, except when the Court orders exclusion of the public from a hearing if such exclusion is required to protect the safety of any of the parties or their representatives or such exclusion is required by considerations of public safety and order.

(2) Any party, representative, witness or other hearing participant whose conduct directed at Judges or the Secretary General is incompatible with the dignity of the Court, or who acts offensively toward another party or that party's representative, may be warned by the President and given an opportunity to present a defense. The President, in consultation with the Judges, may order discipline to be imposed, including the imposition of a fine in accordance with the rates set by the Court or, in exceptional cases, exclusion from the hearing.

(3) If an observer's conduct is incompatible with the dignity of the Court or if an observer disrupts a hearing, the President may order that the observer be excluded from the hearing.

Rule 42 Notice of Hearing

(1) The parties shall be summoned to the hearing by written notice served by the Secretariat on the parties in a manner provided in Rule 26. The hearing notice shall contain the date, time and venue of the hearing and shall be served no later than two weeks before the date scheduled for the hearing, unless in cases of urgency the Court sets a lesser period.

(2) Upon application by a party, the President may postpone a scheduled hearing if the party shows that it will be prevented from appearing at the hearing for an important reason. Other parties shall be given the opportunity to comment on the request for postponement. The President shall decide whether to order postponement of the hearing and the Secretariat shall notify the parties. When granting a request for a postponement, the President may order the party requesting postponement to pay any necessary costs of other parties as a result of the postponement.

Rule 43 Hearing Procedure

(1) The President shall open the hearing and be responsible for the proper conduct of the hearing. The President shall ascertain the attendance of the parties and their representatives, if any.

(2) The Court shall ensure that interpretation services are available throughout the hearing for any party or representative requesting interpretation.

(3) A represented party may address the Court during a hearing through its representative, unless a Judge asks a party to address a question directly.

(4) The parties may be given an opportunity to make a brief opening statement, which shall consist of an oral presentation of arguments, confining the presentations to facts and issues relevant to the claim. The President may limit the period of time allocated to each party for opening statements.

(5) During the hearing, the Judges may ask questions of the representatives of the parties or directly to any party.

(6) After the opening statements, the Court may hear and receive evidence in accordance with Rules 45 – 53.

(7) After gathering of evidence is completed, the parties shall be given an opportunity to present a closing argument on facts and law relevant to the claim. The President may limit the period of time allocated to each party for closing arguments.

(8) The President shall adjourn the hearing and additional hearings may be scheduled only if all evidence and submissions could not be presented at one hearing.

(9) The Secretary General shall ensure that transcripts and minutes of the hearing are prepared and signed by the President.

Rule 44
Deliberations and Voting

(1) As soon as may be following adjournment of the hearing, the Court shall meet for deliberations on the referral. Deliberations of the Court shall not be open to the public and shall remain confidential.

(2) Only the Judges may participate in the deliberations of the Court. The Secretary General and the Chief Legal Advisor shall be present at the deliberations, and other staff of the Secretariat or Legal Advisors may be present if required by a Judge and not opposed by any of the other Judges. No persons present at deliberations, other than the Judges, may participate in the deliberations or speak concerning the referral unless so requested by a Judge.

(3) The Secretary General shall prepare the minutes of the deliberations, recording only the title or nature of the subjects discussed, and the results of any vote taken. The minutes shall not provide any record of the details of the discussions or the views expressed, provided that any Judge shall be entitled to insert a statement in the minutes.

(4) After the vote is taken, if the Judge Rapporteur is among the majority of the Court, the President shall assign to the Judge Rapporteur the task of preparing the final text of the Judgment of the Court. If the Judge Rapporteur is not among the majority, the President shall assign any Judge among the majority of the Review Panel to prepare a draft of the decision of the Court. If no member of the Review Panel is among the majority, the President shall assign any Judge who is among the majority to prepare a draft of the decision of the Court.

V. Evidence

Rule 45
Submission of Evidence By Parties

(1) Parties may submit the following types of evidence to the Court:

(a) the name and address of a witness and a summary of the testimony the witness is expected to provide;

(b) a request for an expert witness and a summary that indicates the facts that would be established by the expert report;

(c) copies of documents or other physical items that contain information relevant to the referral;

(d) a description of a document or other physical item that contains information relevant to the referral, but which is not in that party's possession or control, together with the identification of the person believed to possess or control such evidence and the reasons for such belief; or

(e) identification of a site to be visited or an object to be inspected, together with a description of the evidence to be established by such visit or inspection.

(2) The collection of evidence relevant to the referral that does not raise significant problems of fact or law may be delegated by decision of the Court to a Judge of the

Court. The collection of evidence by a Judge shall proceed in accordance with the provisions of these Rules.

*Rule 46
Summons of Witnesses*

- (1) The Court shall order the examination at a hearing of a witness proposed by a party, provided that the party shows or proves sufficient cause for the examination of such witness.*
- (2) If the Court orders examination of a witness, the Court shall issue an order stating*
 - (a) the full name and address of the witness,*
 - (b) an indication of the facts about which the witness is to be examined, and*
 - (c) the date, time and venue of the examination.*
- (3) If the Court determines that the party has shown insufficient proof for the witness to be summoned, the Court shall inform the party in writing with the reasons for the decision.*
- (4) The witness may be summoned conditional upon the party requesting the summons paying a deposit to the Secretariat in a sum sufficient to cover expected expenses incurred by the witness. If the summons is not made conditional upon a deposit, the Secretariat shall advance the sums necessary in connection with the examination of a summoned witness.*
- (5) The Secretariat shall serve parties and representatives with the orders or decisions on the witnesses.*
- (6) Witnesses properly summoned are required to obey the summons and attend the hearing. If a witness who has been properly summoned fails to appear at the hearing, the Court may impose on the witness a financial penalty not to exceed five hundred (500) Euro and may order another summons to be served on the witness at their expense. If a duly summoned witness refuses to provide evidence or to take the oath to make a solemn declaration, without a valid reason, the Court may impose on the witness a financial penalty not to exceed five hundred (500) Euro.*
- (7) If the witness subsequently provides a valid excuse for failing to attend the hearing, the financial penalty may be reduced or cancelled by the Court. The witness may request that the financial penalty be reduced by the Court if the penalty is disproportionate to the witness' financial means.*

*Rule 47
Witness Testimony*

- (1) The Court may order that witnesses shall be excluded from attending the hearing during any oral presentations by the parties or their representatives or during the examination of other witnesses.*
- (2) Parties shall have a right to be present during the examination of witnesses.*
- (3) A witness has the right to refuse to testify concerning the following matters:*
 - (a) anything a witness was told during a conversation protected by a religious privilege;*

- (b) anything a witness has found out, or advice given by the witness, in the witness' capacity as a lawyer or doctor of medicine or through the performance of an occupation or activity which implies a legally required obligation of confidentiality;*
- (c) facts or information which may tend to incriminate the witness or the witness' spouse or descendants in a direct line, and in a collateral line to the third degree.*
- (4) When a witness is called to provide testimony, the President shall first establish the identity of the witness. Then the President shall inform the witness of the right to refuse to give evidence as provided in paragraph 3 and of the criminal consequences of giving false testimony and that the witness may be required to take an oath or solemn declaration that the testimony the witness will give is true.*
- (5) Before giving testimony, the witness shall take the following oath or solemn declaration:
"I, name, swear (or solemnly declare) that I will tell the truth, the whole truth and nothing but the truth."*
- (6) If a witness refuses without justification to give evidence or refuses to take an oath or a solemn declaration, the Court may impose a financial penalty not exceeding five hundred (500) Euro. The Court shall determine what weight, if any, shall be given to the testimony of witnesses.*
- (7) Before the witness is questioned, the witness shall present an oral account of the witness' knowledge of the facts that are the subject of the examination.*
- (8) The President and the Judges may ask questions of the witness, followed by any party not requesting the examination, and then the party requesting the examination. Judges may ask questions of the witness at any time during the testimony.*
- (9) The Secretary General shall ensure that minutes are drafted and reflect accurately the testimony of each witness. The minutes shall then be signed by the President or by the Judge responsible for conducting the examination of the witness.*

Rule 48 Experts

- (1) The Court engages experts in the following manner:*
 - (a) Upon application by a party bearing the burden of proof for a particular fact, the Court may appoint an expert who shall prepare an expert report. The order appointing the expert shall define the scope of the expert's work and shall set a time limitation within which the expert shall submit a report to the Court.*
 - (b) Any expert so appointed shall at the first available opportunity disclose to the Court any possible conflict of interest that he/she may have in relation to their evidence.*
- (2) A person shall not be appointed as an expert in a referral in which the person*
 - (a) Has previously been involved as a representative or advisor;*
 - (b) Has acted at any time for one of the parties in the case;*
 - (c) Is related by family or marriage to any of the parties; or*
 - (d) Is or was an official, political advisor or contractor of an entity that is a party to the case*
- (3) An appointed expert shall receive a copy of the appointment order and all documents necessary for the work. The expert shall be supervised by the Judge*

Rapporteur appointed to the referral who may be present during the investigation and who shall be kept informed of the progress of the work.

(4) The Court may require the party requesting the expert to pay a deposit to the Secretariat in a sum sufficient to cover the costs of the expert report.

(5) An expert shall give an opinion only on issues and facts which have been expressly referred to the expert.

(6) An expert shall submit the report to the Court and the Secretariat shall provide copies to all Judges and shall serve a copy of the report on each party.

(7) The Court may order that the expert be examined at the hearing on the referral, provided that the parties have been provided notice that the expert will testify. All Judges and all parties may ask questions of the expert.

(8) Before being examined at a hearing or giving testimony, an expert shall take the following oath or solemn declaration before the Court:

“I, name, swear (or solemnly declare) that I have conscientiously and impartially carried out my task; that I have provided to the Court copies of all the evidence on which I have based my opinion; that I believe to be true all the facts on which I have based my opinion; and that I honestly and in good faith hold the opinion which I have stated and will state to the Court.”

(9) If the expert refuses without justification to give evidence or file a report, or refuses to take an oath or solemn declaration, the Court may impose a financial penalty not exceeding five hundred (500) Euro. The Court shall determine what weight, if any, shall be given to the testimony of experts.

Rule 49

Objections Against Witnesses or Experts

(1) Any party may object, by written application to the Court, to the relevance or the competency of a witness, or an expert. Any objection to a witness or to an expert shall be raised no later than fifteen days after service of the order summoning the witness or appointing the expert. The application of objection shall provide the specific grounds for the objection concerning the relevance or competency of the witness or expert and shall provide evidence and legal arguments in support of the objection.

(2) The Court shall give notice of the objection to the other parties who shall have the right to provide the Court with a written reply to the application. The Court shall make its determination on the application after considering the facts and arguments provided in the application and any replies received from the other parties.

Rule 50

Reimbursement of Witnesses and Experts

(1) Witnesses summoned by the Court and experts appointed by the Court shall be entitled to reimbursement of reasonable travel expenses. The Secretariat may make advance payments to witnesses and experts for such expenses.

(2) Witnesses summoned by the Court shall be entitled to compensation for loss of earnings. Experts appointed by the Court shall be entitled to be paid reasonable fees

for their services. The Secretariat shall pay witnesses and experts compensation or fees after completion of obligations. The rates payable shall be determined by the Court.

*Rule 51
Documents*

(1) A document is admissible in a case if the document is authentic and relevant to the claims made in the case. The probative value of an admissible document will be determined by the Court in its assessment of all of the evidence in the case.

(2) A party may offer evidence by producing documents that are in the possession of the party. If the party that bears the burden of proof for a fact has a document in its possession that contains evidence relating to that fact, the party shall submit the document as an attachment to a referral. The Court may order that the original of the document be produced at the hearing.

(3) If evidence for a fact is contained in a document that the party bearing the burden of proof for that fact does not have in its possession, the party may make a written request of another party in the case to produce a certified copy of the document if the requesting party has reason to believe the document is in the other party's possession. A copy of the request shall be filed with the Court.

(4) If the party who receives the request in paragraph (3) refuses to produce the document or fails to respond to the request within a reasonable time, the requesting party may file an application with the Court seeking an Order of the Court to the other party to produce the document. The Court shall order the other party to produce the document if the Court is satisfied that the document is within that party's possession and that production is necessary in the interests of justice. If the party directed by the Court to produce the document fails without reasonable cause to produce the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief. The Court may also strike out the whole or part of a Referral or a Reply as it considers appropriate in the circumstances.

(5) If the party that bears the burden of proof for a fact has reason to believe that a relevant document concerning that fact is in possession of a person who is not a party to the case, the party may file an application with the Court for an Order directing the non-party to produce the document. The Court shall order the other person to produce the document if the Court is satisfied that the document is within that person's possession and that production is necessary in the interests of justice. If the person directed by the Court to produce the document fails without reasonable cause to produce the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief.

*Rule 52
Site or Object Inspection*

(1) A visit of a site or an inspection of an object may be requested by any party when the fact to be proven cannot be proven through witness examination, expert reports or the presentation of documents.

(2) Evidence provided by a site visit or an object inspection may be offered by the party that bears the burden of proof for a fact that may be proven by a visit to the site or an inspection of the object.

(3) If the site or the object is in possession of a person not a party to the proceedings, the party bearing the burden of proof may apply to the Court for an Order requiring the person to grant access to the site or to the object to be examined. The Court shall grant the Order if the site visit or object inspection is necessary in the interests of justice. If the person directed by the Court to comply fails without reasonable cause to allow access to the site or the document, the Court may impose a financial penalty not exceeding five hundred (500) Euro or may order other relief.

*Rule 53
Amicus Curiae*

The Court may, if it considers it necessary for the proper analysis and determination of the case, invite or grant leave to an organization or person to appear before it and make oral or written submissions on any issue specified by the Court.

VI. Interim Measures

*Rule 54
Request for Interim Measures*

(1) At any time when a referral is pending before the Court and the merits of the referral have not been adjudicated by the Court, a party may request interim measures.

(2) The request for interim measures must be submitted in writing, must describe the facts related to the request, the arguments in support of the request, the measures requested and the reasonably foreseeable consequences if the request is not granted. The party requesting interim measures may attach to the request other documents and evidence that is relevant and supportive of the request.

(3) The Secretary shall forward a copy of the request to all Judges and to all other relevant parties.

*Rule 55
Decision on Interim Measures*

(1) A request for interim measures shall be given expedited consideration by the Court and shall have priority over all other referrals.

(2) The President shall assign the request for interim measures to the Review Panel assigned to the referral. If no Review Panel has yet been so assigned, the President shall assign a Review Panel by random draw. If any Judge on the Review Panel is unavailable for expedited consideration, the President shall assign a new Review Panel by random draw.

(3) The Review Panel may request additional facts, documents or information from the party requesting interim measures and may order a reply or additional facts, documents or information from other parties in the case. The Review Panel shall not

make a decision without giving other parties, to the extent possible, an opportunity to present their views on the request for interim measures.

(4) Within seven (7) days, the Review Panel shall recommend in writing to the Court whether the request for interim measures be granted, either in whole or in part, or denied. Before the Review Panel may recommend that the request for interim measures be granted, it must find that:

(a) the party requesting interim measures has shown a prima facie case on the merits of the referral and, if admissibility has not yet been determined, a prima facie case on the admissibility of the referral;

(b) the party requesting interim measures has shown that it would suffer unrecoverable damages if the interim relief is not granted; and

(c) the interim measures are in the public interest. If the party requesting interim measures has not made this necessary showing, the Review Panel shall recommend denying the application.

(5) If the request for interim measures is granted, either in whole or in part, the resolution of the Review Panel shall state the reasons supporting the decision and how the legal standard has been met, and shall state the limited time during which the interim measures will be effective. No decision granting interim measures may be entered unless the expiration date is specified; however, expiration dates may be extended by further decision of the Court. If the admissibility of the referral has not yet been determined, the resolution shall state that interim measures will expire immediately if the Court determines the referral to be inadmissible.

(6) The Secretary shall forward the recommendation to all Judges. The recommendation of the Review Panel on the application for interim measures shall become the decision of the Court unless one or more Judges submit an objection to the Secretary within three (3) days. If one or more Judges object to the recommendation, the application will be forwarded to the Court for consideration.

(7) The President ex officio may order additional information from the parties or schedule a hearing when requested by one or more Judges of the Court or the Court may deliberate and decide as soon as possible on the request for interim measures without a hearing. In deciding whether to grant or deny the request for interim measures, the Court must apply the legal standards set forth in this Rule.

(8) At the request of a party, or ex officio, the Court may, at any time prior to final Judgment, revoke or modify any decision concerning interim measures if a change in the situation justifies such revocation or modification. Any party requesting such revocation or modification shall specify the change in the situation supporting such change. Before determining whether to grant or deny the request for revocation or modification, or before acting ex officio, the Court shall give the parties an opportunity to present their views on the matter.

(9) Unless otherwise stated by the Court, interim measures that are granted by the Court during a proceeding on a referral expire when the Court issues its final Judgment on a referral.

VII. Decisions

Rule 56 Types of Decisions

The Court shall adopt the following types of decisions:

- (1) Judgments, when the Court adjudicates the merits of a referral;*
- (2) Resolutions, when the Court adjudicates the admissibility of a referral;*
- (3) Decisions, when the Court adjudicates on requests for interim measures;*
- (4) Administrative Rulings, when the Court decides on administrative matters in administrative sessions of the Court; and*
- (5) Such other Order as from time to time it deems appropriate*

Rule 57 Content of Decisions

- (1) Judgment, Resolutions, Decisions or other Orders of the Constitutional Court shall contain the following minimum details; the names of the Judges of the Court, an introduction, a statement of the legal basis for deciding the matter, a statement containing the reasoning of the Court and the operative provisions.*
- (2) The statement of the composition of the Constitutional Court which adopted the Judgment, Resolution or other Order shall state the result of the vote, the names of the Constitutional Court judges who submitted separate opinions.*
- (3) The introduction shall state the names of the parties, their legal representatives or other persons authorised by them, if any, the date of the public hearing, if such was held, and the date of the session at which the decision was adopted.*
- (4) The statement containing the reasoning of the Court shall contain a summary of the facts and the allegations of the participants in the proceedings and the reasons for the decision of the Court.*
- (5) The operative provisions shall state the manner of the implementation of the Judgment, Resolution or other Order and when the decision shall take effect and on whom the decision shall be served.*
- (6) Judgments, Resolutions and Decisions are signed by the President of the Court and the Judge Rapporteur.*
- (7) When a Judge is unable to sign the Decision of the Court by reason of end of mandate, leave, resignation, dismissal or recusal, the Judgment or Resolution shall be signed by the President of the Court and the Presiding Judge of the Review Panel or the next senior member of the Review Panel.*

Rule 58 Dissenting Opinions

- (1) A Judge of the Court shall have the right to prepare a dissenting opinion to the Judgment of the Court on the merits of a referral. A dissenting opinion may be joined by other Judges and shall state specifically the reasons why the Judge disagrees with the opinion of the majority or plurality of the Court. A dissenting opinion to a*

Judgment of the Court shall be filed, in so far as it is possible to do so, with the Judgment, become part of the case file, shall be published with the Judgment, and shall be served on the parties at the same time as the Judgment.

(2) A Judge of the Court shall not have the right to prepare a dissenting opinion to a decision of the Court on interim measures. Any Judge shall have the right to indicate in the decision that the Judge voted against the interim measure agreed to by the Court.

(3) A Judge of the Court shall not have the right to prepare a dissenting opinion to a resolution of the Court on the admissibility of a referral. Any Judge shall have the right to indicate in the resolution that the Judge disagreed with the resolution on the admissibility of a referral.

Rule 59 Concurring Opinions

(1) A Judge of the Court shall have the right to prepare a concurring opinion to the Judgment of the Court on the merits of a referral. A concurring opinion agrees with the Court's Judgment, but disagrees with the reasoning utilized. Thus, a concurring opinion may be written by a Judge who supplies a vote in the majority supporting the Court's Judgment. A concurring opinion may be joined by other Judges and shall state specifically the reasons why the Judge agrees with the result but disagrees with the reasoning in the opinion of the majority of the Court. A concurring opinion to a Judgment of the Court shall be filed, in so far as it is possible to do so, with the Judgment, become part of the case file, shall be published with the Judgment, and shall be served on the parties at the same time as the Judgment.

(2) A Judge of the Court shall not have the right to prepare concurring opinions to decisions or resolutions of the Court, but may indicate that the Judge concurs in the decision or resolution.

Rule 60 Final Text of Judgment and Filing

(1) The final text of a Decision of the Court shall be prepared by the Judge Rapporteur in accordance with Rule 44 (4). If the Judge Rapporteur is dissenting from the Judgment or the Presiding Judge of the Review Panel votes against the interim measures, the President shall designate another Judge who voted with the majority to prepare the Judgment or decision of the Court.

(2) The Judge preparing the Judgment, Resolution or Decision of the Court, including a Decision on a request for interim measures, shall finalize the text of the Judgment within a reasonable period of time as determined by the Court from the date of its adoption by the Court. The final text shall be submitted to the Judges for review and each Judge may submit comments within five (5) days. After considering whether to make changes suggested by other Judges, the Judge preparing the Judgment of the Court shall make any necessary changes. The final text shall be submitted to the Judges, who may meet to approve the final version, or may otherwise indicate approval of the final version of the text. Upon final approval by the Judges, the final text shall be submitted for signing, filing and servicing on the parties.

(3) Judges preparing dissenting or concurring opinions must finalize the text of the opinions within ten (10) days from the submission of the final text to the President. Such opinions will be filed, in so far as it is possible to do so, by the Secretary General at the same time as and with the Judgment of the Court and served on the parties with the Judgment.

*Rule 61
Correction of Judgments and Decisions*

(1) The Court may, ex officio, or upon application of a party made within two weeks of the service of a Judgment or decision, rectify any clerical and calculation errors in the judgment or decision.

(2) A rectification order shall be attached to the original of the rectified Judgment or decision.

*Rule 62
Request for Review*

When filing a referral requesting a review of a law, decree, regulation or municipal statute as specified in Article 113. 2. (1) and (2) of the Constitution, an authorized party shall specify the provision or provisions of the normative instrument which it questions.

VIII. Special Provisions on Certain Procedures under Article 113 of the Constitution

*Rule 63
Enforcement of Decisions*

(1) The decisions of the Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.

(2) All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.

(3) All physical and legal persons are obligated to respect and to comply with the decisions of the Court.

(4) The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.

(5) The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.

(6) In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette.

(7) The State Prosecutor shall be informed of all decision of the Court that have not been enforced.

(8) The Secretariat, under the supervision of the Judge who in accordance with Rule 44 drafted the decision, shall follow up the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken.

*Rule 64
Interim Measures*

The Court may order ex officio or upon the request of a party, as an interim measure, that the effects of the normative instrument that is being challenged, or any of its parts, be suspended until the Court issues a Judgment on the referral, in accordance with Part VI of these Rules.

*Rule 65
Judgment*

(1) If the Court establishes that certain provisions of the normative instrument are not in compliance with the Constitution, it shall declare the respective provisions to be invalid.

(2) The Court shall declare the entire law, decree, regulation or municipal statute to be invalid, if the Court determines that the normative instrument does not achieve its legislative purpose or is otherwise meaningless without the provisions, which are determined to be incompatible with the Constitution.

*Rule 66
Legal Effects of Judgment*

(1) Secondary legislation and administrative acts that have been issued based on a provision of a law, decree, regulation or municipal statute that has been invalidated by the Court shall not be applied from the date the Court's Judgment becomes effective.

(2) If a court has issued a decision in a criminal case that is based upon a provision of a law, decree, or regulation that the Court has declared unconstitutional, the person against whom the decision was issued may have proceedings reopened in the criminal case.

*Rule 67
Referral*

(1) When filing a referral pursuant to Article 113.3. (1), an authorized party shall state precisely what conflict exists between the constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo or the Government of Kosovo.

(2) The authorized party shall identify the act which violates its competence and the relevant provision of the Constitution which has been violated by such act.

Rule 68
Notification

The Secretary General shall provide notice to the authority whose act is challenged by the authorized party filing the referral. The responding authority shall have up to fifteen (15) days from the date of notification to respond, unless good cause is shown for a longer time.

Rule 69
Referral

When filing a referral pursuant to Article 113.3 (2) of the Constitution, an authorized party shall clearly state why a referendum is incompatible with the Constitution.

Rule 70
Judgment

(1) If the Court concludes in its Judgment that in a Referral made under Article 113.4 of the Constitution the proposal to amend the Constitution is in breach of international agreements that are binding on Kosovo or that have otherwise been ratified pursuant to the Constitution, or respectively with the provisions of the Constitution on the procedure that should be followed for amending the Constitution, the Court shall order that the proposal not be adopted by the Assembly.

(2) The Court in its Judgment may advise on the type of modifications that could be made to the proposal, so that the proposal to amend the Constitution is in compliance with international agreements that are binding on Kosovo or that have otherwise been ratified pursuant to the Constitution, or respectively with the provisions defined in the Constitution for the procedure to be followed for amending the Constitution.

Rule 71
Notification

(1) Following the filing of a referral by an authorized party pursuant to Article 113. 6 of the Constitution, the Court shall immediately notify the President and send a copy of the referral to the President of Kosovo no later than three (3) days from its filing with the Court.

(2) The Court shall request the President of Kosovo to reply to the referral no later than fifteen (15) days from date the referral is served on the President of Kosovo, unless good cause is shown for a later reply.

Rule 72
Cancellation of Proceedings

The Court shall dismiss the proceedings initiated pursuant to Article 113, paragraph 6 of the Constitution in the event that before issuing a Judgment the President has resigned or has otherwise terminated his/her mandate.

Rule 73
Withdrawal

In the event that an authorized party withdraws the referral, the President may request the Court to continue with the proceedings and issue a Judgment. Such request shall be determined by the Court upon by a majority of Judges present and voting.

Rule 74
Judgment

(1) In the case of a Referral made pursuant to Article 113.7 of the Constitution if the Court determines that a court has issued a decision in violation of the Constitution, it shall declare such decision invalid and remand the decision to the issuing court for reconsideration in conformity with the Judgment of the Court.

(2) If the Court determines that a law has violated the Constitution it shall declare the law invalid in accordance with the provisions of Rules 64 and 65 of these Rules.

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.

Rule 77
Judgment

Rules 64 and 65 shall apply in like manner to Referrals initiated pursuant to Article 113.8 of the Constitution.

Rule 78
Acceptance for Review

Even when a matter is admissible, the Court may determine whether to accept for review a matter submitted by the Vice President of a Municipal Assembly in accordance with Article 62, paragraph 4, of the Constitution. The Vice President of a Municipal Assembly submitting a matter shall state precisely the constitutionally guaranteed rights that have been violated. The Court shall determine whether to accept a matter for review by majority vote of the Judges present and voting.

Rule 79
Review by the Court

If the Court accepts for review a matter referred under Article 62, paragraph 4 of the Constitution, the Court shall handle the referral in the manner provided under these Rules for all referrals. Rules 64 and 65 shall apply in like manner to Referrals initiated pursuant to Article 62.4 of the Constitution.

IX. Final Provisions

Rule 80
Amendments

These Rules of Procedure may be amended upon the proposal of two or more Judges and with the approval of a majority vote of all Judges present and voting.

Rule 81
Entry into Force

These Rules of Procedure shall be effective upon approval by majority vote of all Judges present and voting and fifteen (15) days after publication in the Official Gazette.

Rules of Procedure no. 126-3/2013
17 June 2013

President of the Constitutional Court
Prof. Dr. Enver Hasani

INDEX/LIST OF KEYWORDS

A

Absence or inability of President of Constitutional Court, Art. 11
Abuse of right of petition, Rule 36
Access to files and documents, Rule 23
Accessibility of the work of the Court, Rule 22
Address for service of documents, Rule 25
Address of parties, Rule 25
Adjournment of hearing, Rule 43
Administrative rulings, decision on administrative matters, Rule 56
Administrative matters, Rule 56
Administrative services fees, Rule 20
Administrative sessions, Rule 14
Admissibility of referrals, Art. 22
Age of Judges, Rule 4
Amendments to Rules of Procedure, Rule 80
Amicus Curiae, Rule 53
Annual Report, drafting and publishing, Rule 15
Anonymous referral, Rule 36
Appointment and commencement of mandate of judges, Art. 4, 7, Rule 4
Appointment procedure for judges, Art. 6
Assembly elections Art. 38, 39
Assembly laws Art. 42, 43
Attire, professional, Rule 13
Auditing, internal, Rule 15
Authenticity of translations, Rule 29
Authorization to release confidential documents, Rule 23
Authorized parties, Art. 113.2 (1) and (2) of Constitution, Art. 29

B

Binding force of decisions, Rule 63
Budget and Fees, Rule 20

Budget proposal, Rule 20
Budget proposal, adoption by Assembly, Art. 14
Budget of the Court, Rule 14
Budget, independent management by Court Art. 14
Budget, internal and external audit, Art.14
Budgetary services, Rule 15
Building management services, Rule 15
Building premises, Rule 14

C

Calculation of time periods, Rule 27
Checklist of necessary documents, Rule 30
Chief executive officer, Rule 16
Chief Legal Advisor, Rule 18
Civil servants, hiring, Rule 17
Civil servants, Law on, Rule 17
Civil servants, legal advisors, Rule 18
Civil servants, staff of Secretariat, Rule 17
Code of Conduct for Judges, Rule 12
Code of Conduct for civil service staff of Secretariat, Rule 14
Code of Ethics, staff Secretariat, Rule 17
Collection of evidence by judge, Rule 45
Communities, referral by Vice President Municipal Assembly, Rule 78
Compatibility of proposed const. amendment with inter. agreement/review proc, Special Procedure 5. re. Art. 113.3(4) Const, Art. 36, 37
Compatibility of proposed referendum with Constitution, Special Procedure 3. re. Art. 113.3(2) Const., Art. 33, 34, Rule 69

Conflict of constitutional competencies of Assembly, President and Government, Special Procedure 2. re. Art. 113.3(1) Const., Art. 31, 32, Rule 67, 68

Constitutionality of Gov. laws or acts, infringing upon municipal responsibilities, Special Procedure 7. re. Art. 113.4 of Const., Art. 40, 41, Rule 70

Compatibility of State of Emergency with Constitution, Special Procedure 4. re. Art. 113.3(3) Const., Art. 35

Compatibility with Constitution of laws, decrees, regulations, municipal statutes, Special Procedure 1. re. Art. 113.2(1) and (2), Art. 29, 30, Rule 62, 64, 65, 66

Competition, open and fair, Rule 16

Composition of Constitutional Court, provisional, Art. 55

Concrete constitutional review (Incidental Control), Art. 113.8 of Const., Art. 51, 52, 53, Rule 75, 76, 77

Concurring opinions, Rule 59

Conduct of the hearing, proper, Rule 43

Conduct, incompatible with dignity of the Court, Rule 41

Confidentiality of deliberations, Rule 44

Confidentiality of files and documents, Rule 23

Conflict of constitutional competencies, Special Procedure 2. re. Art. 113.3(1) Const., Art. 31, 32, Rule 67, 68

Constitutional amendments proposed by Assembly, control by Court, Special Procedure 12. re. Art. 113.9 Const., Art. 54

Constitutional Court, symbol, Rule 3

Constitutional review, referral by individuals under Art. 113.7 Const., Rule 74

Constitutionality of laws or acts of Gov, infringing municipal responsibilities

LCC, Special Procedure 7. re. Art. 113.4 Const., Art. 40, 41, Rule 70

Constitutionality of Assembly law/decision, contested by 10 or more deputies, Special Procedure 8. re. Art. 113.5 Const., Art. 42, 43

Content of decisions, Rule 57

Contractual matters, Secretariat and Legal Advisors, Rule 14

Cooperation with other public authorities, Art. 26

Cooperation, national and international, Rule 14

Correction of clerical or numerical errors in referral, Rule 31

Correction of judgments and decisions, Rule 61

Costs born by parties, Art. 28

D

Death of judges, Art. 9

Decision, on interim measures, Rule 56

Decision-making process, Art. 2, 10

Decisions, enforcement, binding force and implementation of, Rule 63

Decisions, entry into force of, Art. 20

Decisions, oral session, Art. 20

Decisions, public announcement, Art. 20

Decisions, publication in Official Gazette, Art. 20

Decisions, reports, drafting of, Rule 18

Decisions, taking of, Art. 19

Decisions, types of, Rule 56

Delegation of duties from President to Deputy President, Art. 11

Deliberations and voting, Rule 44

Deputy President, functions, Rule 12

Dignity of Constitutional Court, Art. 10, Rule 41

Discipline to be imposed, Rule 41

Dismissal of judges, Art. 9, Rule 6

Dissenting opinions, Rule 58

Dissents by Judge on Review Panel not permitted, Rule 35

Documentation and information, supporting, Rule 29
 Documents, Rule 51
 Documents, authenticity and relevance of, Rule 51
 Documents, failing to produce, Rule 51
 Documents, imposition of financial penalty, Rule 51
 Documents, probative value determined by Court, Rule 51
 Documents, production by parties, Rule 51
 Documents, production by third party, Rule 51
 Documents, strike out Referral or Reply or part of, Rule 51
 Domestic and International Cooperation, Rule 21
 Draft Resolution on (in)admissibility, Rule 35
 Drawing lots, Rule 10
 Duties of Deputy President of the Constitutional Court, Art. 11
 Duties of judges, Art. 10
 Duties of President of the Constitutional Court, Art. 11

E

Earlier cases, Art. 56
 Electronic means of communication, Rule 25
 Employees of Secretariat, applicability of Law on civil service, Art. 12
 Employment conditions, Rule 14
 Enforcement of decisions, Rule 63
 Entry into force of Law, Art. 58
 Entry into force of Rules of Procedure, Rule 81
 Equal status, Rule 4
 Evidence received at hearing, Rule 43
 Evidence, procedure for administration of, Art. 25
 Evidence, refusal to give, Rule 47
 Examination of witness, Rule 46
 Exclusion from hearings, Rule 41

Exclusion of a judge, Art. 18
 Exclusion of the public from sessions, Art. 17
 Exemption from paying procedural costs, Art. 28
 Exhaustion of all effective remedies, Rule 36
 Exhaustion of all legal remedies, Art. 47
 Expert, Rule 48, 50
 Expiration of term, Rule 10

F

Facts, succinct description of, Rule 29
 Fee, administrative, Rule 23
 Fees for administrative services, Rule 20
 Files and documents, permitting viewing, Rule 22
 Fines for infractions committed during proceedings, Rule 14
 Fire precaution, Rule 15
 Four months rule, Art. 49, 50, Rule 36

H

Health problem, Rule 6
 Hearing and waiver, right to, Rule 39
 Hearing notice, Rule 42
 Hearing procedure, Rule 43
 Hearing, attendance of parties, Rule 43
 Hearing, closing argument, Rule 43
 Hearings, Rule 15
 Hearings, date and time of, Rule 22
 Hearings, participation in, Rule 41
 Hearings, schedule of, Rule 40

I

Illness of judges, Art. 9
 Illness, Rule 6
 Impartiality and conscience of judges, Art. 10
 Impartiality, reasonable suspicion of, Rule 6

Implementation of decisions, Rule 63
 Implementation of Judgment, Resolution or other Order, Rule 57
 Imposition of fine, Rule 41
 Incidental control by ordinary courts, Art. 113.8 of Constitution, Art. 51, 52, 53, Rule 75, 76, 77
 Inclusions of referral, Rule 29
 Incompatibility of function, Art. 5
 Incompatibility *ratione materiae*, Rule 36
 Incompatibility *ratione personae*, Rule 36
 Incompatibility *ratione temporis*, Rule 36
 Incompleteness of referral, Rule 36
 Independence of the Court, Rule 21
 Independence, organizational, administrative, financial, Art. 2
 Individual complaints, Rule 64, 65, 74
 Invalidity of normative instrument, Rule 74
 Individual rights, violation by public authorities, Art. 113.7 of Const., Art. 46, 47, 48, 49, 50, Rule 74
 Information on course of proceedings, Rule 22
 Infraction, committed by judges, Rule 14
 Initiation of proceedings, Rule 28
 Interim measures, decision on, Rule 55
 Interim measures, duration, Art. 27, Rule 55
 Interim measures, hearing, Rule 55
 Interim measures, procedure Art. 113.2 (1) and (2) of Constitution, Rule 64
 Interim measures, public interest, Art. 27, Rule 55
 Interim measures, request for, Rule 54
 Interim measures, revocation and modification, Rule 55
 Interim measures, risk of irreparable damage, Art. 27, Rule 55
 Interim President or Deputy President, Rule 10

Interim Secretariat of the Constitutional Court, Art. 57
 Internal auditing, Rule 15
 Internal organization and functioning, Rule 14
 Interpretation services, Rule 15, 43

J

Joinder of referrals, Rule 37
 Judge Rapporteur, Art. 22
 Judge Rapporteur, appointment of, Art 22, Rule 4, 8
 Judge Rapporteur, request for additional information, Art. 22
 Judge, exclusion procedures, Rule 7
 Judge, petition for disqualification, Rule 7
 Judges, discipline, Rule 6
 Judges, dismissal procedure, Rule 6
 Judges, equal seniority, Rule 4
 Judges, precedence, Rule 4
 Judges, priority of appointment, Rule 4
 Judges, proposal for dismissal, Rule 6
 Judgment, on merits of a referral, Rule 56
 Judgment, preparation of final text of, Rule 60
 Judgments and decisions, publication of, Rule 22
 Judicial robe, Rule 13
 Jurisdiction of Court at entry into force of Law on Const. Court, Art. 56
 Jurisdiction, Court has no, Rule 36
 Justification, procedural and substantive, Rule 29

L

Language, official, Rule 29
 Law on civil servants, Rule 17
 Legal advisors, Art. 13, Rule 18
 Legal analysis, Rule 18
 Legal effects of judgment of the Court, Rule 66
 Legal research, Rule 18

M

Mandate of judges, Art. 8, 9, Rule 4
Manifestly ill-founded, Rule 36
Minutes and transcripts, preparation of, Art. 12
Minutes of hearing, Rule 43
Minutes of the deliberations, Rule 44
Moot, Rule 32
Multi-ethnic character of personnel, Rule 16
Municipal responsibilities, infringement by const. amendment, Art. 113.4 Const., Art. 40, 41, Rule 70

N

Non-party, Rule 51
Notice of hearing, Rule 42

O

Oath, refusal to take, Rule 47
Oath by Secretariat staff, Rule 17
Oath taken by judges, Art. 7
Object to be inspected, identification of, Rule 45
Objection against witness or expert, Rule 4, 49
Objection to the conclusion of the Review Panel, Rule 35
Offensively acting, Rule 41
Office facilities, Rule 15
Office of the Court, Art. 3
Official Gazette, Art. 20
Operative provisions of Judgment, Resolution or other Order, Rule 57
Oral hearing, Art. 22
Oral hearing, procedure, Art. 24
Oral hearing, waiver of right to, Art. 20
Order of voting of Judges, Rule 4
Orders, other, Rule 56
Organization of the Court, Art. 1, 2
Organizational structure of the Secretariat, Rule 15

P

Payment services, Rule 15
Permanent loss of the ability to act, Rule 6
Personnel services, Rule 15
Personnel, composition of, Rule 16
Pilot judgments, Rule 38
Policies, implementation of non-discriminatory, Rule 16
Post services, Rule 15
Postponement of hearing, necessary costs of, Rule 42
Postponement of scheduled hearing, request for, Rule 42
Power of attorney of representative, Rule 29
Precedence of Judges, Rule 4
Preliminary report, Art. 22, Rule 34
Preparation of draft of the Court decision, Rule 44
Preparation of final text of judgment, Rule 44
President and Deputy President, Art. 11
President and Deputy President, election of, Rule 10
President and Deputy President, term, Rule 10
President and Deputy President, vacancy, Rule 10
President of Kosovo, serious violation of Const. by, Art. 113.6 of Const, Art. 44, 45, Rule 71, 72, 73
President of the Court, functions, Rule 12
Presiding Judge, Rule 9
Press releases and press conferences, Rule 22
Prima facie justified, Rule 36
Printing of documents and other materials, Rule 15
Prior termination of mandate of judges, Article 9
Procedural costs born by parties, Art. 28
Procedural provisions for Court, lack of, Art. 16

Procedure for review of candidates,
 Article 6
 Procedure, general rule, Art. 16
 Procurement, Rule 15
 Professional attire, Rule 13
 Provisional composition of
 Constitutional Court, Art. 55
 Public authorities, cooperation with,
 Art. 26
 Public Financial Management &
 Accountability, Law on, Rule 20
 Public information works, performance
 of, Art. 12
 Public, hearings are, Rule 41
 Publication of judgments and decisions,
 Rule 22
 Publicity, principle of, Art. 17

Q

Quorum of judges, Art. 19

R

Random draw, system of, Rule 4
 Ratione materiae, incompatible, Rule 36
 Ratione personae, incompatible, Rule
 36
 Ratione temporis, incompatible, Rule
 36
 Recording, responsibility for, Art. 12
 Recruitment of staff, Rule 16
 Referendum, compatibility, Rule 69
 Referral by ordinary courts about
 compatibility of law with
 Constitution, Rule 75
 Referral by ordinary courts, interim
 measures, Rule 77
 Referral by ordinary courts, invalidity
 of law, Rule 77
 Referral by ordinary courts, suspension
 of procedures, Rule 76
 Referral forms, Rule 29
 Referral, justified reply, Art. 22
 Referrals, copies to opposing party, Art.
 22

Referrals, processing, Art. 22
 Referrals, time limit for reply, Art. 22
 Referrals, unclear or incomplete, Art.
 22
 Registered mail, Rule 26
 Registration number to referral,
 assignment of, Rule 29
 Registry, maintenance of, Art. 12
 Relief sought, statement of, Rule 29
 Remuneration of judges, Art. 5, 15
 Replacement of Judges, Rule 4
 Representation before the Court, Art. 21
 Representative of party, Rule 43
 Reputation of Constitutional Court, Art.
 10
 Reputation of judges, Art. 4
 Resignation of Judges, Rule 5, 9
 Resignation of President and Deputy
 President, Rule 11
 Resolution, on admissibility of a
 referral, Rule 56
 Resources, efficient and effective
 management of, Rule 16
 Responsibilities of Judges, Rule 4
 Return to previous situation, Art. 50
 Review Panel, Art. 22, Rule 9, 35
 Right to legal protection from
 Constitutional Court, Art. 47

S

Seat of the Court, Rule 2
 Secret ballot, election President, Deputy
 President, Rule 10
 Secretariat, Art. 12, Rule 15, 17
 Secretary General, Art. 12, Rule 16
 Security measures, Rule 15
 Service of documents, Rule 4, 26
 Severance of referrals, Rule 37
 Site or object inspection, Rule 45, 52
 Stamp of the Court, Art. 3, 12, Rule 3
 Statement at hearing, openings, Rule 43
 Status of proceedings, Rule 24
 Submission of evidence by the parties,
 Rule 45

Sufficiently substantiated, claim not, Rule 36

Summons of witness, Rule 46

Summons to the hearing, Rule 42

Support services of the Secretariat, Rule 15

Symbol of the Court, Rule 3

T

Technical services, Rule 15

Telefax, Rule 25

Testimony of witness, Rule 47

Transcript of hearing, Rule 43

Transparent, open and accessible, Rule 22

U

Unauthorised person, Rule 36

V

Vacancy in Office of President or Deputy President, Rule 10

Vehicle services, Rule 15

Vice President Municipal Assembly for Communities, referral Art. 62.4 Const. Rule 64, 65, 78, 79

Violation of Constitution during Assembly elections 6. Procedure Art. 113.3(5) Constitution

Violation of individual rights and freedoms by public authority 10. Procedure Art. 113.7 Constitution

Voting and consultation, participation of judges, Art. 17

Voting, order of, Rule 4

W

Webpage of Court, Rule 22

Withdrawal of a party, Art. 23

Withdrawal of referral by authorized party, Rule 73

Withdrawal of referrals and replies, Rule 32

Witness and expert, reimbursement travel expenses, Rule 50

Witness, advancement of sums for summons, Rule 46

Witness, confidentiality of testimony of, Rule 47

Witness, exclusion to attend hearing of, Rule 47

Witness, excuse for not attending, Rule 46

Witness, false testimony by, Rule 47

Witness, fine for not appearing, Rule 46

Witness, identity of, Rule 47

Witness, non-appearance, penalty disproportionate to witness' financial means, Rule 46

Witness, obligation to appear, Rule 46

Witness, payment of deposit for summons, Rule 46

Witness, presence of parties during examination of, Rule 47

Witness, refusal to give evidence or take oath or make solemn declaration, Rule 46

Witness, right to refuse to give evidence, Rule 47

Witness, testimony of, Rule 47

Working schedules, Rule 14