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Informational Booklet

Constitutional Court of Kosovo



Working Towards a
Stable Multi-Ethnic Kosovo



Enhancing the Positive Impact of the Law for
Vulnerable and Marginalised Groups in Kosovo
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ECMI Kosovo

ECMI Kosovo is the principal non-government organisation engaged with minority issues in Kosovo, with the overarching aim to develop inclusive, representative, community-sensitive institutions that support a stable multi-ethnic Kosovo.

ECMI Kosovo contributes to the developing, strengthening and implementation of relevant legislation, supports the institutionalisation of communities-related governmental bodies, and enhances the capacity of civil society actors and the government to engage with one another in a constructive and sustainable way.

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I INTRODUCTION

This information booklet was written by the European Centre for Minority Issues (ECMI) Kosovo, in collaboration with the Centre for Legal Aid and Regional Development (CLARD), and is part of ECMI Kosovo's project '*Enhancing the Positive Impact of the Law for Vulnerable and Marginalised Groups in Kosovo*', funded by the European Union and managed by the European Union Office in Kosovo.

The aim of this booklet is to increase awareness of the jurisdiction and competences of the Constitutional Court among human rights practitioners in Kosovo. Specifically, it intends to enhance knowledge on the admissibility criteria of the Constitutional Court in relation to referrals filed by individual applicants. Thus, it hopes to address the reported high number of referrals declared inadmissible. It is important to note that this booklet, although providing a good starting point, cannot replace the opinion of an experienced lawyer and anyone considering filing a referral to the Constitutional Court is therefore strongly advised to consult a qualified lawyer.

II CONSTITUTIONAL COURT

The Constitution of Kosovo came into force on June 15 June 2008. It provides far-reaching protections of human and minority rights and incorporated into the State's constitutional law are fundamental international documents such as the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Constitutional Court of Kosovo was established in January 2009, and rendered its first Decision on 16 October 2009. Its mandate is defined by the Constitution of Kosovo. Article 4 states that ***"The Constitutional Court is an independent organ in protecting the constitutionality and is the final interpreter of the Constitution"***. Article 112 of the Constitution establishes the Court as ***"the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution"*** and guarantees it ***"[full independence] in the performance of these activities"***

Article 116 sets out the legal effect of decisions:

1. *Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.*
2. *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

3. *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.*
4. *Decisions of the Constitutional Court are published in the Official Gazette*

The importance of an institution such as the Constitutional Court of Kosovo cannot be overstated. The Constitutional Court has delivered important decisions related to human rights protection. It has already exhibited a trend of holding Kosovo's public authorities to strict standards, and has exhibited full independence in reaching its decisions.

However, similar to other Constitution Courts as well as the European Court of Human Rights, the majority of the Constitutional Court's decisions have been declared inadmissible; this is due to the Court's admissible requirements that have to be satisfied prior to the Court deciding on merits of the case. These requirements are prescribed by the Constitution and the Law on the Constitutional Court and are further elaborated upon in the Court's Rules of Procedure. This booklet hopes to help perspective applicants including persons belonging to minority communities to be able to satisfy these requirements and to use this newly created mechanism for the human rights protection in Kosovo.

Throughout the course of this booklet, European Court of Human Rights (hereinafter ECtHR) case law shall be cited. This is because, according to Article 22.1 of the Constitution, the ECtHR and other international human rights agreements are ***"directly applicable in the Republic of Kosovo and, in case of conflict, have priority over provisions of laws and other acts of public institutions"*** and according to Article 53 of the Constitution ***"Human rights and fundamental freedom guaranteed by this Constitution shall be interpreted consistent with the Court Decisions of the European Court of Human Rights"***

Article 53 is important because it means that the Constitutional Court uses ECtHR case law when interpreting the admissibility of a referral. Therefore when an applicant submits a referral they should use as much ECtHR case law as possible to support of their referral.

III CONSTITUTIONAL COURT JURISDICTION AND AUTHORISED PARTIES

The Constitutional Court is not like a regular Court, it is a court of limited jurisdiction. Referrals can only be brought by certain parties, in particular circumstances and when specific criteria have been met. Who can take a referral to the Constitutional Court, what procedures they should follow and what criteria should be met is explained in Article 113 of the Constitution:

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

2. 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.

3. 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;

(2) compatibility with the Constitution of a proposed referendum;

(3) compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;

(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;

(5) questions whether violations of the Constitution occurred during the election of the Assembly.

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.

5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or

decision adopted by the Assembly as regards its substance and the procedure followed. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation 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.

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

9. 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.

10. Additional jurisdiction may be determined by law.

This booklet shall only examine Article 113 (7) of the Constitution – how an individual may take a referral to the Constitutional Court and briefly Article 113(2) of the Constitution – how the Ombudsperson can take a referral to the Constitutional Court.



IV INDIVIDUAL APPLICANT

2.1 Individual applicant

As mentioned in Chapter 3, individuals are authorized to take referrals to the Constitutional Court, only when certain criteria are met. This is explained in Article 113(7) of the Constitution:

“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”.

According to Article 47 (1) of the Law on the Constitutional Court “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.”

It is clear from the wording in both the Law on the Constitutional Court and the Constitution that in order for an individual to make a referral to the Constitutional Court: (1) there must be a violation of one of their constitutionally guaranteed rights, (2) this violation must have been committed by a public authority, and (3) all legal remedies provided by law must have been exhausted. The latter criteria will be discussed in detail in Chapter 3.2, while the former two criteria will be discussed below.

2.2 Victim status

Notion of “victim”

From the wording in the Law on the Constitutional Court and the Constitution it is clear that the Applicant must be a victim of a rights violation in order to take a case to the Constitutional Court. **There is no general right to bring a referral on behalf of everyone.** In other words, it is not sufficient to claim that there has been a violation of constitutional rights; the Applicant must be able to prove that he/she is personally a victim of this rights violation by a public authority before he/she can take a referral to the Constitutional Court. This concept was expressed by this Court in the following terms when it issued the decision to grant interim measures in the case KI 09/11 *Tome Krosniqi vs RTK et Al* on 16 October 2009, “... the case law of the European Court of Human Rights says that the party may ask for such a measure and be granted as such if “... the party bring *prima facie* evidence of such a practice and of his being a victim of it””.

Direct victim

Both direct and indirect victims can take referrals to the Constitutional Court. In the case of a direct victim, the rights violation must directly affect the applicant. However, this criterion cannot be applied in a mechanical and/or inflexible way. On a case-by-case basis the ECtHR has accepted applications from “potential” victims, that is, from persons who could not complain of a direct violation. In order for an applicant to claim to be a victim in such a situation, s/he must produce reasonable and convincing evidence of the likelihood that a violation affecting him/her personally will occur; mere suspicion or conjecture is not enough to establish victim status.

Example: (ECtHR) *Open Door and Dublin Well Woman v. Ireland Application no. 14234/88; 14235/88 29 October 1992*

In this case the Irish Courts had issued an injunction restraining two women’s health clinics and their servants and agents from providing certain information to pregnant women. Although it was not asserted whether two of the applicants were pregnant, it was decided that they belonged to a class of women of child-bearing age which may be adversely affected by the restrictions imposed by the injunction. Thusly the ECtHR held that they had victim status, as they ran the risk of being directly prejudiced by the measure complained of.

Example: (ECtHR) *The Christian Federation of Jehovah’s Witnesses in France v. France 53430/99 6 November 2009*

The ECtHR decided in this case that the alleged consequences of a parliamentary report were not enough to grant the applicant victim status, as a parliamentary report has no legal effect and cannot serve as the basis for any criminal or administrative proceedings.

An Applicant cannot claim to be a victim where he or she is partly responsible for the alleged violation. In the ECtHR Judgment *Pasa and Erkan v. Turkey Application No 51358/99 12 December 2006* the father of a boy who was injured because of landmines could not claim to be a victim as, due to his position as a mayor, he was partially responsible for the child’s access to the land-mined area.

Applicants may contend that that a law violates their rights, in the absence of any measure of implementation, if it obliges them to either modify their conduct or potentially face prosecution. In the Decision of the ECtHR in *Norris v Ireland Application No 10581/83 26 October 1988* it was found that the applicant, an active

homosexual, had victim status as he suffered because of a law that criminalised homosexual activity, even though the law had not been enforced in recent times.

Indirect victim

The Court may accept an individual application from a person considered an indirect victim, where there is a personal and specific link between the direct victim and the applicant, and because of this link their individual rights under the constitution are violated. In the ECtHR case of *Gakiyev and Gakiyeva v. Russia* 3179/05 23 April 2009 the parents of their deceased son were able to legitimately claim to be the victim of their son's abduction and death by a State servicemen.

Example: (ECtHR) Velikova against Bulgaria Application no. 41488/98 18 May 1999

The "domestic partner" of a man who died while in police custody successfully brought a case to the ECtHR, despite the fact that the children of the deceased where his legal inheritors. In this case the ECtHR had no doubt that the applicant could claim to be personally affected by and therefore a victim of, the alleged violations of the ECHR. The ECtHR found, therefore, that the applicant had the right to bring an application.

Death of a victim

Referrals can only be brought by living persons or on their behalf; a referral cannot be lodged on behalf of a dead person, however, the victim's death does not automatically mean that the case is stuck out of the Court's list.

Generally speaking, when the original applicant dies after the referral has been lodged with the Court, the family of the original applicant may pursue the referral provided that they have a sufficient interest in doing so.

Furthermore, the Court has the power to assess whether it is appropriate to continue its examination for the purpose of protecting human rights. These powers are subject to the existence of a question of general interest. This may arise, in particular, where referral concerns legislation or the legal system in Kosovo.

Example: (ECtHR) Karner v Austria Application No 40016/98 24 October 2003

Mr Karner, the applicant, took a case to the ECtHR claiming that the Austrian tenancy law was discriminatory on the basis of sexual orientation and in violation of Articles 14 and 8 of the ECHR. Karner was an Austrian national who lived in an apartment leased by his homosexual partner. In 1991, his partner was diagnosed with HIV and before his death in 1994 he designated Mr. Karner to be his heir. At

the lower courts Mr Karner was allowed to succeed, however the Supreme Court held that the statutory language of “Life companion” had to be interpreted at the time of the enactment of the Rent Act of 1974, and that the legislature’s intention was to preserve the traditional family and exclude same-sex couples.

In 1997, Mr. Karner lodged a complaint with the ECtHR. Before the complaint was found admissible, Mr. Karner passed away and his mother did not wish to continue the case. Although no heirs came forward, Mr Karner’s complaint was declared partly admissible. This was because the ECtHR also hears applications on public policy grounds. In this case, the ECtHR considered the differential treatment of homosexuals in relation to succession of tenancies under Austrian law an important question of interest for both Austria and for other Member States to the Convention.

The situation is different; however, where the **direct victim died before** the referral was submitted to the Court. In case of *Fairfield and Others v. The United Kingdom Application No 24790/04 08 March 2005* the ECtHR held that a complaint lodged after the death of the applicant will be found inadmissible.

Loss of Victim Status

The applicant must be able to justify his or her status as a victim throughout the proceedings, if not the case will be ruled inadmissible.

Example (Const. Court): KI 09/11 Tome Krasniqi vs RTK et Al on 30 May 2011.

The Applicant complained that the collection of a 3.5 euro television licence fee by KEK was illegal. The Court issued an interim measure against the collection of such fees in October 2009 and again in June 2010. However, when the case was heard in May 2011 these fees were no longer collected and, therefore, the Applicant had lost victim status. The case was found inadmissible under Rule 32 (4) of the Rules of Procedure, as the issue had become moot.

Nevertheless, the **mitigation of a sentence or the adoption of a measure favourable to the applicant** by the authorities will deprive the applicant of victim status only if the violation is acknowledged expressly or at least in substance, and is subsequently redressed. This redress must be appropriate and sufficient. This will depend on all the circumstances of the case, with particular regard to the nature of the Constitutional violation in issue.

Other entitled persons:

In proceedings before the Court, any non-governmental organisation, excluding organisations exercising governmental powers, can appear as an applicant, or as a third party.

A group of individuals can bring a referral: this usually consists of informal alliances, usually temporary, between several individuals. In the Constitutional Court Judgment *KI 40/90 Imer Ibrahimimi and 48 other former employees of the Kosovo Energy Corporation vs. 49 Individual judgments of the Supreme Court of Kosovo* dated 23 June 2010 the applicants were former employees of the Kosovo Energy Corporation (KEK) who were seeking monetary compensation from KEK because their pension rights were violated.

A referral can also be brought on behalf of a company. In the Constitutional Court Resolution *KI 41/09 AAB RIINVEST University vs. Government of the Republic of Kosovo* dated 27 January 2010 the applicant was a provider of higher education, bearing the name “AAB- RIINVEST University”, with its headquarters in Pristina and represented by its Secretary, Granit Curri.

Referrals can also be lodged through a representative. Where applicants choose to be represented rather than lodging the application themselves, Rule 29(2)(b) of the Rules of Procedure requires “*the name and address of representative for service*” and Rule 29(2)(c) requires “*a power of attorney for representation*” to be included in the referral.

Actio Popularis

It is important to note that the Constitutional Court does not allow referrals to be made *actio popularis*. *Actio popularis* is an action taken on behalf of society as a whole, with no specific victim. As was mentioned before in order to have an admissible referral you need to have a specific victim, therefore a referral made *actio popularis* will be deemed inadmissible

Example (Const. Court): *KI 45/09 Teki Bokshi dated 30 November 2010*

In this case the applicant sought the constitutional review of UNMIK Administrative direction No. 2003/13, which requires persons to submit their cases to the Special Chamber in English. He claimed that this was unconstitutional. However, the applicant failed to demonstrate that his rights and freedoms were directly violated by a public body. Therefore the referral was

found inadmissible.

2.3 Constitutional Rights

In order for an individual to bring a referral under Article 113(7) there needs to have been a violation of the individual's constitutional rights. If the Applicant is complaining about an issue that is not a constitutionally guaranteed right, the Constitutional Court has no competence to decide on the issue. The Constitution guarantees a wide range of rights and freedoms, for example, the Constitution under Article 25 protects the individual's right to life. In addition to the directly guarantee rights, such the right to life, the Constitution also indirectly provides for a wide range of rights through Article 22, which states that the human rights and fundamental freedoms guaranteed by the following international agreements and instruments are directly applicable in the Kosovo and, in the case of conflict, have priority over provisions of domestic laws and other acts of Kosovo institutions;

- (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 and its Protocols;
- (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, Inhumane or Degrading Treatment or Punishment

2.4 Public Authorities

Individuals under Article 113 (7) of the Constitution are only authorized to refer violations by public authorities to the Constitutional Court. There is no finite list of Public Authorities but some examples are ministries, municipalities and courts.

V ADMISSIBILITY REQUIREMENTS

3.1 Introduction

Before the Court decides whether or not there has been a violation of the individual's constitutional rights in a referral it must find that the case is admissible. The admissibility requirements are laid out in Section 36 of the Rule of Procedure of the Constitutional Court of Kosovo¹, as listed below and shall be discussed individually.

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 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 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 considered 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.

¹ <http://www.gjk-ks.org/?cid=2,37>

4. In the event that a Referral to the Court is incomplete or it does not contain information necessary for the conduct of the proceedings, the Court shall request that the Applicant make the necessary corrections within a specified time-limit, not exceeding 30 days.

5. If the applicant fails, without good cause, to make the necessary corrections within the time-limit referred to in paragraph 4 of this Rule, the Referral shall be proceeded with.

3.2 Exhaustion of all available Legal remedies

Article 113(7) of the Constitution provides for individuals to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution to the Court, **but only after exhaustion of all other legal remedies provided by the law**. In order to illustrate the importance of this requirement it is repeated in Section 36 (1) (a). In fact, according to a recent study conducted by the Kosovo Law Centre², the failure of applicants to meet this requirement has been the most frequent reason for referrals being found inadmissible.

Purpose of the rule

The rationale behind this rule is to allow the Kosovo legal system the chance to provide an effective remedy, before a case reaches the Constitutional Court. In *AAB-RINVEST University vs. Government of the Republic of Kosovo* KI 42/09 21 January 2010, the Court stated “the Court wishes to emphasize the rationale for the exhaustion rule... is to afford the authorities concerned, including the Courts, the opportunity to prevent or put right the alleged violation of the Constitution. The rule is based on the assumption that the Kosovo legal order will provide an effective remedy for the violation of the constitutional rights.”

What does this mean in Practice?

In practice this means that in order to meet the admissibility criteria the individual must first attempt all real and effective remedies available to them before sending their referral to the constitutional court. These remedies can include administrative appeals committees as well as courts.

² Presented at the KLC Panel Discussion on 12 October 2011.

Example (Const. Court): *Prenk Shllaku vs. the Government of the Republic of Kosovo* KI 77/10 03 November 2011

The applicant in this case made a referral to the Constitutional Court before the Supreme Court had decided on his appeal. Therefore, the Constitutional Court found the applicant's referral inadmissible.

Application of the rule

Flexibility

Following the jurisprudence of the ECtHR the Constitutional Court of Kosovo has stated that this rule must be applied with some flexibility, taking into account particular circumstances such as political context or the practical possibility of access to justice. Only remedies which are "real and effective" must be exhausted for a referral to become admissible. For instance, not having used a recourse that had little chance of succeeding due to established case-law will not be an obstacle to admissibility.

Example (Const. Court): *Valon Bislimi vs. Ministry of Internal Affairs, Kosovo Judicial Council and Ministry of Justice* KI 06/10 30 October 2010

In this case the Applicant had not initiated any other legal proceedings before soliciting the Constitutional Court. The Court held that since the administrative authorities were not respecting their legal framework, and that this situation deprived the applicant of any real opportunity to appeal their decisions, there didn't exist any "real and effective" remedies. The applicant was thus entitled to solicit the Constitutional Court directly.

Distribution of burden of proof

In cases where the challenged public authority claims non-exhaustion of legal remedies, it bears the burden of proving that the applicant has not used a remedy that was both effective and available.

3.3 Four month time limit

You cannot submit a referral to the Court at any time. Referrals must be submitted to the Constitutional Court within four months from date the applicant received the decision of the last effective legal remedy. This is stated clearly in Article 49 of the *Law on the Constitutional Court of the Republic of Kosovo* (the "Law") "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...”

Purpose of the rule

The purpose of the four-month rule is to promote security of the law, ensure that cases raising issues under the Constitution are examined within a reasonable time, and protect the authorities and other persons concerned from being in a situation of uncertainty for a long period of time.

This rule also provides the prospective applicant with sufficient time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, the passage of time rendering problematic any fair examination of the issues raised.

Starting date for the time limit

The four-month period runs from the date that the applicant was served the final decision in the process of exhaustion of legal remedies (see chapter 3.2), as set out in Article 49 of the Law. In other words, the date does not run from the date that the decision was issued, but from the date that the decision was received by the applicant. **It is important to note that the applicant must provide proof of the date of service.**

Continuing violations

The Constitutional court has also employed the ECtHR’s concept of “continuing violations” as an exception to Article 49 of the Law. A “continuing violation” occurs when an act of public authorities deprives an individual of rights over an extended period of time, instead of occurring instantaneously. In these cases, the four month time limit does not apply as long as the violation continues.

Example (Const. Court): Imer Ibrahim and others vs. Supreme Court of Kosovo KI 40/09 23 June 2010.

In this case the Court found that the applicants, by being deprived of the benefits of their contract with KEK, suffered a “continuous violation” of their right to peaceful enjoyment of property. Thus the four month time limit could not be applied so long as this situation continued.

Return to previous situation

If an applicant was unable to submit their referral within the four month time limit, because of an obstacle that was not within their power to overcome, they can submit a request to the Constitutional Court for return to previous situation, which means they can submit a referral after the four month time limit has expired.

Article 50 of the Law on the Constitutional Court states the applicant should submit this request for returning to previous situation within **15 days** from the removal of the obstacle and should justify such a request. The return to previous situation is **not permitted** if one year or more have passed from the day the four month deadline expired.

3.4 Anonymous application

When receiving a referral, the Constitutional Court has to be able to verify that there is an individual victim. Therefore, anonymous referrals, in line with section 36(3) (b) of the Rules of Procedure, may be deemed inadmissible.

This is a reproduction of Article 35 (2) (a) of the ECHR. The ECtHR in its Judgment *Blondje v. the Netherlands Application No 7245/09 15 September 2009* ruled that an application is anonymous, when the case file does not indicate any element enabling the Court to identify the applicant.

An application **introduced by an association on behalf of unidentified persons** is also considered anonymous.

Example (ECtHR): *Federation of French Medical Trade Unions and the National Federation of Nurses v. France Application No 10983/84 12 May 1989*

The applicant associations complained that a law enacted by the French Government constituted an unjustified interference with the right of the associations' members and patients to respect for their private life. The associations did not claim to be themselves the victims of a violation of the Convention, but stated that they represented medical staff who were allegedly the victims of a violation caused by the law. Once they stated that they were representing various individuals, who had become applicants, it became essential for the association to identify these individuals and to show that they had received specific instructions from each. Since this was not done the application was rejected as inadmissible.

Non anonymous applications

The ECtHR found, in *Kuznetsova v. Russia Application No 67579/01 7 June 2007*, that **an unsigned application form** containing all personal details was sufficient to eliminate any doubt as to the identity of the applicant and followed by correspondence duly signed by the applicant's representative is not anonymous.

The ECtHR has found that in some cases **applications introduced under fictitious names are not considered anonymous**. In the case of *Shamayev and Others v. Georgia and Russia Application No 36378/02 12 April 2005* (dec.) individuals used pseudonyms due to the fact that an armed conflict obliged them not to disclose their real names, in order to protect their family members and friends. The ECtHR did not consider that the application was anonymous, holding that "behind the tactics concealing their real identities for understandable reasons were real people identifiable from a sufficient number of indications, other than their names ..." and "the existence of a sufficiently close link between the applicants and the events in question".

3.5 Manifestly ill-founded

Manifestly ill-founded is one of the most common reasons for a referral to be found inadmissible. According to Rule 36 (2) of the Rules of Procedure, a referral may be found manifestly ill-founded if:

- a) the Referral is not *prima facie* justified, or
- b) when the facts presented 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;

In several cases, the Court found one or several of the following things: the applicants had not sustained a violation of their constitutional rights in their claim, had not presented any evidence to support the allegation that their constitutional rights were violated, or had presented no *prima facie* evidence of rights violation.

Prima facie justified

Prima facie justified means that based upon the evidence presented, the Court could find that a violation occurred, unless the evidence is challenged. Deciding whether the applicant's referral is *prima facie* justified is almost like a pre-trial. The Court examines the applicant's evidence to see whether it could be decided, based solely on this evidence that a violation could have occurred. If the Court decides that

the referral is *prima facie* justified, the referral is found to be admissible and then the Court must decide, taking into account the evidence of the opposing parties, whether or not a violation has actually occurred.

Example (Const Court): *X vs. Supreme court of Kosovo KI52/11 01 November 2011*

The applicant submitted a request for recognition of the right to material support for families of children with special needs from the Centre for Social Welfare in Z. The request was rejected. The applicant appealed the decision to the Ministry of Labour and Social Welfare Department of Social Welfare Appeal board in Prishtinë/Priština and the Supreme court, who also rejected the request. The Applicant then submitted a referral to the Constitutional Court alleging that the Judgment of the Supreme Court violated Article 51.2, Article 102.3 and Article 22 of the Constitution.

The applicant failed to state in what manner Articles 22, 51.2 and 102 supported his Referral, as prescribed by article 113.7 of the Constitution and Article 48 of the Law. The Applicant alleged that his rights were violated by erroneous establishment of facts and erroneous application of law by lower courts, without clearly stating in what way these decisions violated his constitutional rights. Therefore the Constitutional Court held that the Applicant did not provide any *prima facie* evidence indicating a violation of his constitutional rights and the case was found inadmissible.

“Fourth instance”

This is also one of the common reasons for a referral being found manifestly ill-founded. As it was said earlier, the Constitutional Court is a Court of specific jurisdiction, it is not a court of appeal, it cannot retry cases heard by the lower courts, nor can it re-examine cases in the same way as a Supreme Court. Fourth-instance applications therefore stem from a misapprehension on the part of the applicants as to the Court’s role.

This concept is explained by the Constitutional Court in its decision *KI 13/09 Sevdail Avdyli vs. the Supreme Court 17 June 2010* “*The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, mutatis mutandis, Garcia Ruiz v. Spain [GC], no. 30544/96, § 28, European Court on Human Rights [ECTHR J1999-1).*

3.6 Ratione Materiae

According to Rule 36 (3) (f) of the Rules of Procedure a referral may be found inadmissible if it is “*incompatible ratione materiae with the Constitution*”, meaning that the referral has to fall within the competence of the Constitutional Court, as defined by the Constitution. In the case of referrals brought by individuals, the Constitution states that individuals are authorised to refer violations by public authorities **of their individual right and freedoms guaranteed by the Constitution**. If the applicant’s referral is not based on a) an individual right and freedom guaranteed by the Constitution the Constitutional Court has no competence *ratione materiae*. The ECHR has a similar provision; Article 32 of the ECHR holds that “*The jurisdiction of the Court shall extend to matters concerning the interpretation and application of the Convention and its protocols...*” Examples that the ECtHR decided were *ratione materiae*; the right to a university degree, right to asylum, right to start a business and right to diplomatic protection.

3.7 Ratione Personae

Pursuant to Rule 36 (3) (g) of the Rules of Procedure, a referral may be found inadmissible if “*the Referral is incompatible ratione personae*”. In relation to referrals by individuals, this means that the referral must relate to a violation committed by a public authority in Kosovo.

Example (ECtHR): *X v. The United Kingdom Application No 6958/75 10 December 1976*

In this case the Applicant, having been in a car crash sought damages from the person he held responsible. The Applicant received an offer from the insurance company, which his lawyer urged him to accept given his remote chances of success in court, while adding that if he did not accept, he could no longer act for him. He then agreed to the offer. Subsequently he tried to resile from the settlement assisted by another solicitor, but the court dismissed his claim.

The Applicant complained to the ECtHR that by pressing him to accept the settlement, his lawyer violated his rights under Article 6 (1) of the ECHR which guarantees the right to a fair and public hearing in the determination of a person’s civil rights, and that he also violated his rights under Article 10 of the ECHR.

The ECtHR held that the case was inadmissible *ratione personae* because an applicant cannot bring a case against private individuals to the ECtHR. Therefore the Applicant could not bring a case to the ECtHR against the lawyer.

It is important to stress that an applicant **cannot** bring a referral against an individual, because they are not a public authority, or a judge, because they have immunity under the Constitution.

3.8 Ratione Temporis

According to Rule 36 (3) (h) of the Rules of Procedure a referral may be found inadmissible if it “*incompatible ratione temporis with the constitution*”. This means that referrals which relate to the period prior to the entry into force of the Constitution of Kosovo, on 15 June 2008, are inadmissible. This is because the Constitutional Court cannot assess the constitutionality of acts of public authorities, since those constitutional rights were neither determined nor guaranteed by the Constitution since the Constitution itself did not exist. Therefore, if you take a case claiming that a Decision of a court, made prior to 15 June 2008, violated a constitutional right, it will be found inadmissible *Ratione Temporis*.

Example (Cons Court): KI 69/10 Vehbi Halili vs. The Supreme Court of Kosovo dated 4 October 2011

The Applicant complained that his right to work guaranteed by the Constitution of Kosovo, which is also guaranteed by international Conventions that are directly applicable according to Article 22 of the Constitution had been violated, by the Judgment of the Supreme Court dated 5 March 2004. The Constitutional Court held that the referral was inadmissible *ratione temporis* with the provisions of the constitution because the challenged act took place prior to 15 June 2008.

N.B It is important to note that the principle of **continuing violation** (see Chapter 3.3), already discussed in this booklet, also applies to the principle of *Ratione Temporis*. This means that if a violation occurred before 15 June 2008, but is still taking place today, the Court may find the referral admissible.

VI OMBUDSPERSON

As already mentioned in this booklet Article 113 (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.

According to Article 29 of the Law on the Constitutional Court the referral must indicate whether the full content of the challenged act or certain parts of the said act are deemed to be incompatible with the constitution and specify the objections put forward against the constitutionality of the act.

Article 30 of the Law on the Constitutional Court establishes the deadline for such a referral as six months from the day upon which the contested act enters into force.

If you think that a law violates the Constitution you should contact the Ombudsperson. As it states above they have the power to review the constitutionality of law, whereas an individual applicant does not. The Ombudsperson does not have to establish victim status or exhaust all other legal remedies; they can simply approach the Court with a referral. This makes the process easier and faster.

HOW TO LODGE A COMPLAINT WITH THE OMBUDSPERSON?

You can either: meet the Ombudsperson or a representative in person, during an "Open Day"; or complete and send in a complaint form to one of the Ombudsperson offices.

In Person

During Open Days, you can meet the Ombudsperson or a Deputy Ombudsperson in person, by appointment. These appointments can be made by contacting one of the offices of the Ombudsperson (full details listed at the end of this section) or by sending an email to:

ombudsperson@ombudspersonkosovo.org.

These Open Days are held at the Prishtinë/Priština Headquarters every two weeks, and every month at the Gjilan/Gnjilane, Mitrovicë/Mitrovica, Pejë/Peć, Gračanica/Gračanicë and Prizren field offices, as well as the Vidanje/Videja sub-office. Open Days are also held monthly at the municipal offices in Gjakovë/Đakovica and, as required, at the municipal offices in Lipjan/Lipljan.

By Internet or Mail

You can also lodge a complaint remotely, by filling in a complaints form and delivering it (by mail or in person) to one of the offices of the Ombudsperson. This form can either be requested from one of the offices of the Ombudsperson, or downloaded at:

<http://www.ombudspersonkosovo.org/repository/docs/ComplaintFormPDF.pdf>

If your mother tongue is not one of the official languages, you have the right to present oral or written submissions to the Ombudsperson Institution in your mother tongue. You are also entitled to receive a reply in your mother tongue.

Contact Information

Prishtinë/Priština Headquarters

Address: Agim Ramadani St, nn. (Formerly "Kosovodrvo" building, nn)
Tel: +381 (0) 38 501 401, 545 303
Fax: +381 (0) 38 545 302
Email: ombudsperson@ombudspersonkosovo.org

Gjilan/Gnjilane Field Office

Address: "28 November" St, Municipal Building II
Tel: +381 (0) 280 20 843
Visiting hours: Mon and Thurs, 10.00 - 14.00

Gračanica/Gračanicë Field Office

Tel: +381(0) 38 64 606
Visiting hours: Monday and Thursday, 10.00 - 14.00

Prizren Field Office

Address: Str.Remzi Ademi nn, OSCE RC, II, no.20
Tel: +381 (0) 29 44 200 ext. 109
Visiting hours: Monday and Wednesday, 10.00 - 14.00

Mitrovicë/Mitrovica Field Office

Address: Agim Hajrizi Square, nn, Regional Tax Administration Building
Tel: +381 (0) 28 30 138
Visiting hours: Monday and Thursday, 10.00 - 14.00

Mitrovicë/Mitrovica Sub-Office

Address: Trepca Annex, Filipa Visnjica 4
Tel: +381 (0) 63 817 44 79, +377 (0) 44 393 181
Visiting hours: Monday and Thursday 10.00 - 14.00

Peja/Pec Field Office

Address: "Queen Teuta" no.59, Municipal Building, 3rd Floor, No. 3
Tel: +381 (0) 39 32 931
Visiting hrs: Monday and Thursday, 10.00 - 14.00

VII INTERIM MEASURES

Article 116 (2) of the Constitution establishes that *“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”*

Example (Const Court). 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 4 June 2010 dated 22 December 2010

The Applicant considered that the Law on Rights and Responsibilities of the Deputy contained provisions which were more favourable than any other retirement benefit for other citizens, and they were not in compliance with constitutional principles of equality, rule of law, non-discrimination and social justice. The Court concluded, without prejudicing the final outcome of the Referral, that the Applicant had put forward enough convincing arguments that the implementation of the challenged provisions of the Law on Rights and Responsibilities of Deputies, No. 03/L-111 of 4 June 2010 would have resulted in unrecoverable damages and that as such an interim measure was in the public interest.

How to request interim measures

Rule 54 of the Rule of Procedure of the Constitutional Court explains how to request an interim measure

(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 argument 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.

VIII FILING A REFERRAL

The rules for filing a referral are laid out in the first part of Rule 29 of the Rules of Procedure

(1) The 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 substantial justification of the referral; and
- (h) the supporting documentation and information.

(2) 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.

(3) 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...

IX SUMMARY

Article 113 (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.

- The referral only processed if the court determines all the legal requirements have been met.
- The applicant must be victim of a rights violation.
- The individual may submit a referral only after he/she has exhausted all fair and effective legal remedies.
- The referral must be served within four months of the last effective legal remedy. However, if an applicant 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 the applicant to the previous situation, i.e to before the four month time limit had expired. The Applicant should submit the request for returning to previous situation within 15 days of the removal of the obstacle and should justify such a request. The return to previous situation is not permitted if one year or more have passed from the day the deadline set in the law has expired.
- In his/her referral, the applicant must accurately clarify what rights and freedoms he/she claims have been violated and what concrete act of a public authority is being challenged.
- The referral shall be filed in writing in one of the official languages of Kosovo referral should be addressed to the Secretary General, should include the date of filing, and the signature of the person filing the referral.

X USEFUL WEBSITES

Constitutional Court:

<http://www.gjk-ks.org/?cid=2,3>

Court Annual Reports:

<http://www.gjk-ks.org/?cid=2,47>

Constitution:

<http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>

Law on the Constitutional Court:

<http://www.gjk-ks.org/?cid=2,25>

Rules of Procedure of the Constitutional Court:

<http://www.gjk-ks.org/?cid=2,37>

European Convention on Human Rights and Fundamental Freedoms:

<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>

European Court of Human Rights:

http://www.echr.coe.int/ECHR/homepage_en

European Court of Human Rights- Case law- HUDOC:

<http://www.echr.coe.int/ECHR/EN/hudoc>

European Court of Human Rights Practical Guide:

<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide/>

XI USEFUL CONTACTS

Constitutional Court

PERANDORI JUSTINIAN,

P.N.10000,

PRISHTINE,

KOSOVO

TEL:

+381 (0)38 220 103

+381 (0)38 609 120

+381 (0)38 609 119

FAX:

+381 (0)38 220 112

WEB :

<http://www.gjk-ks.org/?cid=2,1>

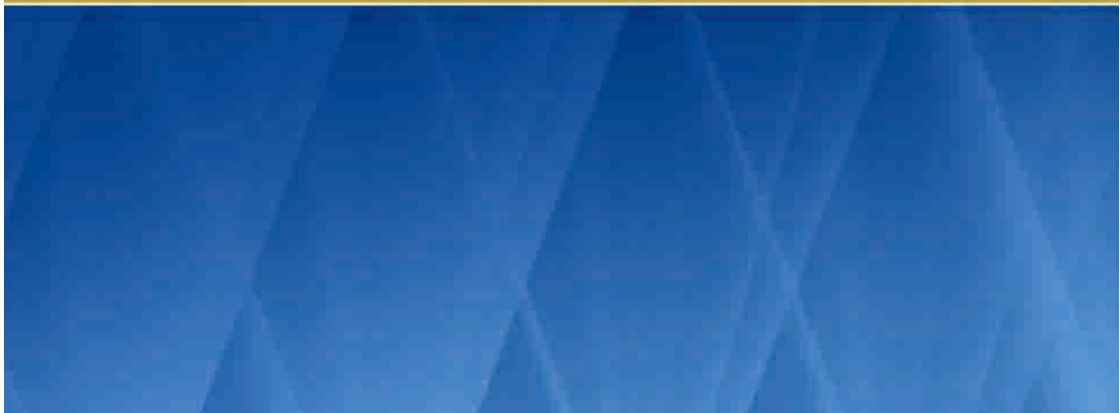
ECMI Kosovo

Str. Rexhep Luc 16/3
10000 Prishtinë/Priština, Kosovo

Tel: +381 (0)38 224 161

Email: info@ecmikosovo.org

Web: www.ecmikosovo.org

A decorative footer consisting of a solid blue background with a subtle, overlapping geometric pattern of triangles and lines in a slightly lighter shade of blue.