

# Report on the Consistency of the Case-law and Harmonization of Judicial Practice in the Context of the Right to Fair Trial



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This publication has been prepared under the project on Support to the Constitutional Court in Applying and Disseminating European Human Rights Standards Phase II, implemented by the Council of Europe.

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Pictures: Shutterstock.com  
Layout and cover design: LeoPrint  
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## I. EXECUTIVE SUMMARY

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This Report provides a comprehensive analysis of the issue of (in)consistency of judicial decision-making in Kosovo\*. In pursuing this aim, the analysis is built on a two-pronged approach; first the Report delineates the legal backdrop pertaining to the consistency of the judicial practice; second, the Report delves into the judicial practice by investigating the case-law of the Constitutional Court as well as of the Supreme Court and other regular courts. Some of the most illustrative cases of the regular courts pertaining to the (in)consistency of the case-law, primarily Supreme Court; as well as of the Constitutional Court, have been scrutinized and presented in this Report.

Legal consistency enjoys strong legal protection, as a constitutional principle as well as an individual right embodied within the general concept of the right to a fair trial. In judicial realm, pertinent judicial mechanism and procedures for ensuring the consistency of the judicial-making are in place. Supreme Court and Constitutional Court – in different ways – are authorized to serve as guarantors of the judicial consistency. These two courts have played important role in establishing the practice of ensuring consistency of the judicial decision-making. This fact notwithstanding – as this Report highlights – the judicial system in Kosovo\* still suffers from the divergences in the case-law. What is more, even the Supreme Court and the Constitutional Court have manifested inconsistencies in their case-law.

This Report identifies the major loopholes and spells out recommendations for ensuring the consistency of the judicial decision-making. The analysis focuses heavily on the jurisprudence of the Supreme Court and the Constitutional Court, because of their mandate to ensure the consistency of the judicial practice and also because through the decisions of this courts it is possible to discern a general overview of the issue of judicial practice. It has to be underlined that systematic analyses and reports on the consistency of case-law in Kosovo\* are scarce. Consequently, difficulties in identifying cases of inconsistencies in the judicial practice and obtaining relevant court decisions has been the biggest challenge for preparing this Report. In particular, it is very difficult to navigate thousands of decisions of the basic courts and the Appellate Court. Databases on judicial practice, such as official page of the Kosovo Judicial Council or the *Lex-Doc* database, are important source of information and data. However, they do not provide information and analysis on specific aspect of the judicial practice, such as the (in)consistency of the court practice.

The author of this Report relied on personal communication with the officials and professionals of the justice system, empirical research on the decisions of the courts that are public online; professional analysis and media reports on the cases of judicial inconsistencies as well as personal experience of the author (as a former judge of the Constitutional Court). The investigation focuses on the most illustrative cases of the divergences in the case-laws, as well as the cases that drew public attention.

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*\* All references to Kosovo\*, whether to the territory, institutions, or population, in this text shall be understood in full compliance with United National Security Council Resolution 1244 and without prejudice to the status of Kosovo\*.*

## II. NORMATIVE FRAMEWORK IN KOSOVO\* ON THE CONSISTENCY OF CASE-LAW

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Constitution of Kosovo\* does not contain any article or provision that explicitly provides for the consistency of the court jurisprudence. Yet, this right is embodied within the wide scope of the right to fair and impartial trial, which is guaranteed by the Article 31 of the Constitution. In judicial realm, consistency of the court practice is construed as an essential component of the principle of legal certainty, and the latter is considered as a fundamental element of the right to a fair trial (embodied in the Article 31 of the Constitution).<sup>1</sup> Indeed, the principle of legal certainty – which embodies within its scope consistency of the case law – has dual constitutional status. Thus legal certainty is a pivotal constitutional principle of a general character, as well as a specific legal right that individuals can invoke in court proceedings.

Consistency of the case law is an essential element of fair and effective judiciary, and also an individual right that every person can invoke in court proceedings. As it will be elucidated at depth in the following parts of this Report, the Supreme Court has the prerogative of a guardian of the principle of consistency in the judicial decision-making. This power is vested on the Supreme Court by the Law No. 06/L-054 on Courts (hereinafter: *Law on Court*). On the other hand, the Constitutional Court has the function of ensuring the rights of persons to fair and impartial trial by, *inter alia*, guaranteeing that regular courts take consistent decisions. In this endeavor, Article 31 of the Constitution serves as a constitutional backdrop within which the Constitutional Court has adjudicated on the rights of persons to seek judicial protection against divergences of the case-law. Further, Article 22 [Direct Applicability of International Human Rights Agreements and Instruments] and Article 53 [Interpretation of Human Rights Provisions], have indirect effect in this regard. Article 22 of the Constitution makes the major international human rights instruments directly applicable in Kosovo\* – including the European Convention of Human Rights (Hereinafter: *ECHR*) – Article 6 of which guarantees fair trial and judicial consistency as one of its elements. Further, Article 53 of the Constitution imposes obligation on the Constitutional Court - and other courts for that matter – to interpret human rights provided by the Constitution in compliance with jurisprudence of the European Court of Human Rights (hereinafter: *ECtHR*). This, practically, means that the issue of consistency of case-law, when presented in the court proceedings on individual cases, has to be interpreted in compliance with the jurisprudence of the ECtHR.

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<sup>1</sup> Article 31 [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers. 2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law. 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. 4. Everyone charged with a criminal offense has the right to examine witnesses and to obtain the obligatory attendance of witnesses, experts and other persons who may clarify the evidence. 5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law. 6. Free legal assistance shall be provided to those without sufficient financial means if such assistance is necessary to ensure effective access to justice. 7. Judicial proceedings involving minors shall be regulated by law respecting special rules and procedures for juveniles.

### III. JUDICIAL APPROACH

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As underscored, by virtue of Constitution and laws, Constitutional Court and Supreme Court are authorized to ensure consistency of judicial practice. The Appellate Court and basic courts have no direct role – in formal sense – for the unification of the judicial practice. They can bring to the attention of the Supreme Court the issues and situations, pertaining to the (in)consistency of judicial practice, that warrant legal opinion or guideline by the Supreme Court. Yet, these courts have no internal professional mechanisms or standards for following systematically the judicial practice, from the perspective of consistency of case-law on similar cases. This is important particularly for Appellate Court, as this is the only court of second instance, with the jurisdiction for the entire territory of Kosovo\* and which adjudicates on all complaints against the decisions of all seven basic courts (with the exemption of the Commercial Court, which has two instances and whose decisions can be appealed at the Supreme Court and the Constitutional Court).

#### 3.1 Supreme Court and other regular court

Article 26 of the Law on Courts [Competencies of the Supreme Court], in paragraph 1.4, stipulates that the Supreme Court “defines principled attitudes and issues legal opinions and guidelines for unique application of laws by the courts in the territory of Kosovo\*.” Article 14 of the same Law [Competences and Responsibilities of the President and Vice-President of the Court], in paragraph 2.10, prescribes that “the President of the Court shall convene an annual meeting of all judges in that court for counseling on the administration of justice within that court; to analyze the organization of the court; to review and propose changes to procedures and practices [...]” Beyond these articles, neither the Law on Courts nor any other normative act speaks specifically about the procedure in the Supreme Court for issuing legal opinions and guidelines for unification of the practice (i.e., how the divergences in the case-law are detected; who can bring to the attention of the President of the Supreme Court the issue/cases if inconsistencies).

Supreme Court issues principled positions for bridging internal divergences, namely for unifying its own case-law; and legal opinions and guidelines for unifying the practice of courts of lower instances.

So far, the Supreme Court has issued many principled positions, legal opinions and guidelines on a range of issue, such as sentencing guidelines in criminal procedures; interpretation of the collective agreements in the sectors of education; health; labor contests; determination of default interest in cases of compensation for damage in traffic accident; interpretation of the Code of Juvenile Justice; deletion of sentences from criminal records; application of the provisions of the minor offences procedure; employment disputes related to the indefinite employment contract; status of public servants etc.

Since 2012, the **Supreme Court has issued 73 legal opinions and principled positions as well as 26 professional guidelines.**<sup>2</sup> In general, legal opinion, principled positions and professional guidelines have been issued either in relation to adoption of new laws and

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<sup>2</sup> This figure is taken from the official page of the Supreme Court of Kosovo\*, where 73 legal opinions and 26 professional guidelines are accessible. See the official webpage of the Supreme Court, [Mendimet Ju.ridike – Gjykata Supreme \(gjyqesori-rks.org\)](http://mendimet.juridike-gjykata.supreme.gjyqesori-rks.org).



creation of new justice mechanism (e.g., Law on Minor Offences; Law on Commercial Court; Law on Public Officials); for clarifying and unifying inconsistent case-law on issues that draw public attention (such as application of the collective agreements on the massive public sectors such as education or health); in addressing inconsistencies of the practice of lower courts, that the Supreme Court has noticed (e.g. sentencing guidelines, application of the Criminal Code of Minors; employment disputes related to the indefinite employment contract); or in the cases when the Constitutional Court has found inconsistency in the application of law by the Supreme Court (e.g., determination of default interest in cases of compensation for traffic accidents).

These statistical figures show that Supreme Court has been quite active in issuing positions, opinions and guidelines aiming at unifying judicial practice and ensuring consistent interpretation of laws. However, the statistical data on itself are not indication that as a result of the Supreme Court actions, the inconsistency in the case-law does not persist.

First, there is no mechanism within the Supreme Court to monitor systematically implementation by the regular courts of the legal opinions and guidelines issued by this Court. For instance, it has been lately reported on the media that there are cases when **execution of the final court judgments on the custody of children** (in cases of divorce), do not follow the legal opinion issued on this issue by the Supreme Court in 2016.<sup>3</sup> Such situations are even more frequent when it comes to the sentencing policies in criminal cases, whereby courts sometimes give different sentences in very similar cases and circumstances.

Furthermore, there are many cases of divergences in the practice of regular courts that do not reach the Supreme Court. The divergences in practices of regular courts have in many occasions become public. One case that drew a lot of public attention and controversy is the so-called **“Case of Passports,”** which was related to the public bid that an Austrian company won for the production of biometric passports. Two different procedures were conducted in this case; namely criminal procedure in Kosovo\* and arbitration procedure in Paris. In criminal procedure, several persons were found guilty and sentenced to many years in prison for some criminal offences, including fraud and money laundry.<sup>4</sup> After termination of the contract by the Ministry of Internal Affairs of Kosovo\*, the Austrian company that had won the bid for furnishing with the biometric passports, initiate arbitration procedures in the Arbitration Tribunal in Paris. The Arbitration Tribunal found Kosovo\* to be in the breach of the contractual obligation and obliged it to compensate the Austrian company in amount of around EURO 5 million (five million). In November 2014, the Ministry of Internal Affairs of Kosovo\* filled a lawsuit at the **Basic Court in Prishtina – Department of Economic Issues**, contesting the jurisdiction of the Arbitration Tribunal. The International Arbitration Tribunal in Paris was included as one of the defendants in this lawsuit. The Basic Court dismissed the claim of the Ministry of Internal Affairs with the reasoning that it had no jurisdiction to adjudicate on the annulment of the decisions of the international arbitration tribunal. Yet, this decision of the Basic Court was quashed by the **Appellate Court**, which remanded the case for retrial. In meantime, the Ministry of Internal Affairs

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<sup>3</sup> See, [Gjykata obligon B.G që në afat prej tri ditësh t'ia dorëzojë në përkujdesje fëmijët ish-bashkëshortes M.L- Betimi për Drejtësi \(betimiperdrejtesi.com\)](http://Gjykata.obligon.B.G.që.në.afat.prej.tri.ditësh.t'ia.dorëzojë.në.përkujdesje.fëmijët-ish-bashkëshortes.M.L-Betimi.për.Drejhtësi.betimiperdrejtesi.com).

<sup>4</sup> This case has to do with the theft of 1.4 million Euros, which happened within the framework of the public contract for the supply of biometric passports to the Ministry of Internal Affairs of Kosovo\*.

withdrew the claim from the Kosovo\* courts. Kosovo\* had few cases in international arbitration tribunals, but lack of jurisdiction of the Kosovo\* courts to adjudicate on the jurisdiction of these tribunals was never questioned.

Another example that was reported in the media (in 2024) is related to the **Commercial Court**, which has decided differently in **two similar situations involving the Ministry of Health**. In one judgment, the Commercial Court found that the Ministry of Health does not have the power to annul a public tender for furnishing with drugs because the price of a drug was 100% higher than in private market. In another case, the same Court found that the Ministry of Health has the power to annul a public tender for furnishing with drugs, because the price of a drug was 100% higher than in private market.<sup>5</sup>

Such discrepancies are also present in the decisions of **the Independent Oversight Board for the Civil Servants** (hereinafter: *IOB*). The Constitutional Court has qualified the IOB as a tribunal for civil servants. Thus, in some occasions the IOB has annulled decisions of the public institutions for imposing disciplinary measures against the civil servants, when the latter were not granted the opportunity to be heard by the disciplinary commission; in some other cases the IOB took different position (i.e., confirmed the decisions of the disciplinary commissions although there was no hearing was held for the civil servants). Furthermore, there are cases when the IOB annulled certain decision of the administrative organ and remanded the case for reconsideration, just to confirm latter the same decision, with the same bases and justification.<sup>6</sup> The practice of the IOB is important to highlight for two reasons. First, IOB is a remedy that has to be exhausted by the civil servants in the administrative procedure, before initiating court proceedings. Second, many persons (i.e. civil servants) do not pursue their cases in the court procedures, after decisions of the IOB, due to the financial burden of the court proceedings and also because of the excessive length of proceedings in this type of cases.

In some instances, the Supreme Court itself has failed to bridge the inconsistencies, and, furthermore, has contributed to the opposite. One starling examples is the profound discrepancy among the regular courts and between them and the Constitutional Court in **qualifying a suspect as “official person,”** in connection with the criminal offences of Official Corruption and Criminal Offences Against Official Duty (Chapter XXXIII of the Criminal Code).

Thus, in the case KI 230/19, the Constitutional Court had found a violation of the right to fair trial because, in the view of the Constitutional Court, *“a sufficient and clear reasoning regarding the status of the ‘official person,’ was not given to the Applicant in any of the regular court judgments, on the contrary, his status (as “official person”) has always been ascertained by the use of analogy, based on the Law on Public Procurement No. 2003/17, without justifying with a single word according to which paragraph of Article 107 of the Provisional Criminal Code.”* This line of reasoning was followed by the Basic Court of Prishtina, in the case DRK PP. Nr. 44/24, when it stated that an authorized person of a private company cannot be considered as “official person.” In another interesting case, in 2023, the Basic Court of Mitrovica dismissed a charge of the Prosecutor against owner of the driving school,

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<sup>55</sup> [Moskonsistenca e Gjykatës Komerciale për çështje të njëjta - KOHA.net](#).

<sup>6</sup>See, among others decisions of the IOB: Vendim A.nr.456/2023, dt.18.04.2023; Vendim A nr.922/2022, 12.12.2022; Vendimit A.nr.280/2023, të datës 30.03.2023.

reasoning that the personnel of the driving school cannot be qualified as “official person” (Judgment number P.nr.89/2022).

But this interpretation was to be contradicted a year later by three instances of the regular courts. Thus, in the case DKR PP.nr.44/24, the Public Prosecutor of Peja initiated criminal procedure against a driving instructor of a private driving school for, among others, bribery, which falls within offences of “Official Corruption and Criminal Offences Against Official Duty.” This qualification of the driving instructor as an “official person,” was based on the Law on Driving License. Three instances of the regular courts, namely the Basic Court in Peja, the Appellate Court and the Supreme Court, approved the interpretation of the Prosecutor, according to which a driving instructor of a private driving school can be qualified as an “official person,” in criminal procedure and this qualification was based by relying on the Law on Driving License (i.e., by using analogy); not on the Criminal Code. These decisions contradict not only two previous decisions of the regular courts mentioned above, but also they are in a stark contrast with the interpretation of the Constitutional Court in the case KI 230/19, whereby it had reasoned that analogy in criminal procedure cannot be used to move beyond the Criminal Code, for qualifying the criminal offences.

In addition to the divergences among various courts, the Supreme Court has suffered from divergences in its judicial practice. This will be illustrated by the jurisprudence of the Constitutional Court presented on the section below.

### 3.2 Constitutional Court

As a general observation, the Constitutional Court of Kosovo\* follows rigidly the jurisprudence of the ECtHR. This is the case also with the constitutional adjudication on the individual complaints related to the inconsistency of case-law of regular courts. Before delving into the case-law of the Constitutional Court, it is important to reiterate that the Constitutional Court decides on the cases of inconsistency of case-law of regular courts only in individual cases, namely requests lodged by physical and legal persons.

Constitutional Court has relied on the fundamental principles concerning the consistency of the case-law, as developed through the jurisprudence of the ECtHR, and discerned three relevant criteria on the basis of which it decides whether the divergence in case-law, in specific cases, constitutes a violation of the principle of legal certainty, respectively violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR. In concrete terms, the decision of the Constitutional Court in these cases is based on the following criteria/questions: (a) whether the divergences in the case-law are “*profound and longstanding*”; (b) does the domestic law provide for mechanism capable of resolving these divergences; and (c) whether those mechanisms have been applied and to what effect, in a concrete case.

In light of the above, it is important to underscore that – contrary to the widespread opinion – not every divergence of the court practice constitutes violation of the legal certainty. According to the jurisprudence of the Constitutional Court (and based on the jurisprudence of the ECtHR), legal certainty (Article 31 of the Constitution) is undermined only if divergences in case-law of courts are “profound and longstanding” and judicial mechanisms to bridge them are either non-existing or have not been utilized.

Cases on judicial consistency have been raised in the Constitutional Court mostly by the legal persons (i.e., banks, insurance companies) and, to a lesser degree, by the individuals. Some of the landmark cases of the Constitutional Court are presented below.

**- Case KI87/18**

A foreign insurance company lodged a constitutional complaint claiming that its right to fair and impartial trial and the principle of legal certainty were violated, because the Supreme Court did not provide satisfactory reasoning to justify its changing of the judgment of the Appellate Court, related to the determination of the amount of default interests in cases of traffic accidents. The divergences in the judgments of the Supreme Court were related to the contradictory application of various laws/normative acts for the same situations; namely Law on Obligatory Relations; or/and Central Bank of Kosovo\* Rule No. 3 on Compulsory Motor Liability Insurance; or/and Law 04/L-018 on Compulsory Motor Liability Insurance. Thus, the Supreme Court determined that the annual interest rate should be eight percent (8%) per year, based on Article 382 of the Law on Obligatory Relations and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as decided by the lower instance courts.

In deciding the case, the Constitutional Court observed that the Supreme Court, in other cases that fully corresponded to the legal and factual situation with the case in question, did not take a consistent position regarding the calculation of interest rates and provided divergent legal reasoning. Consequently, the Constitutional Court concluded that the Supreme Court had violated the rights of the applicant to a reasoned court decision. Furthermore, the Court established that this had also triggered the violation of the principles of legal certainty, which is one of the fundamental components of the rule of law, as embodied in the right to a fair trial under Article 31 of the Constitution and Article 6 of the ECHR. The Constitutional Court reasoned that the regular courts, in their jurisprudence, may render different decisions reflecting the development of the case-law. However, divergences from the judicial practice must have objective and reasonable justifications and explanations, which in the present case was absent in the judgment of the Supreme Court. It also underlined that the Supreme Court, as the highest court in the judicial hierarchy, had a special responsibility to reason a decision that would explain all the reasons for the divergence from the previous case law. In this case, the Constitutional Court concluded that the divergences in this case-law of the Supreme Court in this case were profound and existing mechanisms of unification of the case-law were not effective. Consequently, the Constitutional Court found that the judgment of the Supreme Court in this case violated the right to fair and impartial trial, because of the divergence of the case-law.

**- Case KI235/19**

This case was also relates to determination of the default interest in the traffic accidents. The request in the Constitutional Court was submitted by a foreign insurance company and the circumstances of this case were related to an accident of 2009, in which one person lost her life. Liability for the accident fell on the persons whose vehicle was insured by the company which filed this request at the Constructional Court (the Applicant). The Applicant compensated the family of the deceased in the amount of 36,000.00 euro. Regarding this amount in 2015, the Applicant addressed to another insurance company in Kosovo\*, with a

request for compensation on the basis of the right to subrogation determined through the Law on Obligatory Relations, and in the absence of an agreement, addressed the Basic Court by a lawsuit. The Basic Court and the Court of Appeals recognized the right to the Applicant, confirming the obligation of the Kosovo\* insurance company to compensate the Applicant in the abovementioned amount and also the obligation to pay interest of twelve percent (12%) per year, starting from 5 June 2015 until the final payment. The Supreme Court had also finally confirmed the Applicant's right to respective compensation on the basis of subrogation, but modified the Judgment of the Basic Court and that of the Court of Appeals, regarding the default interest. The Supreme Court determined that the annual interest rate should be eight percent (8%) per year, based on Article 382 of the Law on Obligatory Relations and not twelve percent (12%) per year, based on Article 26 of the Law on Compulsory Insurance, as decided by the lower instance courts. This finding of the Supreme Court, regarding the amount of default interest, was challenged by the Applicant before the Constitutional Court, alleging a violation of Article 31 of the Constitution in conjunction with Article 6 of the ECHR, on the grounds of violation of the principle of legal certainty, as a result of divergence in the relevant case law of the Supreme Court; and lack of a reasoned court decision.

The Constitutional Court assessed the Applicant's allegations regarding legal certainty and the right to a reasoned decision, as one of the guarantees established in Article 31 of the Constitution in conjunction with Article 6.1 of the ECHR. Constitutional Court found no violation of the principle of legal certainty, emphasizing that the Supreme Court on 1 December 2020 issued a "Legal Opinion on Interest on the Applicable Law, Amount and Time Period of Calculation" based on Article 14, paragraph 2, point 10 of the Law on Courts. With this Legal Opinion, that Supreme Court has clarified the applicable law in cases of default interest in the traffic accidents and thus has set the unified standard that all regular courts must follow.

**NOTE:** *There were few decisions of the Constitutional Court which found violation of the principle of legal certainty, as a result of "long standing and profound divergences" by the Supreme Court on the cases of determination of default interests, in cases of compensation of damage in traffic accident. Consequently, on 1 December 2020 Supreme Court issued a "Legal Opinion on Interest on the Applicable Law, Amount and Time Period of Calculation," with the aim of unifying the case-law on this issue.*

#### **- Case KI78/21**

The case was related with the "Notification" issued by a commercial bank for the termination of the employment contract with an employee, due to the breach of work duties by the latter because of the approval of a loan for a client based on falsified documentation. The applicant had initiated court proceedings and courts of different instances took several decisions. Ultimately, the Supreme Court rejected the applicant's appeal. The applicant, among other claims, alleged violation of his right to a fair and impartial trial as a result of contradictory decisions or divergence in the case-law of the Supreme Court. In support of these allegations, the applicant submitted to the Constitutional Court six other judgments, in which the Supreme Court had interpreted and applied the provisions of the laws applicable to employment differently.



Constitutional Court found violation of Article 31 of the Constitution, in conjunction to Article 6 of the ECHR, related to the principle of legal certainty in the context of lack of consistency, namely the divergence of the Supreme Court's case law. The Court, after elaborating the basic principles and criteria of the ECtHR in this respect, applied the same in the circumstances of the specific case. The Constitutional Court found that in the Supreme Court's case law there are "deep and long-term differences" in terms of the law applicable in cases of termination of employment contract by the employer, and consequently found that the Judgment of the Supreme Court had violated the principle of legal certainty, as a result of the divergences in the court practice of the Supreme Court. In this line, the Court emphasized the contradictory application and interpretation by the Supreme Court in this case of the provisions of the Law on Labour of 1989 and the Essential Labour Law [of 2001].

In the reasoning of its decision, the Constitutional Court, among other findings, underlined that the Supreme Court did not use the mechanisms aimed of ensuring the necessary consistency of its case law, in the service of the legal certainty and the principle of the rule of law.

#### **- Case KI116/21**

The circumstances of the present case are related to an employment relationship dispute that was initiated with the "Notification" of a commercial bank, for the termination of the Applicant's employment contract. As a consequence, the Applicant had filed a statement of claim before the former Municipal Court, whereby he had requested the annulment of the Notification, and the reinstatement to his working place. Initially, the Basic Court had approved the Applicant's statement of claim and annulled the aforementioned Notification of the Bank as unlawful, with the reasoning that no disciplinary proceedings had been conducted against him as stipulated in the Law on Labor Relations of 1989, which, according to the Basic Court was applicable in the circumstances of the case, considering that the UNMIK Regulation No. 2001/27 on the Essential Labor Law in Kosovo\*, does not repeal the provisions regarding the disciplinary proceedings of the Law on Labor Relations of 1989. Against such judgment, the Bank had filed an appeal before the Court of Appeals, which had affirmed the Judgment of the Basic Court. However, the Supreme Court, acting upon the Bank's request for the revision, had modified the judgments of the two lower instances, with the reasoning that the Notification on termination of the employment contract is in compliance with the UNMIK Regulation No. 2001/27 on the Essential Labor Law.

The Applicant challenged in the Constitutional Court the judgment of the Supreme Court, alleging, *inter alia*, violation of his right to fair and impartial trial guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution and Article 6 [Right to a fair trial] of the ECHR, on the grounds of the breach of legal certainty as a result of the contradictory decisions or divergence in the case law of the Supreme Court – given that the latter had decided differently in other cases with the same factual and legal circumstances.

The Court, while examining the Applicant's allegations related to the breach of the principle of legal certainty as a result of the lack of consistency, referred to its previous case-law on entirely similar cases, in which this Court had found violation of Article 6 of the ECHR, exactly in the same context. The Constitutional Court argued that in the aforementioned cases,

having analyzed the response of the Supreme Court to the questions posed by the Constitutional Court regarding its legal position in the interpretation and application of the Law on Labor Relations of 1989 and the UNMIK Regulation No. 27/2001 in the respective labor disputes, initially emphasized that the Supreme Court, in assessing the legality of the termination of employment relationship as a result or not of the conduct of disciplinary proceedings, had not consistently applied the Law on Labor Relations of 1989 and the UNMIK Regulation No. 27/2001; interpreting them sometimes together and sometimes in isolation from each other, thus resulting in different decisions and positions as to whether an employment relationship may be terminated without the conduct of the disciplinary proceedings. Consequently, by applying the standards established by the ECtHR, the Constitutional Court concluded that in the practice of Supreme Court there are "*profound and long-standing differences*" in the interpretation and application of the provisions of the Law on Labor Relations of 1989 and those of the Essential Labor Law, namely the UNMIK Regulation No. 27/2001 and that there are Supreme Court mechanisms for harmonization of this case law, which have not been utilized.

Consequently, the Constitutional Court concluded that the "*profound and long-standing differences*" in the case-law of the Supreme Court, in conjunction with the non-use of mechanisms stipulated by law and designed to ensure appropriate consistency within the case-law of the highest court in the country, have resulted in the breach of the principle of legal certainty and in violation of the right to fair and impartial trial of the Applicant (Article 31 of the Constitution in conjunction with Article 6 of the ECHR).

**General comment:** In the above (and many other) cases, Constitutional Court set a standard for the regular courts, with regards of consistency of the case-law, as an essential component of the principle of legal certainty, which is embodied within the ambit of Article 31 of the Constitution.

However, in few but important cases, Constitutional Court itself deviated from this principle. Radical departures from its previous case-law of the Constitutional Court were manifested in few cases related to individual applications, as well as cases of "abstract constitutional review."

Taking into account the fact that decisions of the Constitutional Court are final (Kosovo\* is not yet part of the judicial mechanisms of the ECHR/CoE), and the profound impact of the decisions of this court in the overall socio-political life of the country, it is of crucial importance to bring to the light the inconsistencies in the case-law of this court as well.

Two illustrative cases of the recent years have been presented below. It is important to explain that, although the second case is related to the so-called "abstract constitutional review," it has a profound impact on individual rights, as it related to the salaries in the public and private sector.

## - Case KI 57/22 and KI 79/22

This case was related to the procedure conducted by the Kosovo Prosecutorial Council (hereinafter: *Prosecutorial Council*), in 2022, for selection of the candidate for the Chief State Prosecutor.<sup>7</sup>

On 28 April 2022 and 6 June 2022, respectively, two applicants who were candidates for the position of the Chief State Prosecutor addressed their referrals to Constitutional Court, alleging that the Decision of the Prosecutorial Council proposing the candidate for the Chief State Prosecutor was rendered in violation of their rights and freedoms guaranteed by the Constitution and the ECHR.

In relation to the requirement of exhaustion of legal remedies in regular courts, the applicants claimed that they should be exempted from this constitutional obligation, maintaining, among others, that the Law on the Prosecutorial Council does not provide for legal remedies against the decisions of the Prosecutorial Council and the proceedings before the Basic Court in Prishtina take considerable time, during which the mandate of the Chief State Prosecutor may be entirely consumed. In arguing that they should not be required to exhaust legal remedies in the regular courts, the applicants particularly referred to two judgments of the Constitutional Court in identical cases (in the year 2014), namely cases KI 99/14 and KI 100/14. In both these referrals, the applicants were candidates for Chief State Prosecutor and contested in the Constitutional Court legality of the procedures conducted by the Prosecutorial Council. In these cases, the Constitutional Court absolved the applicants from the obligation to exhaust legal remedies in front of the regular courts, considering these remedies to be ineffective. In those cases, the Constitutional Court had reasoned that “even if there are legal remedies, in the Applicants' case they are not proved to be efficient. Moreover, taking into consideration the specificity of the election procedure for the position of Chief State Prosecutor and the necessity this to be done in a timely fashion, the Court is of the opinion that there is no legal remedy to be exhausted.” The same line of reasoning the Constitutional Court has followed in two latter cases related to the procedure of the Kosovo Judicial Council, for the selection of the candidates for the President of the Supreme Court (Case KI34/17), and the President of the Appellate Court (Case KI 155/17). In these two cases two candidates for the president of the Supreme Court, respectively Appellate Court, contested the legality of the procedures conducted by the Kosovo Judicial Council, to select two candidates for the presidents of the two respective courts. In both these referrals, the Constitutional Court did not require from the applicants to exhaust legal remedies in the regular courts, arguing that there are no effective remedies to exhaust (the status of the Kosovo Prosecutorial Council and of the Kosovo Judicial Council are the same and so are the procedures they follow for the high-ranking appointments in the judicial and prosecutorial system).

In sharp contradiction to the interpretations of the four above referrals, in exactly the same situation the Constitutional Court in the case Cases KI 57/22 and KI 79/22 dismissed the applications as inadmissible, arguing that the candidates for the chief state prosecutor had to exhaust remedies at the regular courts, before lodging a request at the Constitutional Court. What made this new practice even more problematic is the fact that it took more

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<sup>7</sup> As provided by the Constitution and the pertinent laws, the selected candidate for the position of the Chief State Prosecutor is subsequently proposed by the KPC to the President, for the appointment by the Presidential decree.



than a month to the Constitutional Court to declare these referrals as inadmissible – a period within which the deadline for submission of the lawsuit on administrative contest in the Basic Court by both applicants, expired. Subsequently, one of the candidates tried to pursue a procedure for administrative conflict (Law on Administrative Conflicts) at the regular courts, but his claim was rejected as out of time. He then submitted a new request to the Constitutional Court arguing that he had lost the possibility to pursue legal remedies at the regular courts, because of the radical deviation of the Constitutional Court from its previous practice and, consequently, he was denied the right to legal remedies (Article 32 of the Constitution) and the right to judicial protection of rights (Article 53 of the Constitution) But, this time his referral was declared by the Constitutional Court inadmissible, as manifestly ill-founded.

#### - **Case KO158/23**

The referral in this case pertained to the constitutional review of the Law No. 08/L-142 on Amending and Supplementing the Laws that Determine the Amount of the Benefit in the Amount of the Minimum Wage, Procedures on Setting of Minimum Wage and Tax Rates on Annual Personal Income.

The Constitutional Court found the proposed amendments to be in the conformity with the Article the Constitutional, namely Article 24 [Equality Before the Law] and Article 46 [Protection of Property].

In essence, the contested Law amended and supplemented the aforementioned laws in two relevant aspects. First, it changes the manner of determining the amount of pensions and compensations, including the relation of this amount with the minimum wage for the Kosovo\* Liberation Army veterans, blind persons, and paraplegic and tetraplegic persons. The new Law changed existing regulations, according to which the amount of pensions and/or corresponding compensations was related to the amount or a level of the amount of the minimum wage in Kosovo\* and now the amount of these pensions and/or compensations was to be set by the Government, with the proposal of the responsible Ministry of Finance, depending on the budget possibilities, the cost of living and eventual inflation. Secondly, it changes the manner of determining the amount of the minimum wage in Kosovo\*, specifying that, contrary from the existing regulations according to which at the end of each calendar year the Government determined the minimum wage according to the proposal of the Economic-Social Council. In the absence of a proposal from the latter, it is the Government itself that determines the amount of the minimum wage.

In assessing the constitutionality of the contested Law, the Constitutional Court, *inter alia*, referred to the case-law of the ECtHR, emphasizing the fact that states, in principle, have discretion in determining social policies, including the nature and level of benefits and/or compensation for different social categories, always under the obligation of equal and proportional treatment of these categories, including in the context of the corresponding legitimate expectations for compensation and/or support from the state. Further, the Constitutional Court argued that the change in the method of setting the minimum wage in the context of the composition and decision-making of the Economic-Social Council may affect the manner of consultation and/or decision-making among representatives of employers' organizations, employees and the Government, in determining the level of the

minimum wage. Nevertheless, the Constitutional Court argued that it is not within the competence of this Court to assess the selection of public policy by the representatives of the people, but only to assess whether the provisions of the Constitution have been violated.

This approach of the Constitutional Court, emphasizing the discretion of the state, primarily of the Government, to formulate public policies including determining the wages, was not in line with two previous judgments of the Constitutional Court on two laws on salaries in public sector (namely the judgment KO 2019/19, adopted in 2019 and judgment KO 79/23, adopted in 2023). In both these judgments the Constitutional Court proclaimed unconstitutional two laws on the salary on public sector that were adopted by the Assembly. With the judgment of 2019, the Constitutional Court annulled the entire Law, whereas with the Judgment of 2023 it annulled many of the provisions of the newly-adopted Law on Salaries in Public Sector. In both these judgments, the Constitutional Court did not pay particular attention to the discretion of the states (Government and Assembly), to determine economic and social policies through the unified system of wages in the public sector.<sup>8</sup>

It is important to emphasize in relation to this that Kosovo\* has no yet a law/laws on salaries in the public sector.

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<sup>8</sup> In both judgments that proclaimed two respective laws on public salaries as unconstitutional, the Constitutional Court attributed particular importance to the issue of authorization/discretion of the Assembly (legislative organ of the country), to reduce the wages and other incomes and privileges in the justice system – which currently are much higher than in other branches/institutions of the public sector.

## IV. MAJOR FINDINGS AND RECOMMENDATIONS

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The legal order of Kosovo\* contains norms and procedures for ensuring consistency of the case-law and harmonization of the court practice. These legal guarantees are in compliance with the requirements of the ECHR, as interpreted by the ECtHR. In normative dimension, consistency of the case-law of Kosovo\* courts is embodied within the principle of legal certainty, enshrined in the Article 31 of the Constitution [Right to Fair and Impartial Trial]. As such, the legal certainty and judicial consistency enjoys the dual status, as constitutional/legal principle and as individual right.

On the procedural aspect, the Law on Courts authorizes the Supreme Court to harmonize the court practice and to ensure the consistency of the case-law of regular courts, through principled positions, legal opinions, and guidelines. The courts of first and second instance have no formal role in ensuring consistency of the case-law. On the domain of individual rights, the Constitutional Court of Kosovo\* has the jurisdiction to rule on the individual constitutional requests alleging violation of the right to fair trial because of the divergences of the case-law.

Both these courts – Supreme Court and Constitutional Court – have been active in fulfilling their mandates and exercising their competences in this regard and their contribution is meaningful.

However, as this Report has underlined, inconsistency of the judicial decision-making persists and this includes also the Supreme Court and the Constitutional Court. Some of the major deficiencies of the justice system, in relation to the consistency of the case-law, are lack of effective mechanisms and practices in the courts of first instance and, particularly, Appellate Court, to follow the case-law from the perspective of consistency; lack of specific mechanisms by the Supreme Court to monitor systematically the implementation of its legal opinions and professional guidelines; instances of divergences in the case-law of the Supreme Court and Constitutional Court themselves.

In order to bridge the identified gaps in the consistency of the case-law and to advance the harmonization of the court's jurisprudence, the following actions are recommended:

- Training of the judges and professional staff of Basic Courts and Appellate Court on the standards of ECHR/ECtHR on the consistency of judicial practice;
- Establishing of professional mechanisms and/or practices in the Basic Courts and, particularly, Appellate Courts to detect cases of "*profound and longstanding*" divergences in their case-law;
- Training the professional staff of the Supreme Court (i.e., professional collaborators/legal advisors) on the standards of ECHR/ECtHR on the consistency of judicial practice;
- Strengthening mechanisms and standards in the Supreme Court for ensuring the consistency of the case-law. In this regard, establishing within the Supreme Court a

mechanism similar to JuristCounsult of the Constitutional Court, with specific mandate to monitor the consistency of the judicial practice of the regular courts.

- Raising awareness in the Constitutional Court about the standard of reasoning in cases of deviation from the previous case-law;
- Increasing capacity (primarily the number of staff) of the JuristConsult of the Constitutional Court;
- Establishing a regular practice of professional dialogue and exchange between the Constitutional Court, Supreme Court, other courts, as well as with other actors of the justice system, on the issue of consistency of judicial decision-making;
- Diversifying and enriching the databases on judicial practice, primarily the official page of the Kosovo Judicial Council, with analysis, reports and information on issues of constituency of case-law, and similar aspects of the judicial practice.

The project “Support to the Constitutional Court in Applying and Disseminating European Human Rights Standards” aims at supporting the efforts of the Constitutional Court for ensuring the protection of individual human rights and fundamental freedoms of right holders. The objective is to align its judgments with European human rights standards concerning individual complaints, to further raise awareness of legal professionals about the role and function of the Constitutional Court and to increase the impact of the Constitutional Court's case-law on the domestic legal order.

To achieve objectives set, the project will further enhance the capacity of judges and legal advisors of the Constitutional Court through peer-to-peer exchange and tailored capacity-building activities. In addition, the support will be provided to upgrade the case-management system and to enhance the use of the existing electronic tools with the view to improving research skills and cross-citation in the Constitutional Court's decisions. In addition, the project will focus on strengthening and promoting the role of the newly established Jurisconsult of the Constitutional Court.

The project will facilitate regular exchange and judicial dialogue between the Constitutional Court and the ordinary courts towards coherent application of the European Convention on Human Rights (ECHR). It will also support the awareness raising of lawyers, law students and other legal professionals on the rights protected by the ECHR and the work and judgments of the Constitutional Court.

ENG

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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.