

# ROADMAP FOR MONITORING AND SUPPORT EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT

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# **ROADMAP FOR MONITORING AND SUPPORT EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT**

prepared by

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<sup>1</sup> 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.



## Introduction

In accordance with the ToR, this report is focused on the needs assessment of the Constitutional Court of Kosovo in monitoring the execution of judgments. This report deals with the execution of the judgments delivered by regular being a party to the Council of Europe nor a signatory to the European Convention of Human Rights (ECHR), the question of the execution of judgments of the European Court of Human Rights (ECtHR) by Kosovo\* is not part of this report.

For the preparation of this report the Consultants have analysed the domestic legislation, including the by - laws and internal acts of the courts, their case-law as well as the rules and procedures before the ECtHR and the Court of Justice of the European Union (CJEU) and other pertinent materials on this issue. The Consultants have also conducted a series of interviews and meetings, in person, in Prishtina and in Strasbourg, with the President of the Constitutional Court, Mrs. Gresa Caka Nimani, several judges and former judges of the Constitutional Court, Mrs. Selvete Gërxhalliu Mrs. Remzie Istrefi, Mr. Nexhmi Rexhepi, and Mr. Bekim Sejdiu, and staff members of the Constitutional Court, Mr. Jeton Bytyqi. The Consultants also met with the Ombudsman, Mr. Naim Qelaj, and several staff members of the OIK. Several consultations have taken place online as well.

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## Background information as to the legal and institutional context

The domestic legal order, however, has given to the ECHR a privileged position. The Constitution of Kosovo\* has given a constitutional status to the ECHR. Article 22 of the Constitution, entitled ‘Direct applicability of International Agreements and Instruments’ provides that:

*“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:*

...

*(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;”*

In addition, Article 53 of the Kosovo\* Constitution, entitled ‘Interpretation of Human Rights Provisions’, provides that:

*“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistently with the judicial rulings of the European Court of Human Rights.”*

Against this background, in view of the provision of Article 53 of the Convention, quoted above, and the interpretation of the ECtHR, it is clear that the question of the execution of judicial decisions, forms an integral part of the fair trial guarantees, that the institutions and the judiciary have to respect. In addition, the question of the enforcement of the judicial decisions goes to the heart of the efficiency of the operation of the judicial system and a state based on rule of law. For this purpose, the practice of the ECtHR and national institutions, including judiciary, from the countries that are party to the ECHR, in the enforcement of national and ECtHR judicial decisions have been considered and inspired the drafting of this report.

<sup>2</sup> For example, The European Commission for the Efficiency of Justice (CEPEJ) “Good practice guide on enforcement of judicial decisions” As adopted at the 26th CEPEJ Plenary Session, 10-11 December 2015

# **REVIEW OF INTERNATIONAL/EUROPEAN STANDARDS AND RELEVANT DOMESTIC LEGISLATION, SUBLEGAL ACTS AND INTERNAL COURT'S REGULATIONS**

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## A. International/European standards

Without effective access to justice there is no effective legal protection of human rights. Effective access means that everyone, everywhere, should enjoy the equal protection of the law if there is to be justice for all. In the international law, same as in the national law, access to justice can be guaranteed only by the effective judicial remedies. From the point of view of the individual, access to justice is access to a court or a tribunal which is constituted by law and with guarantees for impartiality and independence in the application of the law. Therefore, we can identify several principles which all systems of justice, civil and criminal, should meet to ensure effective access to justice. The effective access to justice should be not just in the result it delivers, but it should be fair in the way it treats litigants, offer appropriate procedures at a reasonable cost, deal with cases with reasonable speed, be understandable to those who use it, provide as much certainty as the nature of the particular case allows and be effective, adequately resourced, and organised.

In ratifying the Convention, the Contracting States undertake to ensure that their domestic law is compatible with the Convention. The European Convention on Human Rights guarantees fundamental rights and freedoms which the Member States to the Council of Europe and to Convention (today 46) are obligated to establish and observe. Effective justice on domestic level is extremely important and therefore in its Article 13, European Convention on Human Rights speaks about “effective remedy” stressing that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The case-law of the ECtHR recognizes that states have a wide margin of appreciation in laying down procedural requirements for the exercise of the right of effective justice. The crucial element is that effective justice emerges as an essential component of every system of human rights protection, which in principle must be safeguarded also in times of crisis and emergency. In this regard, it is the positive obligation of States to organise their judicial system in a way to fulfil the expectations of the citizens of efficient and visible justice

<sup>3</sup> See *Hornsby v. Greece*, app no. 18357/91, 19 March 1997.

<sup>4</sup> Lord Lester of Herne Hill QC, Access to Justice, *Interights-Bulletin*, (A Review of the International Center for the Legal Protection of Human Rights – ISSN 0268-3709 1996 Volume 10 No. 2

<sup>5</sup> Master of the Rolls, Lord Woolf, Report on the English civil system (1996)

<sup>6</sup> *Scordino v. Italy* (no. 1) [GC], application no. 36813/97 §§ 232-234 judgement from 29.06.2006.

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The establishment of an independent judiciary has been one of the key reform priorities in EU accession processes. When it comes to Judicial efficiency, we can notice that many years of neglect and underinvestment have undermined judicial efficiency and access to justice in the Western Balkans. In most countries, there are long court delays and a high backlog of cases.

Abovementioned principles are implemented in the legal systems in Western Balkans, including Kosovo\*. Kosovo\* has undergone a challenging process of harmonising the laws and institutions with the Convention and related EU directives. The legislative and administrative frameworks and judicial practices have been further enhanced and considerable efforts have been devoted to developing the institutional capacity and increasing the knowledge. Yet, there is still much to be done to ensure the means and tools for practical implementation.



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## B. Experiences from the European regional Courts

### i. The execution of the decision of the European Court of Human Rights (ECtHR)

In the ECHR system the main article that regulates the question of the supervision of the judgments of the ECtHR is Article 46 of the Convention. This article provides:

*"Binding force and execution of judgments*

*"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*

*2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.*

*3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.*

*4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.*

*5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."*

It is clear from that provision that the task to supervise the execution of the judgments of the ECtHR is with the Committee of Ministers of the Council of Europe. The Registrar will send copies to the parties, to the Secretary General of the Council of Europe, to any third party, including the Council of Europe Commissioner for Human Rights, and to any other person directly concerned. The original copy, duly signed, will be placed in the archives of the Court.

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In order to perform its tasks, the Committee of Ministers has adopted specific Rules. With the entry into force of protocol 14 ECHR, the role of the ECtHR is reinforced in this regard, especially with the introduction of paragraph 4 of Article 46 . The procedure provided by this provision is triggered by the Committee of Ministers, through a decision adopted by two thirds of sitting authorised representatives of the Committee.

The judgments of the European Court of Human Rights are essentially declaratory in nature, and only in certain special circumstances the Court has found it useful to indicate to a respondent State the type of measures that might be taken to put an end to the situation which has given rise to the finding of a violation. Whether or not the respondent Government has complied with its obligations as set out in the final judgment will be considered by the Committee of Ministers and if necessary, by the Court itself. The Court does not have jurisdiction to order the reopening of proceedings as a measure. However, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle way of redressing the violation.

To facilitate effective implementation of its judgments, the Court may adopt a pilot judgment procedure enabling it to identify clearly in a judgment the existence of structural problems underlying the violations and to indicate specific measures or actions to be taken by the respondent State to remedy them. It falls to the Committee of Ministers to evaluate the implementation of individual and general measures prescribed by the judgement of the Court .

On the basis of Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation which it has found to violate the Convention . If the violation of the Convention is occurring or it is likely to occur in similar situations, the Court has find out that general measures at the national level were undoubtedly best way to prevent further violations for the entire group of individuals affected by the practice found to be in breach. Therefore, the measures should be such as to remedy the Court's finding of a violation in respect of a general practice, so that the system established by the Convention is not compromised by many repetitive applications stemming from the same cause.

It is important that States should be allowed to decide upon and give effect to the most appropriate execution measures. This practice leads to facilitate the task of the Committee of Ministers and the executions department, and it is based on the principle of subsidiary. In that direction, the Court will leave space to the Committee of Ministers in exercising its own jurisdiction and to the States in choosing the appropriate execution measures.

<sup>7</sup> See Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies and on 6 July 2022 at the 1439th meeting of the Ministers' Deputies)

<sup>8</sup> See *Ilgar Mammadov v. Azerbaijan*, app. no. 15172/13, [GC], 29/05/2019 and *Kavala v. Türkiye*, app no. 28749/18, [GC] 11/07/2022.

<sup>9</sup> See *Moreira Ferreira v. Portugal* (no. 2) [GC], 2017, §§ 49 and 51, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020, §§ 311-314

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It is for the Committee of Ministers to supervise, the adoption of measures that are feasible, timely, adequate, and sufficient to ensure the maximum possible reparation for the violations found by the Court . The execution process concerns compliance by a Contracting Party with its obligations in international law under the Convention. Those obligations are based on the principles of international law relating to cessation, non-repetition, and reparation.

If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision will require a majority vote of two-thirds of the representatives entitled to sit on the committee. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation from the final judgement. If the Court finds a violation, it will refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation, it will refer the case to the Committee of Ministers, which shall close its examination of the case.

Article 46, as amended by Protocol No. 14, recognizes that the Court has a complementary role to play in the execution process. The supervision mechanism under Article 46 of the Convention provides a comprehensive framework for the execution of the Court's judgments, reinforced by the Committee of Ministers' practice. The Court reiterates that, according to its settled case-law, the ultimate choice of the measures to be taken to execute a judgment remains with the States under the supervision of the Committee of Ministers, provided the measures are compatible with the "conclusions and spirit" set out in the Court's judgment.

However, even before the entry into force of paragraph 4 of Article 46, the ECtHR has found itself involved in the enforcement of its own judgments, obliging the Court in Strasbourg to take positions due to the alleged non-enforcement of its previous judgements . The recent decisions by the Committee of Ministers of Council of Europe show that the issue of the execution of the ECtHR judgments remains a delicate issue, often prone to political will of the Member States .

<sup>10</sup> See *Greens and MT v. the United Kingdom*, 2010, § 107.

<sup>11</sup> See *Suso Musa v. Malta*, application no. 42337/12, § 120, 23.07.2013.

<sup>12</sup> See *Baybaşın v. the Netherlands*, application no. 13609/02, § 79, 06.07.2006.

<sup>13</sup> See *Ilgar Mammadov v. Azerbaijan* [GC], 2019, § 155.

<sup>14</sup> Rule 62 of the Rules of the Committee of Ministers; also see *Ilgar Mammadov v. Azerbaijan* [GC], 2019, §§ 161-162).

## *ii. The execution of the decisions of the Court of Justice of the European Union (CJEU)*

As far as the binding effect of the judgments of the CJEU, the pertinent Article of the TFEU provides:

*“Article 280 (ex Article 244 TEC)*

*The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.”*

In addition, the Rules of Procedure of the Court of Justice provide that:

*“Article 91 - Binding nature of judgments and orders*

- 1. A judgment shall be binding from the date of its delivery.*
- 2. An order shall be binding from the date of its service.”*

In the EU system the question of the execution of the judgments is entrusted with the European Commission. This is clearly provided by Article 260 § 2 of the TFEU which is worded as follows:

*“Article 260 (ex Article 228 TEC)*

*If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.*

It is important to note that the CJEU has effectively intervened, by imposing considerable fines against EU Member States, in cases of noncompliance with its judgments or orders .

<sup>15</sup> See *Ilgar Mammadov v. Azerbaijan* ‘infringement proceedings’ [GC] no- 15172/13, § 182, judgement from <sup>29</sup> May 2019.

<sup>16</sup> See for example *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), app. no- 32772/02 [GC], 30/06/2009, *Jeronovičs v. Latvia*, app. no- 44898/10, [GC], 05/07/2016, *Emre v. Switzerland* (No. 2), app. no- 5059/10, 11/10/2011.

<sup>17</sup> See decision H46-27 *Kavala v. Türkiye* ‘Requête n° 28749/18’, 1459<sup>e</sup> réunion, 7-9 mars 2023 ‘DH’ and Résolution intérimaire CMResDH(2023)36, *Selahattin Demirtaş* (n°2) v. Türkiye, ‘adoptée par le Comité des Ministres le 9 mars 2023, lors de la 1459<sup>e</sup> réunion des Délégués des Ministres’.

<sup>18</sup> See the Treaty on the Functioning of the European Union (TFEU), in C 115/76 EN Official Journal of the European Union 9.5.2008.

<sup>19</sup> L 265/2 Official Journal of the European Union 29.9.2012

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## C. Experiences from European Constitutional Courts

The typology of Constitutional Courts in other Council of Europe member States is quite variable. So are the constitutional complaints procedures. However, the question of execution of the judgments of the Constitutional Courts has been a matter of concern for many decades, and for this purpose has been the object of studies and analysis from different Council of Europe bodies. Several elements identified in such studies can serve as examples of good practices for the Constitutional Court of Kosovo\* in trying to guarantee the full execution of their judgments. The following elements can be identified:

### i. The binding force of the Constitutional court decisions.

There is a tendency amongst many Council of Europe member States to declare that the decisions of the Constitutional Court are binding. This is provided as well by the Constitution of the Czech Republic, Hungary, and Slovakia. In Bosnia and Herzegovina this is clearly provided by the Constitution and the Rules of the Court. In Croatia this is provided by the Law on Constitutional Court. In Azerbaijan as well is clearly indicated that the judgments of the Constitutional Court are binding. In addition, it is the Constitutional Court that follows up their execution on the basis of annual or six-monthly reports and informs the other institutions of the State where necessary. The execution of the judgment or opinion is notified to the Moldovan Constitutional Court on such terms as it indicates. Then it is the secretariat of the Constitutional Court follows the state of the execution of the decisions of the Constitutional Court. Quite interestingly, in Belgium, Article 115 of the law on the Court of Arbitrations announces that its decisions are executory by law. This provision underlines that it is the King who guarantees the execution of those decisions. This means that all state bodies competencies, and all available legal remedies, can be used for such enforcement. The same can be seen in Austria. As a result of such system, the unconstitutional measures can be set aside with immediate effect.

<sup>20</sup> See also Article 299 (ex Article 256 TEC) which provides:

"Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States shall be enforceable. Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision without other formality than verification of the authenticity of the decision by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union. When these formalities have been completed on application by the party concerned the latter may proceed to enforcement in accordance with the national law by bringing the matter directly before the competent authority. Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner."

<sup>21</sup> See Order of the Vice-President of the Court of 27 October 2021, in Case C-204/21 R Commission v Poland ordering that:

"As it has not suspended the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court, Poland is ordered to pay the European Commission a daily penalty payment in an amount of €1 000 000. Compliance with the interim measures ordered on 14 July 2021 is necessary in order to avoid serious and irreparable harm to the legal order of the European Union and to the values on which that Union is founded, in particular that of the rule of law."

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## C. Experiences from European Constitutional Courts

### ii. The range of subjects involved in the execution of Constitutional Court decisions.

#### *a. erga omnes effect*

The research shows that generally the decisions of Constitutional Courts in most of the European States have erga omnes effect. This is always the case following a declaration of nullity or the annulment of a legislative act, where there has been preliminary review or abstract review. The provision is then invalidated. The erga omnes effect extends in certain States to all judgments relating to the unconstitutionality of a legislative measure, in particular in the context of a referral for a preliminary ruling or of a direct action before the constitutional court. In many States the erga omnes effect is clearly provided in law. In a number of States, it is even provided that judgments of the constitutional court have the force of law. In Austria, judgments relating to the allocation of competences are in principle equated to constitutional law. In some other States, the competent institutions have to adopt measures, especially legislative ones, in order to comply with the decision. This is also the case in France and in the Czech Republic. In Slovakia, the legislature has to bring the legislation into line with the Constitution within a period of six months of the decision of the Constitutional Court. In some countries these authorities are required to adopt those measures within a time limit indicated by the Constitutional Court. In some other cases the authorities in charge depend on the nature of the obligation stemming from the decision of the Constitutional Court.

<sup>22</sup> See Article 89 of the Constitution of Czech Republic

<sup>23</sup> Article 51 of the Law on the Constitutional Court of Hungary

<sup>24</sup> Article 128(1) of the Constitution of Slovakia

<sup>25</sup> Article VI<sup>4</sup> of the Constitution of Bosnia and Herzegovina provides:

“Decisions of the Constitutional Court shall be final and binding.”

<sup>26</sup> See Rules of Procedure of Constitutional Court of Bosnia and Herzegovina

Article 72 (Binding Nature, Manner of Enforcement and Time-limit for Enforcement)

<sup>(1)</sup> The decisions of the Constitutional Court shall be final and binding. Every physical and legal person shall be obligated to comply with them.

<sup>(2)</sup> All bodies shall be obligated to enforce the decisions of the Constitutional Court within their competences established by the Constitution and law.

<sup>(3)</sup> Every person who has a legal interest may seek enforcement of a decision of the Constitutional Court.

<sup>(4)</sup> The Constitutional Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Constitutional Court.

<sup>(5)</sup> Within the time-limit referred to in paragraph 4 of this Article the body obligated to enforce the decision of the Constitutional Court shall be obligated to submit information about the measures taken to enforce the decision of the Constitutional Court as required by the decision.

<sup>(6)</sup> In the event of a failure to enforce a decision or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision as designated by the Constitutional Court.”

<sup>27</sup> Art. 30 of Constitutional law on Constitutional Court provides:

<sup>(1)</sup> The decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them.

<sup>(2)</sup> All bodies of the central government and the local self-government and administration shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court.

<sup>(3)</sup> The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court.

<sup>(4)</sup> The Constitutional Court may determine which body is authorized for the execution of its decision, respectively its ruling.

<sup>28</sup> See Article 130(VI) of the Constitution of Azerbaijan.

<sup>29</sup> Similar system is found in Kosovo\*, as we will see later.

<sup>30</sup> See Article 140 § 5 of the Constitution.



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### ***b. inter partes or specific institutions***

On the contrary, review of the constitutionality of individual decisions, including cases involving a referral for a preliminary ruling as to the validity of provisions, often results in judgments whose scope is merely *inter partes*. However, the *inter partes* effect of such judgments does not prevent victims of the application of unconstitutional measures from requesting the reopening of proceedings or claiming damages, or leading to wider consequences in practice. In Bosnia, for example, it is provided the possibility for every person who has a legal interest to seek enforcement of a decision of the Constitutional Court. In Spain, the decisions relating to the protection of constitutional rights in principle have effect *inter partes*, but the interpretation given by the Constitutional Court is binding on the other courts and the agreement of the full court is needed in order to change the case-law. In addition, if a law contravenes fundamental rights or public freedoms, it may be subjected to review in the abstract.

There are many examples showing that many Constitutional Courts in Europe address a request to a specific institution to adopt a specific act or to act in a specific manner, in order to comply with the decision of the Constitutional Court. In some States, the constitutional court has extensive powers and may give all orders necessary for the execution of the judgments, including giving instructions to other authorities. In Bosnia, the Constitutional Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Constitutional Court. This is also the case in Slovenia, "where necessary, the Constitutional Court shall specify the institution responsible for the implementation and the conditions for applying the decision". The constitutional Court of Ukraine, "may specify in its decision or its opinion the procedures to be followed in order to give effect to them and compel the competent institutions of the State to carry out the decision to comply with the opinion".

The nature of orders given by the European Constitutions Courts, vary in nature. They can consist of ordering the legislature to amend a legal provision, even within a specified time, or by giving notice to this effect, or by ordering a detainee to be freed, by ordering the reopening of criminal proceedings which gave rise to a sanction with continuing adverse effects.

Where a Constitutional Court rules in the context of a direct action brought by an individual for violation of constitutional rights, it may either decide on the merits of the case or refer the case back to an inferior authority for a fresh decision, which seems to be the most frequent solution in such cases. In the later case, the issue of the execution of the Constitutional Court decision stays with the ordinary courts.

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### *iii. The temporary effect of Constitutional court decisions*

Where preliminary review is carried out, this, by definition, prevents the provision from entering into effect. The effect of the judgment is that the law is not promulgated. If only part of the contested text is declared unconstitutional, the rest enters into force. Invalidity usually takes effect on the date on which the judgment is given or published (ex nunc effect) or soon afterwards. States in which invalidity systematically takes effect retroactively (ex tunc) are the exception: in such case, invalidity of a legislative measure does not apply only to the pending proceedings and to proceedings under way at the date of the judgment, but also to certain proceedings which have already been closed.

In other States, the Constitutional Court may stipulate that its judgment has retroactive effect in specific cases. Decisions of the Spanish Constitutional Court have retroactive effect when the non-application of the unconstitutional provision would have resulted in a less severe criminal or administrative sanction or no sanction at all. In several countries judgments in criminal matters which are based on an unconstitutional provision may be revised. In Slovenia, the Constitutional Court may determine that a judgment is to have retroactive effect where regulations adopted for the exercise of public powers are annulled; a party adversely affected by a decision adopted on the basis of such a measure is entitled, under certain conditions, to ask for the amendment or annulment of such measure.

In many States, the date on which the judgment takes effect may be deferred, in order to give the authorities time to adapt the legislation to suit the Court's decision. This occurs particularly where, following a declaration of unconstitutionality, several solutions consistent with the Constitution are possible, when the judgment has major budgetary implications, or political consultations are needed.

<sup>31</sup> See Article 89 of the Constitution of Czech Republic

<sup>32</sup> See Article 22 of the Law on the Constitutional Court on Bulgaria; Article 27 § 2 of the Law on the Constitutional Court of Hungary and Article 190 § 1 of Constitution of Poland

<sup>33</sup> See art. 30 of Constitutional Act of Constitutional court in Croatia:

"1 The decisions and the rulings of the Constitutional Court are binding on every individual or legal person shall obey them:

2. All bodies of the central government and the local self-government and administration shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court;

3. The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court;

4. The Constitutional Court may determine which body is authorized for the execution of its decision, respectively its ruling."

#### *iv. The notification and the publication of the Constitutional Court decisions*

In most States, judgments of the Constitutional Court or the equivalent body are published in an official gazette. For example, in Bosnia and Herzegovina the judgment is published in the Official Gazettes of Bosnia and Herzegovina and its constituent entities. So is the case as well in Estonia, France, Hungary, Italy. In Poland, judgments are published in the organ in which the contested measure was promulgated and, in the absence of such an organ, in the official gazette. In Belgium, it is interesting to note that, a formula is added by the Chancellor of the Court at the end of each decision.

The practice of the Slovenian Constitutional Court, amongst others, is quite interesting in this regard. In its annual reports on the activities of the Court, a special chapter is dedicated to the “Respect for the Decisions of the Constitutional Court”. This is indeed the first chapter of the annual reports of the Constitutional Court of Slovenia, sign that shows the importance given to this issue by that Court.

<sup>34</sup> See Article 72 § 2 of the Law on the Constitutional Court of Lithuania

<sup>35</sup> Article 72<sup>30</sup> of the Law on the Constitutional Court of Lithuania

<sup>36</sup> See Article 60<sup>20</sup> of the French Constitution

<sup>37</sup> Article 89 of the of the Constitution of Czech Republic

<sup>38</sup> See Article 133 of the Constitution of Slovakia

<sup>39</sup> Article 39 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina

<sup>40</sup> In Italy for example it is the Prosecutor general who following a decision of the Constitutional Court orders the release of anyone detained on the basis of an unconstitutional law

<sup>41</sup> This is the case in Denmark for example

<sup>42</sup> In Belgium only judgments on an abstract petition have effect erga omnes while those resulting from a request from an ordinary court have inter partes effect. However following an unconstitutionality verdict on a legislative measure the federal

Council of Ministers or a Community or Regional Government has six months in which to request the annulment of the measure as such by the Constitutional Court. Article 40<sup>2</sup> of the Belgian Special Law on the Court of Arbitration

<sup>43</sup> See Article 72 § 3 of Rules of Procedure of Constitutional Court of Bosnia and Herzegovina which reads: “18 Every person who has a legal interest may seek enforcement of a decision of the Constitutional Court”

<sup>44</sup> Article 35 of the Organic Law on the Constitutional Court

<sup>45</sup> See Article 46 § 2 of Maltese Constitution

<sup>46</sup> See Article 72 § 4 of the rules of Procedure of Constitutional Court

<sup>47</sup> See Articles 40 § 2 and 46 § 2 of the Law on the Constitutional Court of Slovenia

<sup>48</sup> Article 70 of the Law on the Constitutional Court

<sup>49</sup> This is the case in Hungary

<sup>50</sup> This is the case in Germany

<sup>51</sup> This is the case in Italy

<sup>52</sup> This is the case in Switzerland

<sup>53</sup> Article 43<sup>30</sup> of the Law on the Constitutional Court of Hungary

<sup>54</sup> See for example Article 57 of the Law on the Constitutional Court of Slovakia and Article 40<sup>2</sup> of the Law on the Constitutional Court of Slovenia

<sup>55</sup> See Article 62 § 1 of the French Constitution or Article 107 of the Italian Constitution

<sup>56</sup> See for example Article 8 ss of the Special Law on the Court of Arbitration in Belgium and Article 282 of the Portuguese Constitution

<sup>57</sup> See Article 51 §§ 1 and 4 of the Law on the Special Supreme Court in Belgium

<sup>58</sup> Article 40 of the Organic Law on the Constitutional Court of Spain. See also Articles 43 §§ 3-4 of the Law on the Constitutional Court of Hungary

<sup>59</sup> Article 70 of the Law on the Constitutional Court of Germany and Article 26 of the Law on the Organisation and Operation of the Constitutional Court of Romania

<sup>60</sup> See Article 45 and 46 of the Law on the Constitutional Court of Slovenia

<sup>61</sup> For example in Italy there is a practice that Constitutional Court can decide on a deferred date for the entry into force of its decisions. In Slovenia the Constitutional Court is entitled by law to decide on such a date (Article 48 of the Law on the Constitutional Court). So is the case in Bosnia (Article 72 § 4 of the rules of the Court) and in the Czech Republic (Article 70 of the Law on the Constitutional Court) where the Constitutional Courts are free to decide the date in which its judgments take effect. In Poland the Constitution provides that the “judgments of the Constitutional Court shall enter into force on the date of their publication” However the Court may determine another date for the annulment of the legislative act declared unconstitutional. This time may not exceed 18 months in the case of a law and 12 months in the case of other legislative measures (See Article 100 § 2 of the Polish Constitution)

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## D. The legal framework relevant for the execution of the decisions of the domestic court's decisions

### *i. the legal framework relevant to the execution of the decisions of the Constitutional Court of Kosovo*

The Constitutional Court of Kosovo\* was established in 2009, following the preparation of the legal framework by a group of national and international experts. The establishment, composition and functioning of the Constitutional Court of Kosovo\* are regulated in Chapter VIII of the constitution, entitled 'Constitutional Court' and consisting of 7 Articles. The Constitutional Court is composed of 9 judges elected by the Parliament for a mandate of 9 years and until 2016 it included international judges on its ranks.

The Constitutional provision that is pertinent for the purposes of this study, is included in Article 116. This Article, which deals specifically with the Legal Effect of the Decisions of the Constitutional Court, specifically provides:

- "1. Decisions of the Constitutional Court are binding on the judiciary and all persons and institutions 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."*

<sup>62</sup> Article 71 of the Rules of Procedure of the Court.

<sup>63</sup> Article 24(1) of the Law on Constitutional Review Court Procedure.

<sup>64</sup> Article 20 of the Ordinance incorporating an Organic Law on the Constitutional Court.

<sup>65</sup> Article 41 of the Law on the Constitutional Court.

<sup>66</sup> See in particular Article 30 of Law No 47 of 1993.

<sup>67</sup> Article 100 § 2 of the Constitution.

<sup>68</sup> This formula provides:

"Les Ministres, les membres des Gouvernements des Régions et des Communautés et les autorités administratives pour ce qui les concerne, sont tenus de pourvoir à l'exécution du présent arrêt. Les huissiers de justice à ce requis ont à y concourir en ce qui concerne les voies de droit commun"

<sup>69</sup> See respectively for the 2020 and 2021 reports: [https://www.usr.si/wp-content/uploads/2022/07/RSUS\\_LetnoPorocilo\\_2020\\_EN.pdf](https://www.usr.si/wp-content/uploads/2022/07/RSUS_LetnoPorocilo_2020_EN.pdf) and

[https://www.usr.si/wp-content/uploads/2022/07/RSUS\\_LetnoPorocilo\\_2021\\_Web\\_ENG.pdf](https://www.usr.si/wp-content/uploads/2022/07/RSUS_LetnoPorocilo_2021_Web_ENG.pdf)

<sup>70</sup> These Articles regulate respectively: Article 102 [General Principles], Article 103 [Jurisdiction and Authorized Parties], Article 104 [Composition and Mandate of the Constitutional Court], Article 105 [Organization of the Constitutional Court], Article 106 [Legal Effect of Decisions], Article 107 [Immunity] and Article 108 [Dismissal].

This Article is included in Chapter VIII of the Constitution, entitled 'Constitutional Court'.

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It seems clear from this provision that there is a constitutional guarantee that the decisions of the Constitutional Court of Kosovo are binding to all legal operators in Kosovo\*. This provision might have been considered a sufficient legal regulation as far as the execution of the Constitutional Court judgments is concerned, as the Law No. 03/L-121 'On the Constitutional Court of Kosovo' does not contain a provision drafted in similar terms.

There are only two provisions of the law on the Constitutional Court that seems to contribute to the execution of the Constitutional Court's decision. The first is the provision of Article 20 of the said law and especially its paragraph 5 which provides:

*5. A Decision enters into force on the day of its publication in the Official Gazette, unless the Constitutional Court has defined it otherwise in a decision."*

The second is included in Article 36 of the Law on Constitutional Court which regulates the Suspension Effect in proceedings defined under Article 113, Paragraph 3 item 4 of the Constitution. Article 36 of the Law on Constitutional Court provides:

*"A referral filed pursuant to Article 113, Paragraph 3 item 4 of the Constitution shall have a suspensive effect. The Assembly of the Republic of Kosovo shall act upon the contested amendment only after a decision of the Constitutional Court has been rendered."*

This later provision suggests that the Assembly shall act in accordance with the decision of the Constitutional Court.

The legal framework concerning the execution of the Constitutional Court's decisions is further completed and clarified with the Rules of Procedure of The Constitutional Court of Kosovo . These rules include two provisions that deal exclusively with the procedure to be followed in cases where the decisions of the Constitutional Court are not executed. The directly relevant Rule in this regard is Rule 66, entitled 'Enforcement of decisions' which provides:

*"(1) The decisions of the Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo."*

<sup>72</sup> Decision of the Constitutional Court No. 49/2018, adopted on 31 May 2018, No. ref: KK 47/18

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- (2) All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.*
- (3) All natural and legal persons are obligated to respect and to comply with the decisions of the Court.*
- (4) The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.*
- (5) The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.*
- (6) In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced. This ruling shall be published in the Official Gazette.*
- (7) The State Prosecutor shall be informed of all decision of the Court that have not been enforced.*
- (8) The Secretariat, under the supervision of the Judge who, in accordance with Rule 58, drafted the decision, shall follow up on the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken."*

The first paragraph of this provision repeats verbatim the text of the first paragraph of Article 116 of the Constitution. The other paragraphs of Rule 66 detail further the obligation to execute the decisions of the Constitutional Court. Paragraphs 2 and 3, quoted above, specify the subjects of this obligation. These provisions show that the obligation to execute the decisions of the Constitutional Court might be directed to all courts and public institutions, as well as to all natural and legal persons operating in domestic legal system.

Of particular interest is paragraph 4 of Rule 66. This paragraph recognises the Constitutional Court with the competence to make not only declaratory decisions, but to specify the nature of the obligation and the manner in which its decision shall be executed. In addition, the same paragraph recognises the competence of the Constitutional Court to indicate a time-limit within which the decision shall be executed. Although it is not specifically provided, it is our understanding that in specifying the manner of the execution and the time limits, it can be noted that the Constitutional Court in its decisions directly identifies as well the responsible body, public or private, which has to take measures for the execution of the decision. This results from several decisions of the Constitutional Court . To our opinion, this provision gives clarity as to the measures to be taken by the bodies responsible for the execution of the Constitutional Court's decision, and the time limits for the adoption of such measures.

<sup>73</sup> See for example paragraph VII of the operative part of the Constitutional Court decision K199/06 of 5<sup>12</sup>2007, where the Court decides "TO ORDER the Kosovo Property Agency (AKP) that in accordance with rule 46 of the Rules of Procedure of the Court notify him as soon as possible but not later than 6 (six) months the Constitutional Court in regarding the measures taken for the implementation of the Judgment of this Court."



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Paragraph 5 of Rule 66 provides the obligation of the body to which the decision of the Constitutional Court is directed to, to provide information to the latter, as to the nature of the obligation, the manner of the execution of the decision and within the time limits indicated by the decision. This provision creates an institutional dialogue between the Constitutional Court and the bodies under the obligation to execute the decision of the former and to our opinion helps for the effective execution of the decisions. The Constitutional Court has used this provision as a reminder to the bodies obliged to execute the decision, that no steps have been taken in this regard or are being taken with delay .

If no information is provided to the Constitutional Court on the basis of paragraph 5 of Rule 66, and when the Court no timely progress in the execution of its own decisions, it might adopt, on the basis of paragraph 6 of Rule 66, a decision declaring that its decision on the merits has not been executed.

The system is further reinforced by the provision of Rule 66 § 7 quoted above. The practice analysed by the Consultants shows that usually at the moment of the adoption of the rulings provided for in Rule 66 § 6, analysed above, the Constitutional Court notifies the State Prosecutor as well. This notification has to be read together with Article 394 of Kosovo\* Criminal Code (formerly Article 402 in the 2012 version of the Criminal Code) which provides that the failure to execute court decisions constitutes a criminal offence . This means that a criminal investigation could be triggered in case of non-execution of a Constitutional Court decision. According to the information collected during the interviews, it can be reported that in the majority of cases where the decisions of the Constitutional court were not executed, criminal investigation has been indeed initiated by the prosecution service. There are no data, however, as to the stage of those criminal proceedings as in most of the cases the decisions were ultimately executed. The question, however, remains what if no criminal responsibility is found in the specific case. There does not seem to be any non-criminal instrument, of punitive or other nature, being able to assist in the execution of the courts' decisions.

Another provision of the Rules of the Constitutional Court suggests that institutions are obliged to respect the proceedings of that Court, with a view of facilitating later the execution of the judgment to be adopted. Rule 71, entitled 'Referral pursuant to Article 113.3 (4) of the Constitution and Articles 36 and 37 of the Law', provides in its pertinent paragraph 2, that:

*"A referral filed pursuant to this Rule will have a suspensive effect."*

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This provision indicates the responsible body that they should stay the proceedings and wait for the decision of the Constitutional Court, with the clear purpose of later adopting a legislative or regulatory solution that respects the latter's decision.

***ii. the legal framework relevant to the execution of the decisions of the Kosovo\* ordinary courts***

While the binding effect of the decisions of the Constitutional court is clearly stated in article 116 of the Constitution, we found no similar constitutional provision providing for the binding effect of the decision of the ordinary courts. It shall be mentioned that Law no. 06/L - 054 "On Judiciary", contains a similar provision to that effect. That provision states:

*"Article 6 - Court decisions*

- 1. Court decisions are drawn up in written form, in accordance with the law.*
- 2. Court decisions are binding on all natural and legal persons.*
- 3. Courts publish all judgments on their official website, within the deadline of sixty (60) days from the date of issuing the judgment in accordance with the legislation in force.*

*The Council issues by-laws for the implementation of this Article."*

Practice shows that the difficulty with the execution of the ordinary court's decisions is later reflected with the execution of the decisions of the Constitutional Court. Following the interviews with judges and lawyers, it is our assessment that it is not the level of the jurisdiction that it is the problem behind the difficulties to execute a judicial decision, but it is rather the nature of the case that renders the execution difficult

<sup>74</sup> See for a recent example the letter of the President of the Constitutional Court of 17 April 2014, Ref Nr: KK 054, to Mrs. Kada Bunjaku-Përçuku, President of the District Court of Mitrovica, reminding the latter that the Mitrovica District Court has not informed the Constitutional Court on their execution measures of the latter's decision in case K1192.

<sup>75</sup> This Article provides: Article 394 "Failure to execute court decisions"

<sup>76</sup> The official or responsible person who refuses to execute any final order, ruling, decision or judgment of any court in the Republic of Kosovo or who fails to execute the decision pursuant to the time frame provided by law or the time frame specified in the decision shall be punished by a fine or imprisonment of up to two (2) years.

<sup>77</sup> When the offense provided for in paragraph 1 of this Article causes a severe violation of human rights or substantial material damage, the perpetrator shall be punished by imprisonment of six (6) months of up to five (5) years.

<sup>78</sup> If the perpetrator of the criminal offense provided for in paragraph 1 of this Article executes the final decision of the court, the prosecution will not be undertaken."

<sup>79</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=08%2F09#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=08%2F09#nav-id)

<sup>80</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=56#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=56#nav-id)

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## E. Review of the relevant caselaw of the Constitutional Court and regular courts

The procedure provided by Rule 66, § 6 of the rules of the Constitutional Court, analysed above, resembles with the one provided for in Article 46 § 4 ECHR. The Constitutional Court of Kosovo has used that procedure in the following cases until now:

i.

*KI08/09 Applicant: The Independent Union of Workers of IMK Steel Factory in Ferizaj, Judgment of December 17, 2010*

ii.

*KI59/09 Applicant Fadil Hoxha and 59 others against the Municipal Assembly of Prizren, Judgment of September 22, 2010*

iii.

*KO01/09 Applicant: Ćemilj Kurteši*

iv.

*KI 112/12 Applicant: Adem Meta, Judgment of July 5, 2013*

v.

*KI187/13 Applicant: Nadežda Jovanović, Judgment of April 1, 2014*

vi.

*KI132/15, Applicant: Visoki Decani Monastery, Judgment of May 19, 2016*

vii.

*KI90/16 Applicant: Branislav Jokić*

According to the information received by the interviewed judges and lawyers of the Constitutional Court, it results that, after the triggering of the procedure provided in Rule 66 § 6, only three decisions of the Constitutional Court remain non-executed to date. This shows that the procedure has its benefits and serves as an effective tool for the execution of the Constitutional Court's decisions. However, one might note that the nature of the Constitutional Court's rulings declaring that its decisions have not been executed remains declaratory. This means that the rulings on non-enforcement cannot oblige the bodies tasked with the execution of the decision to proceed with the adoption of execution measures as required by the Constitutional Court.

Following the interviews held with the judges and lawyers, and the analysis of the pertinent case-law of the Constitutional Court, the Consultants can conclude that during the years 2014, 2015, 2019 and 2021 the State Prosecutor has been notified of the non-execution of the judgments of the Constitutional Court in all cases mentioned above in paragraph 28 of this report. From the analysis of the operative part of these decisions declaring the non-execution of the decisions on the merits, on the basis of Rule 66 § 6, it seems that the notification of the State Prosecutor, on the basis of Rule 66 § 7, is applied automatically in every case the non-execution is proclaimed by the Constitutional Court. This shows, first, the paragraphs 6 and 7 of the Rule 66 are intrinsically linked. Secondly, this practice shows that the Constitutional Court takes seriously the problem of non-execution of its own decisions.

<sup>79</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=01%2F09#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=01%2F09#nav-id)

<sup>80</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=112#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=112#nav-id)

<sup>81</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=187#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=187#nav-id)

<sup>82</sup> [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=KI+132%2F15#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=KI+132%2F15#nav-id)

<sup>83</sup> See at [https://gjk-ks.org/vendimet/?prej=&deri=&lloji\\_i\\_aktit=aktvendim\\_mosmbarim&numri\\_i\\_rastit=KI90%2F16#nav-id](https://gjk-ks.org/vendimet/?prej=&deri=&lloji_i_aktit=aktvendim_mosmbarim&numri_i_rastit=KI90%2F16#nav-id)

These decisions are:

- a. K19/09 Applicant: The Independent Union of Workers of IMK Steel Factory in Ferizaj – Constitutional Review of the Decision of the Municipal Court in Ferizaj C No 349/2001.
  - The Judgment was issued on 17 December 2010. The Court was notified by the respective party that the Judgment was not being enforced. After a series of correspondence with the relevant parties the following steps were taken:
    - The Court rendered a Non-enforcement Decision in case K19/09 on 18 October 2012;
    - The Court notified the State Prosecutor about the non-enforcement of Judgment in case K19/09, on 28 May 2016;
  - b. K19/15 Applicant: Visoki Decani Monastery – Constitutional review of two decisions AC1-13-0008 and AC1-13-0009, of the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo\* on Privatization Agency of Kosovo Related Matters
  - The Judgment was issued on 19 May 2016. The Court was notified by the respective party that the Judgment was not being enforced. After a series of correspondence with the relevant parties the following steps were taken:
    - The Court rendered a Non-enforcement Decision in case K19/15 on 22 September 2017;
    - The Court notified the State Prosecutor about the non-enforcement of Judgment in case K19/15 on 24 September 2021;
  - c. K19/16 Applicant: Branislav Jokić 'member of non-majority community' – Constitutional review of non-execution of Decision KKP/KDŽ/29/2014, of Kosovo Property Claims Commission of 13 March 2014
  - The Judgment was issued on 3 December 2017. The Court was notified by the respective party that the Judgment was not being enforced. After a series of correspondences with the relevant parties the following steps were taken:
    - The Court rendered a Non-enforcement Decision in case K19/16 on 18 July 2022;
    - The Court notified the State Prosecutor about the non-enforcement of Judgment in case K19/16 on 2 August 2022;
- In none of these cases the Constitutional Court has been notified of any steps taken towards the execution of the respective decisions

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## **F.Collection of inputs from the Constitutional Court and other stakeholders relevant for execution of the Constitutional Court's decisions** *(online working group meetings)*

Paragraph 8 of Rule 66, clarifies that the registry of the Constitutional Court, led by the judge rapporteur in the specific case, follows the execution of the judgment of the Constitutional Court. During the interviews, the Consultants were informed that there is established indeed a working group within the Constitutional Court, led by the President, currently Mrs. Gresa Caka-Limani, that follows the process of the execution of the judgments of the Constitutional Court. That working group meets usually twice a year. The follow up of the execution process is regularly recorded in an excel document which serves as the basis for the discussion of the working group. At the meetings, the Constitutional court judges and lawyers assess the progress or the lack of thereof, and the steps that should be taken accordingly. The format, the periodicity, and the functioning of this working group shows the attention that constitutional court gives to the process of the execution of its own decisions

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## G.Dialogue between Constitutional Court and other institutions in Kosovo\*

The implementation of the judgments of the Constitutional Court of Kosovo\* should be analyses of the shared judicial responsibility between this court and other national courts, but also as a shared responsibility with executive and legislative part of the state. Therefore, it is important to analyse the role of the Constitutional court in the implementation of its own judgments and the role of the national courts in implementation of the judgments. One of the crucial issues in the relationship between the Court and the national authorities is the principle of legality and the aim for a stable legal system. This imposes obligations on all parts of the State powers duty in the execution of the constitutional Court's judgments. The highest national courts like Supreme and Appellate courts play a crucial role in the implementation of the constitutional Court's judgments on account of their hierarchical position in the domestic judiciary. It follows that the courts should deal with each other with high mutual respect.

The Constitutional Court should be very active in developing judicial dialogue with other national courts and it should build up a strong basis for bringing together other institutions responsible for the execution of the judgements. This will be the opportunity to have a direct exchange on procedural and substantive issues with the high-level courts and other partners to the Constitutional Court. There are many challenges common to all national courts like for instance stable caselaw on the protection of human rights, problems linked to the knowledge on fear trial, migration and terrorism, digitalization etc. The dialog between the courts is a signal for better protection of rule of law.

<sup>84</sup> See for example the notification from the President of the Constitutional Court, Gresa Caka-Nimani to the General Prosecutor, Mr. Aleksander Lumnezi, Nr. ref.:KK231/21, Prishtina, IUe 24 September 2021

<sup>85</sup> See also paragraph 2 of this Report.



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## H. Training and education

Training and education of judges and lawyers are important elements for rightful implementation and execution of the judgements and in ensuring that public policies do not block the protection of fundamental rights. Professional training is the most important trigger to develop knowledge and skills to safeguard proper execution of judgements. Judges have a duty to perform judicial work professionally and it will help to build professional ability through training . In line with its current strategic objectives, national academia or other specialized bodies for education and training of judges and prosecutors at the national level should focus not only on the training and education about the fundamental rights and the case law of the ECtHR, but their curriculums should also prescribe the education and training about the implementation and execution of the judgements of the Constitutional Court.

In line with the joint task to educate and train the professional in judiciary, the strategic goals in future should be to increase the level of knowledge of the execution and implementation of the judgments; to work on effective internal cooperation between institutions responsible for the implementation of the judgements, to work on external cooperation and continued form of dialog between the Constitutional Court and other national courts; to reinforce, as far as possible, the primacy of the role of the national specialized institutions for training and education in all areas of judicial training at the national level.

<sup>86</sup> Opinion no 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels.

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## **I. Public awareness and presentation of new judgment**

It is extremely important to raise awareness of new judgments, particularly to new standards and principles, or judgements that are linked with systemic problems. That is why at the time when the judgement is pronounced and published in the database of the Constitutional Court it should be published together with a legal summary of the judgement. Legal summaries are important for national judges, other professionals, for research purposes, for applicants or any other person interested in the case law of the Court.

The duty of raising awareness of the public about the new standards set by the case law they may be part of the work of the Press service of the Court that may be by the judges of the Court, Registry and the lawyers who are working on the concrete case. The aim of the press service is to provide information, which is publicly available about cases, and to guide the public in the use of the Constitutional Courts database of previous cases. Press officers of the Court should be available to brief journalists by email or by phone or by use of press releases.

The Court should try to accept the new challenges in the time of the Internet and other new tools for information. Therefore, following the example of the ECtHR, the Constitutional Court may provide those who are interested in the work of the Constitutional Court, to follow the Court on Twitter, or by subscribing to mailing list for press release.

## **III. Conclusions and recommendations**

### **i. Recommendations on reception of feedback on execution from applicants and respondents (parties)**

During the meetings held in Prishtina, in Strasbourg and online, the Consultants were told that for the purposes of following the execution of a Constitutional Court decision, the person in charge is the judge rapporteur of the specific case. The judge rapporteur, assisted by the registry of the Court, follows, identifies, classifies and evaluates the information pertaining to the execution of the specific decision. That information later serves, if necessary, as a basis for the discussion in the working group mentioned in the previous paragraph of this report, and when deemed that the executions process has stalled to an unjustified delay or in any case in breach of the indications of the decision of the Court, to trigger the procedure provided in Rule 66, analysed above. This means that Rule 66 procedure can be triggered ex officio by the Court itself.

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However, it is clear from the interviews that also the parties, the applicants and the respondents in the case before the Constitutional court can inform the latter on the execution measures or the absence thereof. This seems a reasonable solution in order not to overburden the Constitutional Court with a process which is not the main focus of its mission and allow it to direct its limited resources on the judicial function.

## **ii. Recommendation on judicial methodologies to be used by the Constitutional Court**

It is true that the Constitutional Court indicates, in conformity with rule 66 § 5 the subject in charge with the execution of the judgment and the deadline to inform the constitutional Court for the measures taken in this regard . This is measure which is also adopted by several other Constitutional Courts around Europe . The consultants consider that it is important for the Constitutional Court to continue to indicate, clearly and consistently, the subjects that are responsible for the execution of its judgment, and always indicate a clear deadline for the execution of the judgment.

The measures to execute the judgment of Constitutional Court must be compatible with the conclusions of the judgment. For effective and better implementation judgements shall be clear, well elaborated and reasoned. In that regard, in certain cases it might be necessary to elaborate in more in detail, in the operative part of the judgment, the measures that should be taken by the authorities, eventually by referring to the paragraphs containing the ratio of the Court's judgment, or by specifying in detail the measure to be taken.

The question of monetary sanctions and monetary damages might be also discussed with all stakeholders, including the respective interests in case of delayed execution of the judgment of the Court. Such measures might especially be discussed/envisaged in cases when the non-execution does not stem from structural, institutional or procedural difficulties, but it is the result of pure unwillingness to execute the judgment .

The Constitutional Courts should initiate introduction of pilot judgement procedure on the applications that concern the existence of a structural or systemic problem. Pilot judgement procedure is with the aim to solve systemic problems but also to prevent further mass applications. A pilot judgement procedure will require good cooperation with the legislator and the government. However, Constitutional Court shall indicate measures that in one side are clear enough to lead the legislator and the government in the adoption of new measures to resolve these issues, on the other side shall be prudent enough to leave them the necessary margin they shall enjoy to finding the better ways to undertake the required measures.

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### iii. Recommendations on the forms of annual or periodic review of execution of judgements

It is clear from the preceding paragraphs in this report that the Constitutional court is quite dedicated and focused on the execution of its decisions. The biannual meetings of the working group of the Constitutional Court on the execution of decisions, can be considered as an appropriate tool, functioning at reasonable intervals, to assess the issue of the execution of the Constitutional court decisions.

There is no information, however, that such meetings take place in other judicial bodies or within the Council of the Judiciary, in order to deal with a problem which seems to be more problematic at the level of the ordinary courts.

Constitutional and Supreme Court must be leaded by the idea for a dialog between them and other courts, with the aim for better implementation of the legislation and for effective execution of the judgements. Good dialog will bring better understanding of the role of the judges and of the importance of the execution of the judgements in the time of digital age.

The Parliament should respect the judgments of the Constitutional Court. Cooperation with the Constitutional Courts should be held in the same manner from the side of the administrative organs, of any other institutions.

It would be appropriate to establish a monitoring mechanism of the execution of final judicial decisions outside the judicial bodies, such as the Ombudsperson, Ministry of Justice, Parliament, etc.

Following from above, it would be very useful, for the periodic review purposes and for awareness purposes, for the Ombudsman include a separate chapter on the execution of Constitutional Court's judgments in their activities annual report before the Parliament.

With the respect to the execution of judgments of the Constitutional Court, there should be annual joint meetings of the high-level courts, the legislator, the government, and responsible administrative bodies meeting and discussing the judgements that are in process of the execution. A separate public meeting, dedicated on the execution of the Constitutional Court judgments, organised by the Legal affairs Committee of the Parliament, with all interested institutions, might be also envisaged.

<sup>87</sup> See paragraph 44, above. See for example decision of the Constitutional Court of Kosovo of 06.04.2023 in case no. K114/22.

<sup>88</sup> See paragraphs 29-32, above.

<sup>89</sup> See for example the Rules of Procedure of the Constitutional court of Bosnia and Hercegovina which provide: Article 74 'Compensation for Non-Pecuniary Damage'

<sup>90</sup> In a decision granting an appeal the Constitutional Court may award compensation for non-pecuniary damages

<sup>91</sup> If the Constitutional Court considers that compensation for pecuniary damage is necessary it shall award it on equitable basis taking into account the standards set forth in the case law of the Constitutional Court"

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#### **iv. Recommendations on allocation of human resources**

The Constitutional Court does not have a dedicated institutional structure focused on the execution of the decisions. As mentioned above there is only the Working Group led by the President of the Court which meets twice a year to follow that process. In view of the limited number of staff with the Constitutional Court, of the limited number of Constitutional court decisions that remain not executed to date and to the fact that the execution of judicial decisions is not, per se, a judicial function, the Consultants would not advise the establishment of a separate structure for that purpose

#### **v. Recommendation on awareness raising on the execution of the decisions of the Constitutional Court**

It is important that the execution of the judgements of the Constitutional Court of Kosovo should be perceived as collective responsibility of the government, parliament, national judges, and other administrative bodies. The concept of the responsible state is built on the mutual understanding that human rights and their execution belong to the states.

The importance of execution of the judgements is closely linked with the risk of repeated violation of individual rights. The obligation to execute judgements is applicable for all state powers equally. Therefore, it is important to bear in mind the binding effect of the judgements of the Constitutional Court of Kosovo\* and for that purpose there should be a systematic monitoring activity on execution of judgments.

It is important to keep an open and trustful dialog with the media and to inform the public about new judgements, decisions, and new working methods. Constitutional Court may follow the example of the ECtHR in using social media to send important messages of certain new judgements. In that direction, it may be helpful to use for example twitter, Facebook, or any other social media.

The Press Service may help the Constitutional Court to disseminate publications, statements, information notes prepared by the Registry of the Constitutional Court. This approach will provide positive results for the public and it will bring the work of the court closer to the public. Press releases and short and informative legal summaries will help in informing the public but also the legal institutions, academic community, and civil society about the final and binding judgements of the Constitutional court or of the ECtHR.

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The practice of the Slovenian Constitutional Court, described above, could be adopted. The Constitutional Court of Kosovo may consider it useful to dedicate a special chapter and starting with it, on its annual report of activities.

It is important to establish a network with the courts and to hold conferences, round-table meetings with judges and prosecutors from courts of first instances, courts of appeals, national human rights institutions such as Ombudsman Institution and Human Rights and Equality Institution.

***The consultants***

***Mirjana Lazarova Trajkovska***  
***Ledi Bianku***

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## Annex - Terminological index and sources

### Terminological index:

- ECHR – European Convention of Human Rights and Fundamental Freedoms (where the term ‘Convention’ is used without any specification is always meant as European Convention of Human Rights and Fundamental Freedoms)
- ECtHR – European Court of Human Rights
- Committee of Ministers - Committee of Ministers of Council of Europe
- CJEU – Court of Justice of European Union
- CEPEJ - The European Commission for the Efficiency of Justice
- EU – European Union
- TFEU – Treaty on Functioning of the European Union
- TEU – Treaty on European Union

### Sources:

- Treaties and acts of European Regional Courts
  - *European Convention on Human Rights*
  - *TFEU - Treaty on the Functioning of the European Union*
  - *TEU – Treaty on European Union*
  - *Rules of Procedure of ECtHR*
  - *Rules of Procedure of CJEU*

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## Annex - Terminological index and sources

### • Judgments of the ECtHR:

- *Baybaşın v. the Netherlands*, application no. 13600/02, 06.07.2006.
- *Emre v. Switzerland (No. 2)*, app. no. 5056/10, 11/10/2011.
- *Greens and M.T. v. the United Kingdom*, 2010
- *Guðmundur Andri Ástráðsson v. Iceland* [GC], 2020
- *Hornsby v. Greece*, app no. 18357/91, 19 March 1997.
- *Ilgar Mammadov v. Azerbaijan*, app. no. 15172/13, [GC], 29/05/2019
- *Jeronovičs v. Latvia*, app. no. 44898/10, [GC], 05/07/2016,
- *Kavala v. Türkiye*, app no. 28749/18, [GC] 11/07/2022.
- *Moreira Ferreira v. Portugal (no. 2)* [GC], 2017,
- *Scordino v. Italy (no. 1)* [GC], application no. 36813/97 29.06.2006.
- *Suso Musa v. Malta*, application no. 42337/12, 23.07.2013.
- *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, app. no. 32772/02, [GC], 30/06/2009

### • Committee of Minister Resolutions:

- *Committee of Ministers resolution H46-27 Kavala v. Türkiye (Requête n° 28749/18)*, 1459e réunion, 7-9 mars 2023 (DH)
- *Résolution intérimaire CM/ResDH(2023)36, Selahattin Demirtaş (n°2) v. Türkiye*, (adoptée par le Comité des Ministres le 9 mars 2023, lors de la 1459e réunion des Délégués des Ministres).

### • Rules of the Committee of Ministers

### • Official Journal of the European Union 29.9.2012

### • National Constitutions and laws on Constitutional Courts



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- *Constitution of Azerbaijan.*
  - *Law on the Court of Arbitrations on Belgium*
  - *Law on the Constitutional Court on Bulgaria,*
  - *Constitution of Bosnia and Herzegovina*
  - *Rules of Procedure of the Constitutional court of Bosnia and Hercegovina*
  - *Constitution of Czech Republic*
  - *Constitutional Act of Constitutional Court in Croatia*
  - *Constitution of Kosovo\**
  - *Rules of Procedure of the Constitutional Court of Kosovo*
  - *Law on the Constitutional Court of Hungary.*
  - *Constitution of France*
  - *Constitution of Italy*
  - *Law on the Constitutional Court of Lithuania.*
  - *Constitution of Malta*
  - *Constitution of Poland.*
  - *Law on the Constitutional Court of Slovakia*
  - *Constitution of Slovakia*
  - *Law on the Constitutional Court of Slovenia.*
  - *Organic Law on the Constitutional Court of Spain.*

#### **• Decisions of Constitutional court of Kosovo**

- *KI08/09 Applicant: The Independent Union of Workers of IMK Steel Factory in Ferizaj, Judgment of December 17, 2010*
- *KI59/09 Applicant Fadil Hoxha and 59 others against the Municipal Assembly of Prizren, Judgment of September 22, 2010*
- *KO01/09 Applicant: Ćemilj Kurteši*
- *KI 112/12 Applicant: Adem Meta, Judgment of July 5, 2013*
- *KI187/13 Applicant: Nadežda Jovanović, Judgment of April 1, 2014*
- *KI132/15, Applicant: Visoki Decani Monastery, Judgment of May 19, 2016*
- *KI90/16 Applicant: Branislav Jokić*

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## • Reports

- *The European Commission for the Efficiency of Justice (CEPEJ) "Good practice guide on enforcement of judicial decisions" As adopted at the 26th CEPEJ Plenary Session, 10-11 December 2015*
- *Opinion no 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels.*
- *Master of the Rolls, Lord Woolf, Report on the English civil system (1996)*

## • Doctrine

- *Lord Lester of Herne Hill QC, Access to Justice, Interights-Bulletin, (A Review of the International Center for the Legal Protection of Human Rights – ISSN 0268-3709 1996 Volume 10 No. 2*

[www.coe.int](http://www.coe.int)

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.

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