THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

Newsletter

January — June 2020

CONTENT:

SIX MONTHS WORKING REPORT.....2

ACTIVITIES OF THE CONSTITUTIONAL COURT.....4

JUDGMENTS 5

ECtHR – IMPORTANT DECISIONS 16

Constitution of Kosovo - Chapter VIII

Constitutional Court

Article 112

[General Principles]

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.

2. The Constitutional Court is fully independent in the performance of its responsibilities.

Composition of the Constitutional Court

The Constitutional Court of the Republic of Kosovo is composed of 9 (nine) Judges.

The Judges of the Constitutional Court of the Republic of Kosovo are appointed in accordance with Article 114 [*Composition and Mandate of the Constitutional Court*] of the Constitution and Articles 6 and 7 of the Law on the Constitutional Court of the Republic of Kosovo.

Following the establishment of the Constitutional Court in 2009 and in accordance with the former Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution, 6 (six) out of 9 (nine) judges were appointed by the President of the Republic of Kosovo on the proposal of the Assembly.

Of the 6 (six) national judges 2 (two) judges served for a non-renewable term of 3 (three) years, 2 (two) judges served for a non-renewable term of 6 (six) years and 2 (two) judges served for a non-renewable term of 9 (nine) years.

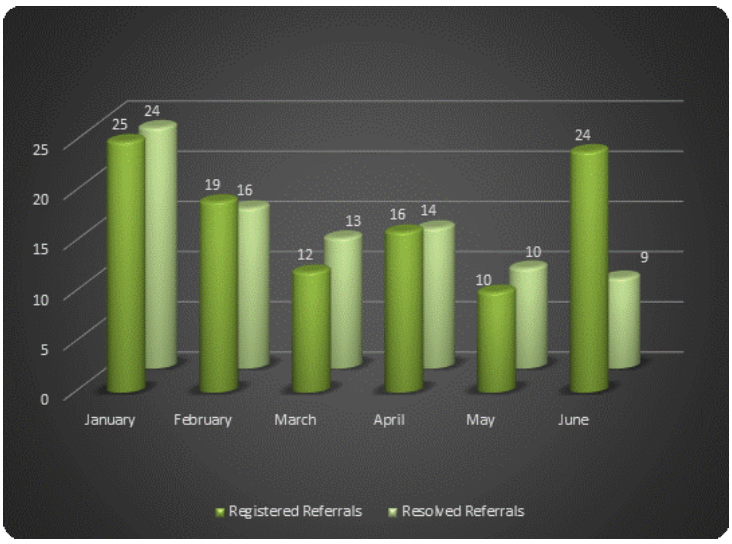
Pursuant to the abovementioned Article 152 [*Temporary Composition of the Constitutional Court*] of the Constitution 3 (three) international judges were appointed by the International Civilian Representative, upon consultation with the President of the European Court of Human Rights.

The Court is currently composed of 9 (nine) national judges.

Status of cases

During the six-month period: 1 January – 30 June 2020, the Court has received 106 Referrals and has processed a total of 253 Referrals/Cases. A total of 86 Referrals were decided or 33.99% of all available cases.
During this period, 78 decisions were published on the Court's webpage.

The dynamics of received referrals by month (1 January - 30 June 2020)



The following are 8 judgments that the Court rendered during the six month period, 1 January - 30 June 2020:

- Judgment in Case KI 14/18, submitted by: Hysen Kamberi. The filed referral requested the constitutional review of Judgment of the Supreme Court of Kosovo, PML.No.241/2017, of 5 December 2017.
- Judgment in Case KI 07/18, submitted by: "Çeliku Rollers" sh.p.k. The filed referral requested the constitutional review of Judgment of the Supreme Court of Kosovo, E. Rev. No. 14/2017, of 14 September 2017.
- Judgment in Case KI 35/18, submitted by: "Bayerische Versicherungsverbrand". The filed referral requested the constitutional review of Judgment of the Supreme Court of Kosovo, E. Rev. No.18/2017, of 4 December 2017.
- Judgment in Case KO 54/20, submitted by: The President of the Republic of Kosovo. The filed referral requested the constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020.
- Judgment in Case KO 61/20, submitted by: Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo. The filed referral requested the constitutional review of Decision [no. 214/IV/2020] of 12 April 2020, of the Ministry of Health on declaring the Municipality of Prizren "quarantine zone"; and Decisions [no. 229/ IV/2020], [no. 238/IV/2020], [no. 239/IV/2020] of 14 April 2020 of the Ministry of Health on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipalities of Prizren, Dragash and Istog.
- Judgment in Case KI 193/18, submitted by: Agron Vula. The filed referral requested the constitutional review of Decision Ac. No. 227/18 of the Court of Appeals of 18 September 2018, regarding non-enforcement of Decision A02 158/07 of the Independent Oversight Board of Kosovo of 25 February 2008.
- Judgment in Case KO 72/20, submitted by: Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo. The filed referral requested the constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020.
- Judgment in Case KI 123/19, submitted by: "SUVA Rechtsabteilung". The filed referral requested the constitutional review of Judgment Ae. No. 146/17 of the Court of Appeals of Kosovo, of 26 February 2019, Judgment adopted on 13 May 2020 and published on 18 June 2020.

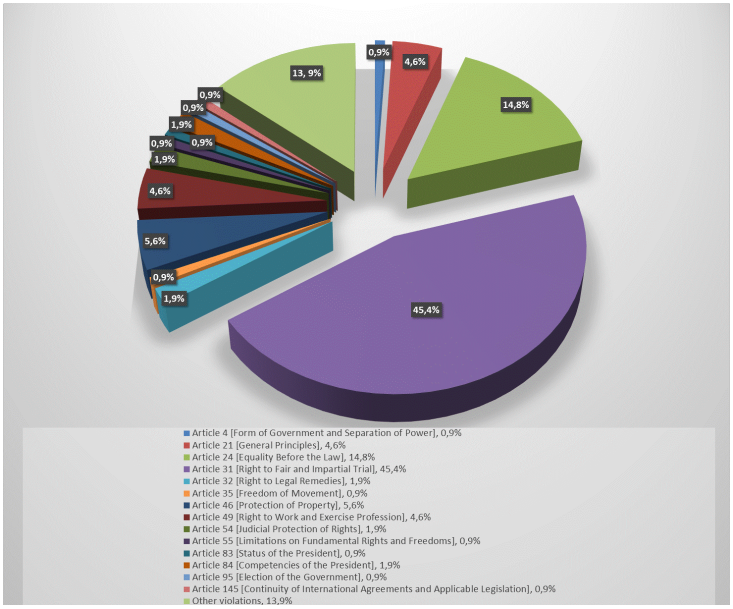
Types of alleged violations

The types of alleged violations in the 106 referrals received during the six-month period: 1 January - 30 June 2020, are the following:

- Article 4 [Form of Government and Separation of Power], 1 case or 0,9%;
- Article 21 [General Principles], 5 cases or 4,6%;
- Article 24 [Equality Before the Law], 16 cases or 14,8%;
- Article 31 [Right to Fair and Impartial Trial], 49 cases or 45,4 %;
- Article 32 [Right to Legal Remedies], 2 cases or 1,9%;
- Article 35 [Freedom of Movement], 1 cases or 0,9%;
- Article 46 [Protection of Property], 6 cases or 5,6%;

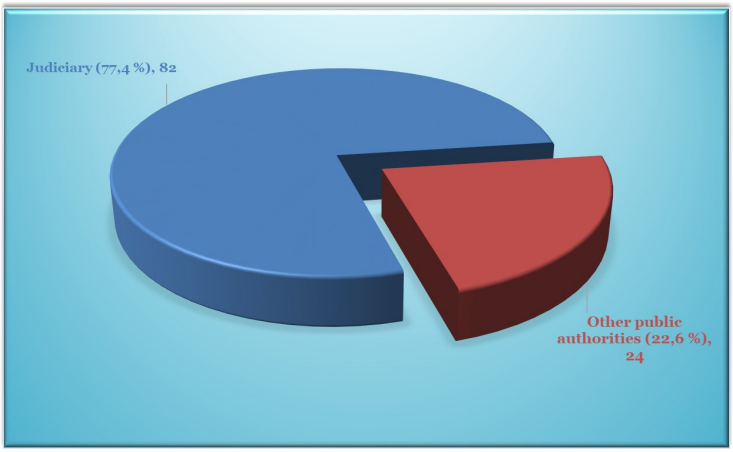
- Article 49 [Right to Work and Exercise Profession], 5 cases or 4,6%;
- Article 54 [Judicial Protection of Rights], 2 cases or 1,9%;
- Article 55 [Limitations on Fundamental Rights and Freedoms], 1 case or 0,9%;
- Article 83 [Status of the President], 1 case or 0,9%;
- Article 84 [Competencies of the President], 2 cases or 1,9%;
- Article 95 [Election of the Government], 1 case or 0,9%;
- Article 145 [Continuity of International Agreements and Applicable Legislation], 1 case or 0,9%;
- Other violations, 13 cases or 9,7%;

Alleged violations by type
(1 January - 30 June 2020)



Alleged violators of rights

- 82 Referrals or 77,4 % of Referrals refers to violations allegedly committed by court's decisions;
- 24 Referrals or 22,6 % of Referrals refers to decisions of other public authorities;

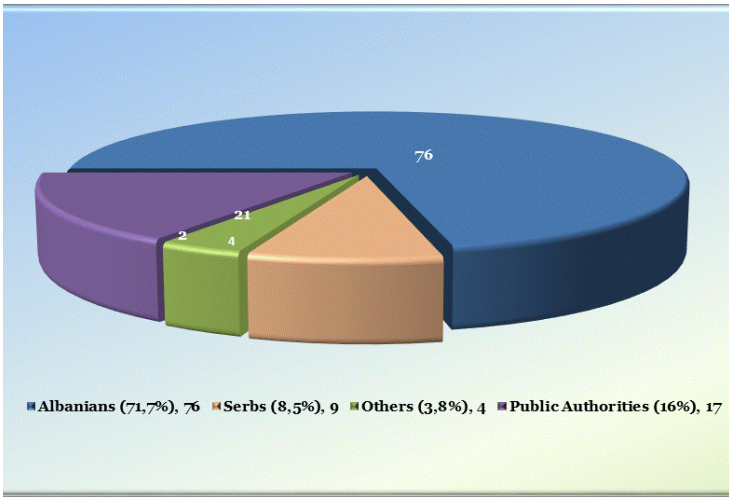


Access to the Court

The access of individuals to the Court is the following:

- 76 Referrals were filed by Albanians, or 71,7%;
- 9 Referrals were filed by Serbs, or 8,5%;
- 4 Referrals were filed by other communities, or 3,8%;
- 17 Referrals were filed by other public authorities, or 16%;

Ethnic structure of the Applicants
(1 January - 30 June 2020)



Sessions and Review Panels

During the six-month period: 1 January - 30 June 2020, the Constitutional Court held 20 plenary sessions, 87 Review Panels and 1 Public Hearing, in which the cases were resolved by decisions, resolutions and judgments.

During this period, the Constitutional Court has published 78 decisions.

The structure of the published decisions is the following:

- 8 Judgments (10,3%);
- 59 Resolutions on Inadmissibility (75,6%);
- 8 Decisions to summarily reject the Referral (10,3%);
- 1 Decision on Interim Measure (1,3%);
- 2 Decisions on extension of the Interim Measure (2,6%);

10 February 2020

In the Courtroom of the Constitutional Court of the Republic of Kosovo a public hearing was held, in which the Referral with case number KI56/18 was considered, whose subject of constitutional review was, "*the inability of the Applicant to register his deceased son, who died in Sweden, in the Principal Death Register in Kosovo*".
The Applicant, the representative of the Civil Registration Agency within the Ministry of Internal Affairs, the representative of the Ministry of Foreign Affairs and the representative of the civil status sector in the Directorate of Administration of the Municipality of Prishtina attended the public hearing.
After the Applicant and other parties involved in the case presented their main arguments, they answered to several questions asked by the Judges of the Constitutional Court regarding the subject matter.
The Court set a one-week time limit for all the parties involved in the case to submit additional documents and their final comments on the case.

21 February 2020

At the invitation of the American organization Federalist Society for Law and Public Policy Studies and as part of the delegation of the European Network of Judges, the President of the Constitutional Court of the Republic of Kosovo, Mrs. Arta Rama-Hajrizi, and Judge of the Constitutional Court, Ms. Gresa Caka-Nimani have stayed for a several-day working visit to the United States.
President Rama-Hajrizi and Judge Caka-Nimani began their official visit to the US capital, Washington, on 18 February 2020, where they held meetings with senior State Department officials, responsible for overseeing the rule of law and fighting of corruption in the countries of the Southeast and Central Europe.
Following the visit to the United States, President Rama-Hajrizi and Judge Caka-Nimani stayed in the US city of Atlanta, where they attended the Transatlantic Symposium 2020 on Human Rights Law, organized by Federalist Society for Law and Public Policy Studies, in cooperation with Emory University School of Law, on 19 February 2020.
In the framework of the symposium organized by the American judges and academics, President Rama-Hajrizi and Judge Caka-Nimani addressed the participants with their presentations on the issues of freedom of expression and the judiciary.
During the visit to Atlanta, on 20 February 2020, President Rama-Hajrizi and Judge Caka-Nimani were received by the President of the Supreme Court of Georgia, Mr. Harold Melton, as well as judges of the Court of Appeals of this American federal state, with whom they discussed various issues of mutual interest in the field of protection of human rights and the rule of law.

2 March 2020

The President of the Constitutional Court of the Republic of Kosovo, Mrs. Arta Rama-Hajrizi, received the former judge of the European Court of Human Rights (ECtHR) from Albania, Mr. Ledi Bianku, who stayed for one week working visit to the Constitutional Court with the support of the Council of Europe Office in Prishtina. The general case law of the ECtHR, the experience of former Judge Bianku in dealing with applications and judicial review proceedings, and the same decision-making of the ECtHR judges in similar applications, were just some of the topics addressed in the joint discussion.
During the conversation, the President Rama-Hajrizi notified Mr. Bianku in a more detailed way about the consolidation of the case law of the Constitutional Court of Kosovo in line with the case law of the ECtHR, the study visits to this court of the judges and advisors of the Constitutional Court of Kosovo, as well as about the excellent cooperation with the constitutional courts around the world made possible through the Venice Commission Forum.
At the conclusion of the meeting, President Rama-Hajrizi thanked Mr. Bianku for the visit and for his willingness to share with the judges and advisors of the Constitutional Court of Kosovo his experience and expertise gained from his several-year work as a judge of the European Court of Human Rights.
After thanking President Rama-Hajrizi for the hospitality, the former Judge Bianku highly appreciated the achievements of the Constitutional Court of Kosovo so far in implementing the European standards of constitutional justice.

Judgment

KO 54/20

Applicant

The President of the Republic of Kosovo

Request for constitutional review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020

On 24 March 2020, the President submitted Referral KO54/20 to the Court. Through this Referral, the President requested a constitutional review of the Decision [no. 01/15 of 23 March 2020] of the Government and the imposition of the interim measure against the challenged Decision of the Government.

The subject matter of the Referral was the constitutional review of the challenged Decision of the Government, which according to the Applicant's allegation is not in compliance with Articles: 21 [General Principles], 22 [Direct Applicability of International Agreements and Instruments], 35 [Freedom of Movement], 43 [Freedom of Gathering], 55 [Limitations on Fundamental Rights and Freedoms] and 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution of the Republic of Kosovo, and Article 2 [Freedom of movement] of Protocol No. 4 of the European Convention on Human Rights, Article 13 of the Universal Declaration of Human Rights, as well as Article 12 of the International Covenant on Civil and Political Rights.

Under the heading VII – CONCLUSIONS – of this Judgment (see paragraphs 310-325), the Court summarized the essence of the case and stated the following:

As a preliminary issue, the Court in this Judgment clarified that it is not its role to assess whether the measures taken by the Government to prevent and combat the COVID-19 pandemic are adequate and appropriate. Moreover, the Court notes that the need to take measures and their necessity has not been challenged by either party in this case. Defining public health policies does not fall within the competences and authorizations of the Constitutional Court. In matters of public health, the Constitutional Court itself also refers and obeys to relevant health and professional institutions at the state and world level.

The constitutional question that this Judgment entails is the compatibility with the Constitution of the challenged Decision of the Government, namely whether by its issuance the Government has limited the fundamental rights and freedoms guaranteed by the Constitution in accordance with the law or beyond the powers provided by law. In this context, regarding the assessment of whether the restrictions made at the level of the entire Republic of Kosovo by the challenged Decision of the Government are prescribed by law, the Court has focused on the assessment of the powers established in Articles 41 and 44 of Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Articles 12 (1.11) and 89 of Law No. 04/L-125 on Health.

In this regard, the Court considered: (i) the Applicant's Referral and the allegations presented in this Referral; (ii) the comments submitted by the Government and other interested parties; (iii) the case law of the ECtHR and, in particular, general principles on the applicability of the criterion "prescribed by law" as regards the restriction of fundamental rights and freedoms; and (v) the case law of the Constitutional Court itself.

Based on the foregoing considerations and assessments, the Court, unanimously, decided to declare Referral KO54/20 admissible for review on merits since, in the circumstances of the present case, all the admissibility requirements established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure were fulfilled.

The Court also unanimously decided that Decision [No. 01/15] of the Government of 23 March 2020 is incompatible with Article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with Articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] and Article 2 (Freedom of movement) of Protocol no. 4, Article 8 (Right to respect for private and family life) and Article 11 (Freedom of assembly and association) of the ECHR.

The Court held that the limitations contained in the challenged Decision of the Government regarding the constitutional rights and fundamental freedoms referred to above, are not "prescribed by law", and therefore are contrary to the guarantees contained in Articles 35, 36 and 43 of the Constitution in conjunction with the respective Articles of the ECHR, and Article 55 of the Constitution, which in its first paragraph clearly states that the fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.

The Court reiterated the fact that the challenged Decision of the Government refers to the implementation of the two abovementioned laws, which authorize the Ministry of Health to take certain measures in those laws in order to prevent and combat the infectious diseases. However, the Court held that

the abovementioned laws do not authorize the Government to limit the constitutional rights and freedoms provided in Articles 35, 36 and 43 of the Constitution at the level of the entire Republic of Kosovo and for all citizens of the Republic of Kosovo without exception.
In this respect, the Court found that the restrictions imposed through the challenged Decision: (i) regarding the freedom of movement and gathering established in Articles 35 and 43 of the Constitution, exceed the limitations permitted by the abovementioned law adopted by the Assembly; and (ii) related to "gatherings in all settings – private and public, open or closed" which incorporate aspects of the rights guaranteed by Article 36 of the Constitution, are not based on any of the authorizations set forth in the aforementioned law or any other law of the Assembly.
The Court clarified that the Government cannot restrict any fundamental right and freedom through decisions unless a restriction of the relevant right is provided by the law of the Assembly. The Government can only enforce a law of the Assembly that restricts a fundamental right and freedom only to the specific extent authorized by the Assembly through the relevant law.
With regard to the Applicant's allegations of a violation of Article 56 [Fundamental Rights and Freedoms During a State of Emergency] of the Constitution, the Court held that this Article is not applicable in the circumstances of the present case, since it is applicable only following the declaration of a State of Emergency.
However, with regard to the disagreement between the parties to the dispute, the President and the Government, over the meaning of the constitutional terms "limitation" and "derogation" that appear in Articles 55 and 56 of the Constitution, the Court clarified that the "limitation" of human rights and freedoms can be made "only by law" of the Assembly, but this does not mean that the "limitation" of rights can only be made through and after the declaration of a State of Emergency.
The Court also clarified that the term "limitation" used in Article 55 of the Constitution implies the fact that the Assembly has the right to limit the fundamental rights and freedoms, through law, but only insofar and to the extent necessary in order that in an open and democratic society, fulfills the purpose for which the limitation is allowed.
In other words, "limitation" implies a lighter degree of interference and this can be done even without declaration of a State of Emergency; whereas "derogation" implies a more severe degree of interference since it can never be done without a declaration of a State of Emergency. As to the request for interim measures, the Court finds that following the unanimous decision of the judges to decide in their entirety the merits of the case and to render this Judgment, the latter remains without subject. In accordance with Articles 116.3 of the Constitution, Article 20.5 of the Law on the Constitutional Court and Rule 60 (5) of the Rules of Procedure, the Court set the date 13 April 2020 as the date of entry into force of this Judgment, namely the repeal of the challenged Decision of the Government.
The Court has set another date of entry into force of its Judgment, namely 13 April, 2020 exceptionally and having regard to: (i) the circumstances created by the declaration of the COVID-19 pandemic at the world level; (ii) relevant recommendations of the health institutions at the state and world level; (iii) the potentially harmful effects on public health as a result of the immediate repeal of the restrictions provided by the Decision of the Government; and (iv) the protection of public health and interest until the enforcement of this Judgment by the relevant institutions of the Republic of Kosovo.
During this period of time and within the meaning of Article 55 of the Constitution regarding the "limitation" of fundamental rights and freedoms, the relevant institutions of the Republic of Kosovo, and, in the first place, the Assembly, should take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to safeguard public health have been made in accordance with the Constitution and this Judgment.
Finally, the Court also noted that the Ministry of Health, namely the Government, continues to be authorized to render decisions with an aim of preventing and combating the pandemic, insofar as it is authorized by Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law No. 04/L-125 on Health.

Judgment

KO 61/20

Applicant

Uran Ismaili and 29 other deputies of the Assembly of the Republic of Kosovo

Request for constitutional review of Decision [no. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren "quarantine zone"; and Decisions [no. 229/IV/2020], [no. 238/IV/2020], [no. 239/IV/2020] of 14 April 2020 of the Ministry of Health on preventing,

fighting and eliminating infectious disease COVID-19 in the territory of the Municipalities of Prizren, Dragash and Istog

On 17 April 2020, 30 deputies of the Assembly submitted Referral KO61/20 to the Court. Through this Referral, the Applicants requested the constitutional review of four (4) decisions of the Ministry of Health, namely: (i) Decision [no. 214/IV/2020] of 12 April 2020 of the Ministry of Health on declaring the Municipality of Prizren "*quarantine zone*"; (ii) Decision [no. 229/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Prizren*"; (iii) Decision [no. 238/IV/2020] of 14 April 2020 of the Ministry of Health "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Dragash*"; (iv) Decision [no. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*on preventing, fighting and eliminating infectious disease COVID-19 in the territory of the Municipality of Istog*".

The subject matter of the Referral was the constitutional review of the four (4) challenged decisions, which the Applicants allege that are not in compliance with Articles 35 [Freedom of Movement] and 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution) and Article 2 of Protocol no. 4 of the European Convention on Human Rights (hereinafter: ECHR). The Applicants also requested the imposition of the interim measure for the suspension of the challenged decisions.

Under heading VI – CONCLUSIONS – of this Judgment (see paragraphs 246-263), the Court summarized the essence of the case and stated the following: On 31 March 2020, the Court decided on case KO54/20 through which Judgment, it declared Decision no.01/15 of the Government invalid, holding that the latter was in contradiction with article 55 [Limitations on Fundamental Rights and Freedoms] of the Constitution in conjunction with articles 35 [Freedom of Movement], 36 [Right to Privacy], 43 [Freedom of Gathering] of the Constitution and the equivalent articles of the ECHR, namely articles 8 (Right to respect for private and family life), 11 (Freedom of assembly and association), and 2 (Freedom of movement) of Protocol No. 4 of the ECHR.

Through the abovementioned Judgment, the Court emphasized that (i) the Government can only implement a law of the Assembly that limits a fundamental right and freedom, and only to the extent that the Assembly has authorized it through the respective law; and that (ii) the Ministry of Health, namely the Government, is authorized to issue decisions aimed at preventing and fighting the pandemics, only to the extent it is authorized through the Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases and Law no. 04/L-125 on Health. The Court also stated that these two laws do not authorize the Ministry of Health, namely the Government, to limit the rights and freedoms guaranteed by the Constitution at the level of the entire Republic of Kosovo and for all the citizens of the Republic of Kosovo without exception.

Following Judgment KO54/20, on 14 April 2020, through thirty-eight (38) decisions for "*prevention, fighting and elimination of the infectious disease COVID-19*", the Ministry of Health imposed limitations in all municipalities of Kosovo and for all citizens of the Republic of Kosovo. The Court in the present case, namely KO61/20, did not conduct a constitutional review of all thirty-eight (38) abovementioned Decisions, because the Applicants have not challenged all of them.

Only three (3) of them have been challenged before the Court, Decisions [No. 229/IV/2020]; [No. 238/IV/2020]; and [No. 239/IV/2020] of 14 April 2020, for the municipalities of Prizren, Dragash and Istog, respectively. In addition the three abovementioned decision, it is Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health declaring the Municipality of Prizren "*quarantine zone*", has also been challenged before the Court.

Therefore, the constitutional question entailed in this Judgment, KO61/20, was the compatibility with articles 35 and 55 of the Constitution of the four (4) challenged Decisions of the Ministry of Health. The Court, in assessing their constitutionality, based on article 55 of the Constitution, the case-law of the Court, including the Judgment of the Court KO54/20, and the case-law of the ECtHR pertaining to article 2 of Protocol no. 4 of the ECHR, has reviewed whether the "*interferences*", namely the limitations on the freedom of movement of the citizens in the municipalities of Prizren, Dragash and Istog, respectively (i) are "*prescribed by law*", namely by the Law no. 02/L-109 for Prevention and Fighting against Infectious Diseases; (ii) pursue a "*legitimate aim*"; and (iii) are "*necessary in a democratic society*". Based on the examinations and assessments of the documents submitted to the Court and its case-law, the Court, unanimously, decided to declare Referral KO61/20 admissible for review on the merits, taking into account that all admissibility criteria established in the Constitution, the Law on the Constitutional Court and the Rules of Procedure, have been met.

The Court decided that the Decisions "*for prevention, fighting and elimination of the infectious disease COVID-19*" in the municipalities of Prizren, Dragash and Istog, respectively, are in compliance with the Constitution, with the exception of the respective points of the enacting clauses which determine the respective administrative minor offences, whereas it declared unconstitutional the Decision declaring the Prizren municipality a "*quarantine zone*". More precisely, the Court, unanimously, decided that: (i) Decision [No. 229/IV/2020] of 14 april 2020 of the Ministry of Health, "for prevention, fighting and elimination of the infectious disease COVID-19" in the municipality of Prizren (points I, II, III, IV, VI, VII and

VIII); and (ii) Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" in the municipalities of Dragash and Istog (points I, II, III, V, VI and VII), respectively, are in compliance with article 55 of the Constitution in conjunction with article 35 of the Constitution and article 2 of Protocol No. 4 of the ECHR. Consequently, all the specified points of the three abovementioned Decisions, were declared constitutional by the Court.

The Court held, that in issuing the abovementioned Decisions, the Ministry of Health, has acted in compliance with the authorizations prescribed by the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens of the municipalities of Prizren, Dragash and Istog, through the abovementioned Decisions, were "*prescribed by law*". The Court also found that the latter, pursue a "le*gitimate aim*", namely the one of the protection of "*public health*", as foreseen in paragraph 3 of article 2 of Protocol no. 4 of the ECHR; are proportional in relation to "*legitimate aim*" pursued; and are "*necessary in a democratic society*".

However, the Court, by majority, decided that: (i) item V of Decision [No. 229/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" for the municipality of Prizren; and (ii) item IV of Decisions [No. 238/IV/2020] and [No. 239/IV/2020] of 14 April 2020 of the Ministry of Health, "*for prevention, fighting and elimination of the infectious disease COVID-19*" for the municipalities of Dragash and Istog, respectively, through which the administrative minor offences and the respective sanctions are determined, are not in compliance with article 55 of the Constitution in conjunction with article 35 of the Constitution and article 2 of Protocol No. 4 of the ECHR.

The Court reasoned that in determining the non-compliance with the measures provided for by the abovementioned Decisions as "*administrative minor offences*", the Ministry of Health exceeded the authorizations provided by Law No. 02/L-109 or Prevention and Fighting against Infectious Diseases. The Court stated that based on Law No. 05/L-087 on Minor Offences, the minor offenses and the respective sanctions must be determined only by law of the Assembly of the Republic or through acts of the Municipal Assemblies, and that this authorization may not be delegated to other bodies. Consequently, the administrative minor offenses determined through these three challenged Decisions, are not "*prescribed by law*" and consequently, are declared unconstitutional.

The Court, on the other hand, decided, by majority, that Decision [No. 214/IV/2020] of 12 April 2020 of the Ministry of Health, declaring the Municipality of Prizren "*quarantine zone*", is not in compliance with articles 35 and 55 of the Constitution and article 2 of Protocol no. 4 of the ECHR. The Court held, that in issuing this Decision, the Ministry of Health has exceeded the authorizations provided by Law no. 02/L -109 for Prevention and Fighting against Infectious Diseases, and consequently the "*interferences*" with the right of freedom of movement of the citizens, through the quarantine of the entire municipality of Prizren, are not "*prescribed by law*". The Court clarified that the "*quarantine*" according to Law no. 02/ L-109 for Prevention and Fighting against Infectious Diseases, may be ordered by the Ministry of Health, following the recommendation by NIPHK, only for natural persons which are confirmed or suspected to have been in direct contact with the sick persons or suspected of infectious disease. Therefore, the Decision declaring entire municipality of Prizren a "*quarantine area*", was declared unconstitutional.

Pertaining to the request for interim measure, the Court held that following the decision of the judges to decide the merits of the case in their entirety, and to render this Judgment, the interim measure remained without a subject of review.

The Court also recalled that, by Judgment KO54/20, it had set another date for the entry into force of its Judgment, namely 13 April 2020, emphasizing that until that date, the relevant institutions of the Republic of Kosovo, in the first place, the Assembly, must take appropriate measures to ensure that the necessary limitations on fundamental rights and freedoms in order to preserve the public health, are made in accordance with the Constitution and Judgment KO54/20.

In addition, the Court emphasized that despite the specific request addressed to the Assembly requesting information "*regarding all the steps taken by the Assembly of the Republic of Kosovo after the publication of Judgment KO54/20 of 31 March 2020*", the Court did not receive a response from the Assembly. In this regard, the Court initially emphasized the fact that it is a legal obligation of all public authorities "*to support the work of the Constitutional Court and to cooperate with the Constitutional Court upon request of the Constitutional Court*".

Furthermore, the Court emphasized that based on Judgment KO54/20, the Assembly was obliged, either through amendment of existing applicable legislation or through the adoption of a new law, to determine the most appropriate mechanisms and the corresponding authorizations, for the competent authorities, including the Ministry of Health, namely the Government, to take the appropriate and necessary measures designed to fight and prevent COVID-19 pandemics, in a manner compliant with the Constitution and Judgment KO54/20. In this aspect, the Court also emphasized article 116 [Legal Effect of Decisions] of the Constitution, based on which, the decisions of the Constitutional Court are binding on the judiciary and all persons and institutions of the Republic of Kosovo.

In Judgment KO61/20, the Court also addressed the submission of 23 April 2020 of the Acting Prime Minister, submitted to the Court on behalf of the

Government, entitled "*submission regarding non-compliance with the legal deadlines and the Rules of Procedure of the Constitutional Court by the Constitutional Court in case no. KO61/20*". Through this submission the Government expressed its "*concerns*" pertaining to "*violation of essential provisions regarding the procedure and deadlines to be followed*" by the Court, while also emphasizing that the "*Government will carefully review the legal violations so far and, depending on their legal qualifications, will take the necessary actions based on the legislation in force*".

The Court has shared this submission, same as other submissions, with all the interested parties in this case. The submission will also be published on its entirety together with Judgment KO61/20, which will also contain the necessary clarifications pertaining to this submission. Nevertheless, the Court strongly emphasizes that the Government's approach towards the Constitutional Court reflected through this submission, is unacceptable and contrary to the fundamental values of the Constitution of the Republic.

The Court emphasized that it is an independent body established to protect the Constitution and it is the final interpreter of the Constitution. The Court recalled that the Constitution attributes to it full independence in the performance of its responsibilities. Furthermore, it is a constitutional obligation of the Government and all institutions of the Republic, not to interfere with this independence. The Court also reminded the Government that the Constitution does not attribute to it any competence regarding the decision-making of the judicial power. Respecting the basic constitutional values, pertaining to the separation of powers, the independence of the justice system, the independence and authority of the Constitutional Court and the protection of the rule of law, is a constitutional obligation of all branches of government of the Republic of Kosovo.

Finally, the Court emphasized the fact that regardless of the situation created with pandemic COVID-19, and which has affected the entire world, the state of law and rule of law, must prevail. This is also emphasized by the Council of Europe in the Information Document SG/Inf(2020)11 of 7 April 2020 on Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, but also in the Opinions of the Venice Commission, including the one on Protection of Human Rights in Emergency Situations and the Rule of Law Checklist.

All institutions of the Republic are obliged to act in full compliance with the respective constitutional and legal competences and in compliance with the Judgments of the Court.

Judgment

KO 72/20

Applicant

Rexhep Selimi and 29 other deputies of the Assembly of the Republic of Kosovo

Request for constitutional review of Decree No. 24/2020 of the President of the Republic of Kosovo, of 30 April 2020

The Referral was submitted by thirty (30) deputies of the Assembly of the Republic of Kosovo based on Article 113, paragraph 2, subparagraph 1, of the Constitution. The subject matter of the Referral was the constitutional review of the challenged Decree, which according to the Applicant's allegations was not in compliance with paragraph 1 of Article 4 [Form of Government and Separation of Power], paragraph 2 of Article 82 [Dissolution of the Assembly], paragraph 14 of Article 84 [Competencies of the President] as well as Article 95 [Election of the Government] of the Constitution.

Under the heading VIII – CONCLUSIONS – of this Judgment (see paragraphs 546-580), the Court summarized the essence of the case and stated the following:

In the assessment of the Decree [no. 24/2020] of 30 April 2020 of the President of the Republic of Kosovo, through which "*Mr. Avdullah Hoti, is proposed to the Assembly of the Republic of Kosovo as a candidate for Prime Minister to form the Government of the Republic of Kosovo*", the Court decided: (i) unanimously that the request of the Applicants is admissible; (ii) unanimously that the contested Decree of the President is in compliance with paragraph 2 of Article 82 [Dissolution of the Assembly] of the Constitution; whilst therefore declaring that the successful vote of a motion of no confidence by the Assembly against a Government does not result in the mandatory dissolution of the Assembly and thereby permits the election of a new Government in compliance with Article 95 [Election of the Government] of the Constitution; (iii) by majority that the contested Decree is in compliance with paragraph (14) of Article 84 [Competencies of the President] in conjunction

with paragraph 4 of Article 95 [Election of the Government] of the Constitution of the Republic of Kosovo; (iv) unanimously to repeal the interim measure which was set through the Decision of 1 May 2020; and (v) unanimously to reject the request for a public hearing.

The Court recalled that the constitutional matter involved in this Judgment is the compliance with the Constitution of the disputed Decree of the President of the Republic, through which Mr. Avdullah Hoti was proposed to the Assembly of Kosovo as a candidate for Prime Minister. In assessing the constitutionality of the aforementioned Decree, and based on the Applicants' allegations as well as the arguments and objections of other interested parties, the Court initially assessed whether after a successful vote of no confidence by the vote of two thirds (2/3) of all Deputies of the Assembly on 25 March 2020, the President of the Republic, was obliged to dissolve the Assembly of the Republic and to announce early elections, based on paragraph 2 of Article 82 of the Constitution. Further, the Court clarified the procedure to be followed for the formation of a new Government, after a successful vote of no confidence in the Assembly and also gave its assessment, as to whether, in the circumstances of the concrete case, the procedure followed for the nomination of the candidate for Prime Minister pertaining to the formation of a new Government, resulted in a Decree that is constitutionally compliant.

In order to interpret the constitutional articles related to the circumstances of the concrete case, respectively Articles 82, 95 and 100 of the Constitution, the Court also took into account: (i) the constitutional principles on the role of the Assembly and the President; (ii) its case law, including Judgment KO103/14 and all cases cited by the parties to the proceedings; (iii) the relevant Opinions of the Venice Commission; (iv) the Comparative Analysis of the Constitutions, including those referred to by the Applicants; (v) responses received from the Constitutional/Supreme Courts, part of the Venice Commission Forum; and (vi) the preparatory documents for the drafting of the Constitution. The Court initially recalled that the Constitution consists of a unique entirety of constitutional principles and values on the basis of which the Republic of Kosovo has been built and must function. The norms provided by the Constitution must be read in conjunction with each other, because that is the only manner through which their exact meaning derives.

Constitutional norms cannot be taken out of context and interpreted mechanically and in isolation from the rest of the Constitution. This is due to the fact that the Constitution has an internal cohesion, according to which each part is connected to the other. The structure of the constitutional norms related to the establishment of state institutions that stems from the people's vote must be interpreted in such a way that they enable and not block the establishment and the effective exercise of the respective functions. Any ambiguity of norms must be interpreted in the spirit of the Constitution and its values. No constitutional norm can be interpreted in such a way as to block the effective establishment and functioning of the legislative and executive branches of government, nor the way in which they balance each other in terms of the separation of powers.

In addition, the Court also noted that every state power and holder of public functions without any exception, is under the obligation to undertake the respective public duties in service of the implementation of the values and principles based on which the Republic of Kosovo was built to function. The rights and obligations deriving from the Constitution must not be exercised in service of establishment and effective functioning of State Institutions. Further and with regard to the constitutional provisions pertaining to the dissolution of the Assembly, the Court emphasized that the Constitution provides an obligation to dissolve the Assembly only in the circumstances of paragraph 1 of Article 82 of the Constitution, and the possibility to dissolve the Assembly in the circumstances of paragraph 2 of Article 82 of the Constitution, following a successful vote of a motion of no-confidence.

More precisely, the Assembly is mandatorily dissolved only in three cases: (i) if the government cannot be established within sixty (60) days from the date when the President of the Republic of Kosovo appoints the candidate for Prime Minister; (ii) if two thirds (2/3) of all deputies of the Assembly vote in favor of the dissolution of the Assembly; and (iii) if, within sixty (60) days from the date of the beginning of the President's election procedure, the latter is not elected. Whereas, in case of a successful vote of no confidence against Government, the President has the possibility but not the obligation to dissolve the Assembly.

The President's possibility to dissolve the Assembly cannot be exercised independently or contrary to the will of the Assembly, but it must be exercised in coordination and depends on the will of the necessary majority of the representatives of the people represented in the Assembly. The use of the verb "*may*" in the context of paragraph 2 of Article 82 of the Constitution, only reflects the possibility of the President to dissolve the Assembly, based on consultations with the political parties represented in the Assembly. Such a determination pertaining to the presidential competencies related to the verb "*may*" ["*mund*"/"*može*"] in the context of the dissolution of the Assembly, is also confirmed through the Opinions of the Venice Commission, referred to in this Judgment.

The Court emphasized that the Assembly is the only institution in the Republic of Kosovo that is directly elected by the people for a four (4) year term. Apart from the Constitution, the representatives of the people are not bound by any other power or obligatory mandate. Neither does the President who is elected by the Assembly have the power to dissolve the Assembly in contradiction with its will; nor can the exercise of the competence of the Assembly to express a vote of no confidence against a Government which was elected by

Assembly itself, can result into the end of the mandate of the Assembly itself. The Assembly cannot be conditioned to self-dissolution if it chooses to express no confidence against a Government it has elected, because a motion of no confidence as a mechanism of constitutional control of the Government by the Assembly as a representative organ of the people, would not have any meaning. Such an approach is contrary to the constitutional principle of parliamentary control of the Government enshrined in paragraph 4 of Article 4, paragraph 8 of Article 65 and Article 97 of the Constitution and the basic democratic principles.

The high threshold of the vote required to dissolve the Assembly by the deputies themselves, reflects the weight and importance that the Constitution has set for this purpose. In addition to the highest threshold provided for the amendment of the Constitution, which requires the approval of two thirds (2/3) of all deputies of the Assembly, including two thirds (2/3) of all deputies of the Assembly holding guaranteed seats guaranteed for representatives of communities that are not in the majority in the Republic of Kosovo, the Constitution sets the next highest possible threshold for the dissolution of the Assembly, namely the vote of two thirds (2/3) of all its deputies, which equals, *inter alia*, to the necessary vote for the delegation of state sovereignty, as defined in Article 20 of the Constitution. In contrast, for a successful motion of no -confidence against the Government, the Constitution has set a lower threshold of the required vote, namely sixty-one (61) deputies.

If the President could dissolve the Assembly on its own motion following a no-confidence motion, then the President would have the power which equals to the two-thirds (2/3) of the votes of the representatives of the people and which would result in an arbitrary reduction of the necessary will of two thirds (2/3) of the deputies for the dissolution of the Assembly, into only sixty one (61) votes, required for a motion of no confidence. Such a power, Presidents, based also on the Opinions of the Venice Commission, do not even have in the majority states with presidential regulation.

In fact, the Analysis of other Constitutions reflected in this Judgment, including those Constitutions used in the arguments of the Applicants, the relevant Opinions of the Venice Commission and the responses of the Venice Commission Forum, reflects that no Constitution requires the mandatory dissolution of the Assembly only due to the fact that a motion of no-confidence has been successfully voted. On the contrary, the successful vote of a motion of no-confidence results in three situations: (i) the automatic election of a new Prime Minister, in cases where the Constitutions provide for a "*constructive motion*"; (ii) an additional possibility for the election of a Prime Minister; and (iii) the return of the process to the President, to start and follow the procedures for the election of the Government, for the number of possibilities for prescribed in the Constitution.

In all these countries, only when all the constitutional possibilities for the election of a new Government have been exhausted, the Assembly is dissolved and early elections are announced.

The competence of the President to dissolve the Assembly as set forth in paragraph 2 of Article 82 of the Constitution, is applied correctly, only when following a successful motion of no confidence voted by at least sixty-one (61) deputies: (i) there is sufficient majority of deputies to form a new Government, and at the same time (ii) there is no majority of two-thirds (2/3) of the deputies, necessary to self-dissolve. This competence, on one hand, represents an additional possibility to form the Government within the existing legislature and avoid elections; while on the other hand, it represents a possibility to enable the unblocking of situations in which there is neither will nor a necessary majority to form a new Government by the Assembly within the same legislature.

To this day, Article 82 of the Constitution has always been applied in this same way. More precisely: (i) the third and fifth legislatures were dissolved by the President in the third year of their term, in 2010 and 2017, respectively, when in the Assembly there was no will or necessary majority to form a new Government; whereas, (ii) the fourth and sixth legislatures, in 2014 and 2019, respectively, were self-dissolved with two-thirds (2/3) of the votes of all deputies and this dissolution was only decreed by the respective Presidents.

The circumstances of the present case are clearly different from those of previous legislatures. In this case, (i) a no-confidence motion was passed by the votes of two-thirds (2/3) of all people's representatives and the same, do not need the President's help to self-dissolve; and (ii) the majority of political parties and coalitions represented in the Assembly, respectively the majority of the people's elected representatives, have declared their will in favor of the establishment of a new Government, after expressing no confidence against the caretaker/dismissed Government. The dissolution of the Assembly by the President against the will of the people's representatives would be arbitrary and clearly unconstitutional. On the contrary, the President was obliged to initiate proceedings which would provide for the opportunity to establish a new Government based on the provisions of Article 95 of the Constitution.

The manner of electing the Government in the Constitution of Kosovo is determined through Article 95. The procedure to be followed for the election of a Government is clarified in the Judgment of the Court in case KO103/14. The Court adhered to the principles set out in that Judgment. The latter clarified that for the establishment of a Government, the Constitution defines two possibilities. The first right to establish the Government belongs to the "*political party or coalition that has won the necessary majority in the Assembly to establish the Government*", respectively the political party or the coalition having won the elections. The President has no discretion regarding the right of this political party or coalition to nominate

a candidate for Prime Minister and only mandates the same. In case of failure of the election of this Government in the Assembly, or rejection of this mandate by the winning political party or the coalition, the right to establish the Government passes to the political party or coalition represented in the Assembly, which at the discretion of the President is more likely to establish the Government and avoid elections. Whilst, the failure of these two possibilities, results in the obligation of the President to announce the elections, as defined in the Constitution.

Article 95 of the Constitution defines the procedure for electing a Government during an election cycle. The same, defines two options for electing a Government, after the elections and after the resignation of the Prime Minister/Government. The Court has clarified that the effect of the resignation of a Prime Minister results in the resignation of a Government, just as the effect of the successful vote of a no-confidence motion on the "*Government as a whole*", results in the resignation of the same. Such a stand is also consistent with the Comparative Analysis, the cited Opinions of the Venice Commission and the contribution submitted to the Court by members of the Venice Commission Forum, according to which, after a successful motion of no-confidence, the Prime Minister/Government are resigned, and the respective constitutional article pertaining the election of the Government is activated, except for those cases that have provided for the "*constructive motion*", or have provided only one more possibility for the election of the Prime Minister/Government, after the relevant motion.

Therefore, all cases of resignation of the Prime Minister, or when the post becomes vacant for other reasons, result in the fall of the Government, including when the resignation of the Government is the result of a successful motion of no confidence, provided that after this motion there is no dissolution of the Assembly, based on the principles explained above, paragraph 5 of Article 95 of the Constitution is activated, obliging the President to mandate the new candidate for Prime Minister. The political party or coalition that has the first right to nominate the candidate for Prime Minister and establish the Government, is again the winning political party or coalition.

For the establishment of this Government, the procedure defined through paragraphs 2 and 3 of Article 95 of the Constitution must be followed, while the failure to obtain the necessary votes in the Assembly or the rejection of this mandate, results into passing the right to establish the Government to a political party or a coalition that may have the necessary majority to establish the Government, as provided in paragraph 4 of Article 95 of the Constitution and in accordance with the principles set out in Judgment KO103/14. The Court clarified that through Judgment KO103/14, it has never determined that the winning political party or coalition has the exclusive and sole right to nominate the candidate for Prime Minister and to establish the Government.

The Court also noted that the competence of the Assembly to elect and express no confidence against the Government is set out in paragraph 8 of Article 65 of the Constitution and is implemented through Articles 95 and 100 of the Constitution, on the Election of the Government and the Motion of No Confidence, respectively. The latter is one of the most essential mechanisms for exercising parliamentary control over the Government and, consequently, for balancing the powers among the branches of government. The democratic legitimacy of a government elected by an Assembly stems from the confidence that the representatives of the people vest with it when electing it. This confidence ceases at the moment when the majority of all deputies of the Assembly have voted against it. As a result, it loses the confidence of the representatives of the people, and consequently the constitutional authority to exercise the relevant competences.

The Court reiterated that in the circumstances of the concrete case, on 25 March 2020, a motion of no-confidence was voted for by two-thirds (2/3) of the votes of all deputies of the Assembly, against the Government led by the winning political party in the elections of 6 October 2019. The same political party, unlike most of the Constitutions analyzed and reflected in the Judgment, after a successful vote on the motion of no confidence, based on the Constitution of Kosovo, still has the first right to propose a candidate for Prime Minister. Such a proposal has not been made by this political party even after (4) four requests by the President, starting from 2 April 2020 to 22 April 2020. The respective political party, namely VETËVENDDOSJE! Movement, in essence, claims that: (i) after a motion of no confidence, the President is obliged to dissolve the Assembly and announce early elections; and that (ii) there is no constitutional deadline for proposing of the candidate for Prime Minister, therefore, it is at the full and indefinite discretion of the winning political party to nominate the candidate for Prime Minister and that "*only when the political, administrative and technical conditions have been met.*" Consequently, another matter relevant for this Judgment is: (i) the deadline within which the candidate for Prime Minister must be proposed; and (ii) if the lack of proposal of this candidate by the political party that has the first right to nominate, reflects the refusal to accept the mandate for the Prime Minister.

Regarding the deadline within which the proposal for the candidate for Prime Minister should be made, the Court has emphasized that this matter must be analyzed in terms of: (i) the system of constitutional deadlines that the Constitution has set for the purposes of forming the Government; and (ii) the nature of the "*consultation*" between the President and the political party or coalition with the right to nominate a candidate for Prime Minister, including mutual responsibilities and obligations between them, for the purpose of nominating the candidate for Prime Minister. First, the Court noted that the nomination of a candidate for Prime Minister by the President results

into the running of two types of parallel constitutional deadlines: (i) that of the dissolution of the Assembly if the election of the Government is not made within sixty (60) days of taking the mandate; and (ii) those set out in Article 95 of the Constitution, which relate to the two possibilities for the formation of the Government, respectively the fifteen (15) day period within which the candidate for Prime Minister presents the composition of the Government and requires approval by the Assembly; (iii) the ten (10) day deadline within which the President nominates another candidate for Prime Minister, in case the first candidate for Prime Minister fails to secure the necessary votes in the Assembly or refuses the respective mandate; and (iv) referring to the "*same procedure*", the fifteen (15) day deadline, within which the other candidate for Prime Minister, presents the composition of the Government and requests its approval by the Assembly. These precise deadlines reflect the purpose and importance that the Constitution has assigned to the need for speedy establishment of the Government, setting the deadline of fifteen (15) days for the candidate for Prime Minister, to negotiate and reach the agreements to secure the necessary votes of deputies of the Assembly for the proposed Government; and also the sixty (60) day deadline for the formation of a Government, and the corresponding consequence of the dissolution of the representatives of the people, if this deadline is not met.

Secondly, the Court recalled that in Judgment KO103/14, it distinguished between the nature of "*consultation*" between the President and the political party or coalition with the right to nominate the first and second candidate for Prime Minister. In the first case, the President has no discretion and it is clear which is the political party or coalition that proposes the candidate for Prime Minister, consequently this "*consultation*" entails a completely formal and technical process between the President and the winning party or coalition, pertaining to the proposal of the candidate for Prime Minister and the appointment of the same. By contrast, in the second case, the President has the discretion and it is not clear at the outset which is the political party or coalition with the right to propose the candidate for Prime Minister, therefore, this process of "*consultation*" is more complex and entails the obligation of the President to consult with all the political parties and coalitions represented in the Assembly and his/her assessment, as to who has the highest probability to form the Government in order to avoid elections. In exercising this discretion, the Constitution has set a deadline of ten (10) days for the President.

Therefore, in the context of: (i) the undisputed importance of the effective functioning of a Government as one of the three branches of government; (ii) the system of precise and short deadlines set out in the Constitution regarding the formation of a Government; (iii) the completely clear, technical and formal nature of the "*consultation*" between the President and the winning political party or coalition for the purposes of nominating the first candidate for Prime Minister; and (iv) the constitutional limit of ten (10) days for the purposes of nominating the second candidate for Prime Minister through a much more complex "*consultation*" process, the Court noted that the non-specification of deadlines by the Constitution pertaining to the proposal of the first candidate for Prime Minister from the winning political party or coalition, does not entail the right and the discretion of the latter not to act for an unlimited duration of time.

In this respect, the Court noted that a time limit for proposing the candidate for the Prime Minister is not specified in the Constitution not only with respect to the political party or coalition with the first right to propose a candidate, but it also does not specify a deadline within which the President is obliged to decree the proposed candidate, or to submit the same to the Assembly. The Court noted that the designation of the candidate for the Prime Minister, neither involve only the obligation of the President to decree the candidate, nor only the right of the winning political party to propose a candidate; but it also includes the duty of the latter to propose or refuse to propose the candidate for Prime Minister. More precisely, the designation of the candidate for Prime Minister involves the mutual obligation for the cooperation between the President and the winning political party in this process. Moreover and whilst having in mind the technical and formal nature of the "*consultation*" for the purpose of designating the first candidate for Prime Minister, a step that puts into motion the process Government formation and corresponding constitutional deadlines, it is clear and self-understanding that this "*consultation*" must be concluded as soon as possible and that it involves the requirement for a swift cooperation dynamic.

On the contrary, all of the above-mentioned constitutional norms regarding the deadlines and the purposes that they entail regarding the formation of the Government, would be without any meaningful effect and completely unnecessary. The election of the Government would remain hostage to the "*unlimited deadlines*" and at the full discretion of a winning political party or coalition or at the full discretion of the President. The former, would hold the formation of the Government pending, relying to the full and indefinite discretion to propose a candidate for Prime Minister, while the President would also refer to the full and indefinite discretion to decree the same.

This "*full and unlimited discretion in terms of time*", in the meantime, is related to the election of the Government, a competence which pertains to another branch of government, respectively the Assembly. Such an approach and interpretation would be arbitrary and clearly contrary to the structure of constitutional norms, its purpose and spirit, but also contrary to the basic principles of a parliamentary democracy. In this regard, the Court also emphasized that, despite the allegations of the applicants regarding the delay of the procedures for establishing institutions after the elections, emphasizing the

situation of 2014 in respect to the prolongation of the process for the establishment of the Assembly, the Court has never, including in the Judgment KO119/14, addressed the issue of deadlines related to the constitution of the Assembly, as the same were not the subject matter of the case before the Court.
Regarding the lack of a proposal of candidate for the Prime Minister by the winning political party in the elections, the Court, in this Judgment, has analyzed the exchange of letters between the Chairman of the winning political party, at the same time the caretaker Prime Minister, and the President. These letters reflect two characteristics: (i) the President's request for the nomination of a candidate for Prime Minister on the one hand; and (ii) the lack of a proposal and the request for the dissolution of the Assembly and the announcement of early elections by VETËVENDOSJE! Movement, on the other hand.
The Court, in this Judgment, has emphasized that: (i) for the purposes of "*consultation*" to nominate the candidate for Prime Minister between the President and the winning political party or coalition, only the nomination of the candidate for Prime Minister and the respective decreeing by the President is relevant; and (ii) this "*consultation*" process cannot include issues related to the dissolution of the Assembly or the announcement of early elections, because none of these issues is within exclusive competence of either the President or the winning party or Caretaker/ resigned Government.
This because it is clear that: (i) the cases of compulsory dissolution of the Assembly are precisely defined in the Constitution; (ii) the possibility of the Assembly to be dissolved by the President, as has already been clarified, is not a competence exercised by the President without coordination with all political parties and coalitions represented in the Assembly, and not only with the one that has won the elections; and (iii) the Government has no constitutional competence either with regard to the dissolution of the Assembly or the announcement of elections. On the contrary, in relation to these two issues, the role of political parties or coalitions represented in a Government is equivalent only to the power they have through their representation in the Assembly. The will of the majority of the Assembly in the circumstances of the current case, has clearly made it impossible for the President to dissolve the Assembly and announce early elections. The Court noted that in the circumstances of the present case, the political party that has led the Government against which a motion of no confidence has been voted, has not made a proposal for a new candidate for Prime Minister for the purpose of forming a new Government. However, the Applicants claim that they have never explicitly refused to accept this mandate.
Regarding the possibility of refusing to accept the mandate, the Court recalled that in Judgment KO103/14, it found that "*it is not excluded that the party or coalition in question will refuse to accept the mandate*". Despite the fact that it was not an issue before the Court in 2014, the Court had foreseen the possibility of refusal, precisely for the purpose of making it impossible to block the formation of the Government in the future. This Judgment did not specify the manner in which the refusal of the respective mandate can be made. Therefore, the claim of the applicants that "*the Court has stated that the President may bypass the winner of the election only if the latter expressly waives his right but under no other circumstances*" is incorrect. This is so because also the authorization of the winning political party or coalition to refuse the mandate only explicitly, namely the possibility to not propose a name for the candidate for Prime Minister, and at the same time, to hold this right by not refusing explicitly, would vest the winning political party or coalition with the undisputable right to block the process of nominating a candidate for Prime Minister by the President.
Such a possibility would make it impossible for the President to exercise his competence to appoint a candidate for Prime Minister, thus making it also impossible for the Assembly to exercise its competence for the election of Government. On the contrary, as it has already been clarified, the appointment of a candidate for Prime Minister requires immediate interaction in fulfilling the mutual obligations and responsibilities between the President and the winning political party or coalition. Therefore, the refusal in fact means the lack of action in order to fulfill this obligation, namely the lack of concrete action towards and through proposing the candidate for Prime Minister by the winning political party or coalition. The Constitution and its spirit foresees that this right and, at the same time, obligation, for both, the winning party and the President, cannot be abused by any of them and must be exercised in a good faith and in the function of forming of the Government.
From the exchange of official letters between the President and the winning political party in the present case, not only that there is no proposal of a candidate for Prime Minister, but even a single indication of the intention to propose a candidate for the Prime Minister, is reflected. They rather only contain the request to dissolve the Assembly and call early elections. These demands exclude the possibility of proposing a candidate for Prime Minister. In circumstances where a no-confidence motion with two -thirds (2/3) of the representatives of the people is successfully voted and the possibility to form a new Government exists, if the claims about (i) the unlimited time and the full discretion of the winning political party, and (ii) the right to only expressly refuse the candidate for Prime Minister, were to be held, combined with the sole demand for the dissolution of the Assembly and the announcement of early elections, the formation of a Government would be blocked indefinitely, keeping in office a Government that has lost the confidence of the representatives of the people. This is not the spirit of the Constitution of the Republic of Kosovo.
The President, through balancing his obligation to guarantee the constitutional functioning of the institutions defined by the Constitution, as set forth

in paragraph 2 of Article 84 of the Constitution, including in this context, the right of the Assembly to elect a Government, as defined in paragraph 8 of Article 65 of the Constitution, on the one hand; and on the other hand, given that the winning political party has not undertaken any single action towards proposing the candidate for Prime Minister despite the President's requests, but has continued to request the dissolution of the Assembly and the announcement of early elections, despite the fact that the majority of political parties or coalitions represented in the Assembly have already declared themselves against this possibility, whereby making it impossible for the President to exercise the competence set out in paragraph 2 of Article 82 of the Constitution, has rightly ascertained the constitutional possibilities to nominate a candidate for Prime Minister by the winning political party have been exhausted.

As a result, the President initiated the procedures for the appointment of the new candidate for Prime Minister, in consultation with and after the proposal of the political party, which based on the relevant consultations, resulted to have the highest probability to form the Government and in order for the elections to be avoided. The opposite would make impossible the exercise of the essential powers of the Assembly of the Republic to elect the Government of the Republic of Kosovo.

The right to nominate a candidate for Prime Minister is a responsibility and a privilege. The proposal of this name represents the highest point of success of a political party or coalition for and within an election cycle. The first right to nominate a candidate for Prime Minister is guaranteed to the winning political party or coalition, through the Constitution. The exercise of this right is not vested with the authorization to block the formation of a Government within an election cycle. Such an attitude would submit the most important state institutions to the sole will of the winning political party or coalition.

Finally, the Court concluded that the democratic functioning of institutions is the primary responsibility of every person who is vested with public authority. All actions taken by persons vested with public power or authorizations must be in accordance with the Constitution and its spirit and contribute to the orderly conduct and coordination of affairs of public interest for the state of the Republic of Kosovo, so that the latter would develop and implement the values and principles on which it has been built and aspires through its Preamble.

ECtHR – Important decisions (1 January – 30 June 2020)

* Refusal to investigate hate-speech comments about same-sex kiss on Facebook was discriminatory (14/01/2020)

In its Chamber judgment in the case of **Beizaras and Levickas v. Lithuania** (*application no. 41288/15*) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 14 (prohibition of discrimination)** of the European Convention on Human Rights, **taken in conjunction with Article 8 (right to respect for private and family life), and a violation of Article 13 (right to an effective remedy).**
The case raised questions about the State's responsibility to protect individuals from homophobic hate speech. The applicants were two young men who are in a relationship. One of the applicants posted a photograph of them kissing on his Facebook page, which led to hundreds of online hate comments. Some were about LGBT people in general, while others personally threatened the applicants. Both the prosecuting authorities and the courts refused to launch a pre-trial investigation for incitement to hatred and violence against homosexuals, finding that the couple's behaviour had been provocative and that the comments, although "unethical", did not merit prosecution. The Court found in particular that the applicants' sexual orientation had played a role in the way they had been treated by the authorities, which had quite clearly expressed disapproval of them so publicly demonstrating their homosexuality when refusing to launch a pre-trial investigation. Such a discriminatory attitude had meant that the applicants had not been protected, as was their right under the criminal law, from undisguised calls for an attack on their physical and mental integrity.

* Requirement to collect data to identify users of pre-paid SIM cards did not violate the right to privacy (30/01/2020)

In its Chamber judgment in the case of **Breyer v. Germany** (*application no. 50001/12*) the European Court of Human Rights held, by **six votes to one**, that there had been: **no violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.
The case concerned the storage of pre-paid SIM card users' data by telecommunications companies. The Court found in particular that collecting the applicants' names and addresses as users of pre-paid SIM cards had amounted to a limited interference with their rights. The law in question had additional safeguards while people could also turn to independent data supervision bodies to review authorities' data requests and seek legal redress if necessary. Germany had not overstepped the limits of its discretion ("margin of appreciation") in applying the law concerned and there had been no violation of the applicants' rights by the collection of the data.

* Freedom of expression: A judgment recapitulating case-law on the offence of propaganda in favour of terrorist organisations (11/02/2020)

In its Chamber judgment in the case of **Özer v. Turkey (No. 3)** (*application no. 69270/12*) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 10 (freedom of speech)** of the European Convention on Human Rights.
The case concerned criminal proceedings brought against Mr Özer over an article published in his magazine. Mr Özer was prosecuted and convicted of the criminal offence of providing propaganda for a terrorist organisation, under section 7(2) of Law No. 3713. The Court reiterated the principles which it had established in its case-law under Article 10 of the Convention, concerning criminal proceedings initiated for the offence of propaganda in favour of a terrorist organisation, punishable under section 7(2) of Law No. 3713. The Court noted that the domestic courts had not taken account of all the principles established in its case-law, given that their assessment of the case had not answered the question of whether the impugned passages of the article in question could – having regard to their content, context and capacity to lead to harmful consequences – be considered as comprising incitement to the use of violence, armed resistance or rebellion, or as amounting to hate speech. The Court therefore held that the domestic authorities had failed to conduct an appropriate analysis having regard to all the criteria set out and implemented by the Court in cases concerning freedom of expression, and that the Government had not demonstrated that the impugned measure had met a pressing social need, had been proportionate to the legitimate aims pursued and had been necessary in a democratic society.

* Glorifying violence is not covered by freedom of expression, but criminal proceedings must meet fairness requirements (10/03/2020)

In its Chamber judgment in the case of **Altıntaş v. Turkey** (*application no. 50495/08*) the European Court of Human Rights held: unanimously, that there had been **a violation of Article 6 § 1 (right of access to a court)** of the European Convention on Human Rights, **and** by a majority, that there had been **no violation of Article 10 (freedom of expression).**
The case concerned a judicial fine imposed on Mr Altıntaş for an article published in 2007 in his periodical *Tokat Demokrat*, describing the perpetrators of the "Kızıldere events", among others as "idols of the youth". The events in question took place in March 1972, when three British nationals working for NATO were abducted and executed by their kid-nappers. Mr Altıntaş was convicted in 2008 by the

Criminal Court, which found that the article glorified the insurgents involved in those events.
The Court held as follows: Mr Altıntaş had suffered a disproportionate restriction of his right of access to a court, as he had not been able to appeal on points of law against a conviction decided at first instance because the amount of the judicial fine did not reach the statutory threshold for such an appeal. The Court drew attention to its relevant case-law.
The interference with Mr Altıntaş's right to freedom of expression had not been disproportionate to the legitimate aims pursued. The Court took the view, in particular, that the expressions used in the article, about the perpetrators of the "Kızıldere events" and their acts, could be seen as glorifying, or at least as justifying, violence. It took account of the margin of appreciation afforded to national authorities in such cases and the reasonable amount of the fine imposed on Mr Altıntaş. Furthermore, it was important not to minimise the risk that such writings might encourage or drive certain young people, in particular the members or sympathisers of some illegal organisations, to commit similar violent acts with the aim of becoming, "idols of the youth" themselves. The expressions used had given the impression to public opinion – and in particular to people who shared similar political opinions to those promoted by the perpetrators of the events in question – that, in order to fulfil a purpose that those individuals regarded as legitimate in terms of their ideology, the use of violence could be necessary and justified.

* Court endorses new Albanian scheme for compensating former owners as an effective remedy (07/05/2020)

The case of **Beshiri v. Albania** (*application no. 29026/06*) **and 11 other applications** concerned complaints about a prolonged lack of enforcement of final decisions awarding compensation for property expropriated during the communist era. In its decision in the case, the European Court of Human Rights has unanimously declared the **applications inadmissible**. The decision is final.
The Court in particular examined in detail the new domestic scheme for dealing with the many outstanding claims over decades-old compensation decisions which had not been enforced. That scheme, which was brought into effect by the 2015 Property Act, was a response to the Court's pilot judgment in 2012 in the case of *Manushaqe Puto and Others v. Albania*, which had found violations of Article 6 § 1 (right to a fair trial), Article 1 of Protocol No. 1 (protection of property) to the Convention and Article 13 (right to an effective remedy) and had given general recommendations on the steps needed to deal with the long-standing issue in question, one which had generated many cases in Strasbourg. The Court concluded that the mechanism introduced by the 2015 Property Act was an effective remedy which the applicants had to use, even if their applications had been lodged before the Act had come into force.
It declared their applications inadmissible for non-exhaustion of domestic remedies, as premature, or because the applicants were no longer victims of a violation of their rights. The Court added a key proviso: it noted that the property valuations used by the 2015 Property Act might result, in some cases, in much lower levels of compensation than under previous legislation. To avoid such an excessive burden on this category of former owners, compensation under the new remedy therefore had to be at least equal to 10% of the value to which former owners would be entitled if the financial evaluation were to be carried out by reference to the current cadastral category of the expropriated property.

* Disclosure of being HIV positive in a military service exemption certificate breached privacy rights (26/05/2020)

In its Chamber judgment in the case of **P.T. v. the Republic of Moldova** (*application no. 1122/12*) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.
The case concerned disclosure of the applicant's HIV positive status in a certificate exempting him from military service. He complained that he had had to show the certificate when renewing his identification papers in 2011 and in certain other situations, such as whenever he applied for a new job. The Court found in particular that the Moldovan Government had not specified which "legitimate aim" of Article 8 of the Convention had been pursued by revealing the applicant's illness. Moreover, they had not explained why it had been necessary to include sensitive information about the applicant in a certificate which could be requested in a variety of situations where his medical condition had been of no apparent relevance. Such a serious interference with his rights had been disproportionate.

* Repossession of a nationalized property (23/06/2020)

In its Chamber judgment in the case **Kasmi v. Albania** (*application no. 1175/06*) the European Court of Human Rights held that there had been**: a violation of Article 1 of Protocol No. 1 (protection of property)** of the European Convention on Human Rights.
The case concerned the applicant's legal efforts, Mr. Gezim Kasimi, an Albanian national living in Tirana, to evict tenants from a former nationalised property which had been restored to his family. In 1997 the applicant and his siblings inherited two houses which had been nationalised during the communist period but which had been restored to their father. One of the houses was occupied by tenants and the applicant lodged a civil action with Tirana District Court to evict them. The District Court upheld his action in March 2003, however, on appeal by the tenants, the

judgment was quashed in respect of three of the four tenants. The Court of Appeal held that the tenants had been occupying the house since the 1980s. It found that one of them was legally homeless and had had a right to a tenancy since 1993. Two others had been living abroad as economic migrants for two years but had not established any permanent residence there and had not abandoned their dwelling in Albania. The Supreme Court upheld the Court of Appeal's decision in July 2005, finding that the three tenants were legally homeless and had a right to occupy the house. The applicant informed the Court in May 2010 that he had taken possession of the house after the tenants living there had died. The applicant complained of a breach of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights as he had been unable to recover possession of his house and receive income from it. The Court awarded Mr Kasimi with 30,000 euros in respect of pecuniary damage.

*** Repeated remittal of murder case before conviction in a fifth set of proceedings violated the Convention (25/06/2020)**

In its Chamber judgment in the case of **Tempel v. the Czech Republic** (*application no. 44151/12*) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 6 § 1 (right to a fair trial)** of the European Convention on Human Rights owing to a lack of fairness of the applicant's conviction for murder, and **a violation of Article 6 § 1** owing to the length of the proceedings.
The case concerned repeated first-instance and appeal proceedings over a period of 10 years on a charge of murder. The Court found in particular that the actions of the High Court, which had repeatedly remitted the case to first-instance jurisdictions, had essentially gone against the rules of criminal procedure and Constitutional Court case-law. It had also ultimately imposed its own view on the lower courts of the correct interpretation of the evidence and the applicant's being guilty of murder. The High Court's actions had had the effect of persuading the first-instance court in the fifth set of proceedings that it had to find the applicant guilty.

*** Statements made in defence in the courtroom deserve heightened protection under the Convention (25/06/2020)**

In its Chamber judgment in the case of **Miljević v. Croatia** (*application no. 68317/13*) the European Court of Human Rights held, unanimously, that there had been: **a violation of Article 10 (freedom of expression)** of the European Convention on Human Rights. The case concerned the applicant's conviction for defamation following statements he had made in his defence in another set of proceedings against him for war crimes. In particular, in his closing arguments, he had accused a retired colonel in the Croatian army, a third party who had no role in the war crime proceedings, of witness tampering.
The Court found in particular that the domestic courts had failed to strike a fair balance between the applicant's freedom of expression in the context of his right to defend himself, on the one hand, and the colonel's right to the protection of his reputation, on the other. In particular, the applicant's statements had not been malicious and had been sufficiently linked to his case, while the colonel should have been more tolerant of criticism given that he had entered the public arena by attending hearings on the applicant's case and by his high profile activities in uncovering war crimes. The Court emphasised that priority should be given to an accused who wished to speak freely in his defence without fear of being sued for defamation, as long as it did not result in a false suspicion of punishable behaviour against a participant in the proceedings or a third party. That had not been the case here, as the applicant's accusations had not led to any criminal investigation against the colonel.

*** Applicants stripped of nationality for terrorism-related offences: No violation of Convention (25/06/2020)**

In its Chamber judgment in the case of **Ghoumid and Others v. France** (*application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16*) the European Court of Human Rights
held, unanimously, that there had been: **no violation of Article 8 (right to respect for private life)** of the European Convention on Human Rights.
The case concerned five individuals, formerly having dual nationality, who were convicted of participation in a criminal conspiracy to commit an act of terrorism. After serving their sentences they were released in 2009 and 2010, then stripped of their French nationality in October 2015.
The Court reiterated the point, already made in a number of judgments, that terrorist violence constituted in itself a serious threat to human rights. As the applicants already had another nationality, the decision to deprive them of French nationality had not had the effect of making them stateless. In addition, loss of French nationality did not automatically entail deportation from France, but if such a measure were to be decided against them they would have the appropriate remedies by which to assert their rights. Lastly, the Court observed that deprivation of nationality under Article 25 of the Civil Code was not a criminal sanction, within the meaning of Article 4 of Protocol No. 7 (right not to be tried or punished twice), and that this provision was therefore inapplicable.

(*For more information please visit the website of the European Court of Human Rights: www.echr.coe.int*)

INFORMATION ON THE COURT

The building of the Constitutional Court:

The Constitutional Court of the Republic of Kosovo, since it became functional in 2009, has been located in the building of the former Kosovo Protection Corps - KPC, located in the center of Prishtina, in the area of Pejton. The position of the Court in the center of the capital city, symbolizes an equal access to all citizens and other authorized parties to the Constitutional Justice. Over the years this building has been adapted according to the needs and nature of work of the Constitutional Court. This has been carried out with the support of our donors, as in the case of construction of the Courtroom of the Court which has been funded by the Constitutional Court of the Republic of Turkey in 2010, the establishment of the Library of the Court which was entirely supported by the GIZ Legal Reform Project and the donation of additional office space/containers by the Constitutional Court of the Republic of Turkey in 2011.
The building of the Court has a usable office space of 784 m² and is used by 65 employees.

ADDRESS

Street: “Perandori Justinian”, nr. 44, 10 000 - Prishtina
Tel: +383 (0)38 60 61 62
Mob: +383 (0)45 200 595; +383 (0)45 200 576
Fax: +383 (0)38 60 61 70
E-mail: gjykata.kushtetuese@gjk-ks.org
Web: www.gjk-ks.org